EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC 2)

International Scientific Conference

EU LAW IN CONTEXT – ADJUSTMENT TO MEMBERSHIP AND CHALLENGES OF THE ENLARGEMENT

Editors:
Dunja Duić
Tunjica Petrašević

PRAVOS

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International Scientific Conference

EU Law in context – adjustment to membership and challenges of the enlargement

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FOREWORD

Building on the Jean Monnet International Scientific Conference "Procedural aspects of EU law" that marked the beginning of the EU and comparative law issues and challenges series (ECLIC), we are happy to be publishing the second EU and comparative law issues and challenges series issue. EU and comparative law issues and challenges series features papers presented at ECLIC research events. The publications contain papers delivered by speakers and panellists, as well as ancillary texts (draft laws and rules) debated at the conferences. The focus of this series is on publication of fully blind peer-reviewed papers, inclusion of reviewed short papers reporting on work in progress is welcome. Importantly, international representative conference program committee guarantee a strict peer-review and paper selection process.

This book is a collection of scientific articles that passed the double blind peer review process and were presented at the International Scientific Conference„ EU Law in context – adjustment to membership and challenges of the enlargement" that took place on 14-15 June 2018 at Faculty of Law Osijek. We take pride in the fact that this Conference brought nearly 60 academics from EU Member States and candidate countries. Starting on the same question about adjustment to membership and challenges of the enlargement numerous aspects of European, criminal, civil, international, international private, administrative and constitutional law were researched and presented. This created unique academic forum that emerged new ideas and debates.

To close, we must thank all the authors in this book and cheer for even more fruitful next year conference.

Editors:

Dunja Duić
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Topic 1

EU legal issues

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CONSTITUTIONAL REFORM OF THE JUDICIARY IN SERBIA AND EU INTEGRATION

ABSTRACT

The National Assembly of the Republic of Serbia enacted the National Judicial Reform Strategy for the period from 2013 to 2018 in 2013 and the Government adopted an Action plan for implementation of the National Judicial Reform Strategy in which it envisages concrete measures and activities for implementation of strategic objectives, defines the deadlines and competent authorities for its implementation and financial sources. The Republic of Serbia accepted the EU Acquis with respect to Chapter 23 Judiciary and Fundamental Rights in 2016. On the path of EU integration, the constitutional reform of the judiciary is a very important and necessary step. Serbian constitutional law experts as well as the Venice Commission identified a number of weak points of the Constitution of Serbia of 2006 regarding the judicial system. Those weak points compromised the possibility of adhering to the principle of judicial independence as one of the basic principles of the rule of law. In this article, the author explains what should be regulated in the Constitution in order to have stronger guarantees of independence of the judiciary and the rule of law. Bearing in mind that there is no uniform European model of judiciary, the author concludes that successful constitutional reform requires a compromise between executive power and its tendency to dominate judiciary, on the one hand, and judicial power and its aspiration for absolute independence, on the other hand.

***Key words**: Constitutional reform, Judiciary, EU integration, Judicial independence, Rule of law, Constitutional culture*

1. INTRODUCTION

In the process of European integration, reform of the Constitution of Serbia specifically the section on the judiciary appeared on the agenda. The National Judicial Reform Strategy (for the period 2013-2018), that was adopted by the National Assembly, foresees three key phases of change: 1) exclusion of the National Assembly from the process of the election of Presidents of the Courts, judges, public prosecutors/deputy public prosecutors; as well as members of the High Judicial Council and State Prosecutorial Council; 2) changeover in the composition of the High Judicial Council and State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branches from membership in

these bodies; 3) prescribing a degree be obtained from the Judicial Academy as an mandatory precondition for first election into the judiciary or as a prosecutor. [1]

The Commission for the Implementation of the Strategy formed a Working Group, which included four University Professors of Constitutional Law, with the task of preparing a legal analysis of the existing constitutional framework of the judiciary. At the end of June 2014, the requested legal analysis had already seen the light of day. It was not only based on the Strategy itself, but had equally encompassed the views of the Serbian Constitutional Sciences and the Venice Commission. It seemed that this text was a good platform for the preparation of the draft constitutional reform of the judiciary, because it was greeted with unanimous support by the legislative and verbally those of the executive power.[2]

Serbia had taken on the obligation, with the initialization of Chapter 23 on the judiciary, to amend the Constitution by the end of the year 2017. Everything pointed to a positive outcome. However a standstill ensued, although from time to time, the Serbian media talked about the reform of the Constitution in the context of EU integration. For the most part, the media touched upon questions regarding the judiciary and the integrative clauses in the Constitution, whilst other matters were only speculative (Kosovo, changes to the election process and competencies of the President of the Republic, reform of the constitutional judiciary, etc.).

At the end of July 2017, the Ministry of Justice officially starts the first round of public hearings with civil society (six round tables in multiple cities in Serbia). At that time there still was no text of the draft constitutional amendments. At the beginning of September, certain associations of experts and non-government agencies withdrew from discussions with the rationale that the public hearings were feigned and fallacious.[3] It was clear that Serbia will not amend the part of the Constitution regarding the judiciary by the end of the year 2017. The Ministry of Justice presented a working text of amendments of the Constitution (24 amendments to the Constitution) at the end of January 2018.[4] A new round of public hearings, for the most part with the same participants, was concluded at

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1 [http://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf] Accessed 20 March 2018

2 Conference "Towards Constitutional Amendments: the Constitutional Position of the Judiciary", Belgrade, 29 November 2016

3 [http://rs.n1info.com/a316091/Vesti/Vesti/NVO-o-promeni-Ustava.html] Accessed 20 March 2018

4 [https://www.mpravde.gov.rs/files/Ministry%20of%20Justice%E2%80%99s%20Working%20Version%20of%20the%20Draft%20Amendments%20to%20the%20Constitution%201.pdf] Accessed 29 March 2018

the beginning of March in the same manner as the first round – a significant divide appeared with the Ministry of Justice on the one side and a large number of expert and non-government agencies on the other, supported also by a handful of professors of law.[5] The former affirming that the working text is good and balanced, written with consideration of the views and recommendations of the Venice Commission. The latter, that this text was in essence even worse than the valid Constitution[6] and that it only contained perfidious mechanisms for political control of the judicial powers, and that as such it should therefore be withdrawn in its entirety.[7]

Where did the error occur? What is the first cause of misunderstanding of the executive, on the one hand and the judicial powers on the other hand? How to escape the "dead-end" of the constitutional reform of the judiciary on the road to EU integration of Serbia? In this text, an attempt will be made to point out the key questions of constitutional reform of the judiciary in the context of EU integration and what are the seemingly correct guidelines for responding to those questions.

2. "SOURCES" OF INDEPENDENCE OF THE JUDICIARY

Theoretically, comparatively and from the viewpoint of the positive law of the Republic of Serbia, the fundamental constitutional principle is the principle of the Rule of law. The Constitution of the Republic of Serbia (in further text: CRS) first and foremost, defines this principle as a "fundamental prerequisite for the Constitution".[8] It is source of all other constitutional principles, but is also a fundamental constitutional value – legitimating basis of the constitution itself.[9] The Rule of law is effectuated within the political framework, and politics are moderated by the Rule of law. That latent tension between the law and politics, the supremacy of the constitution and the sovereignty of the people, has acquired its own expression in the syntagma "constitutional democracy".

In the constitutional democracy of political power, the legislative and executive have to have legitimacy and the judicial to be independent. Legitimacy is drawn

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5 [https://www.paragraf.rs/dnevne-vesti/080318/080318-vest3.html] Accessed 29 March 2018

6 The Constitution of the Republic of Serbia, Official Gazette No. 98/2006

7 See: The Opinion and Suggestions of the High Judicial Council to the Working Draft of the Ministry of Justice Amendment to the Constitution of the Republic of Serbia [https://vss.sud.rs/sites/default/files/attachments/ENG_Ustav.pdf] Accessed 25 March 2018

8 Art. 3 of the Constitution of the Republic of Serbia, Official Gazette No. 98/2006

9 See: Petrov, V., *Ustavna načela uopšte i u Republici Srbiji – teorijski pogled*, Pravni život, god. 29, tom IV, No. 12, 2016, pp. 497-508

from the consent of the people, acquired by way of free choice. The independence of the judiciary originates from other sources. The first is the Constitution, which defines the independence of the judiciary as a fundamental principle of a legal state and secures institutional guarantees of that independence. The other is constitutional culture, which is characterized by the "agreement on understanding" of political powers on the one hand, and the judicial powers on the other. That "agreement" arises when two naturally different powers renounce their "egoistical" aspirations – the executive power to put under "tutelage" the judicial and the judicial of make its independence absolute and isolate itself from other powers in the state.

It is not hard to understand why for decades in Serbia the reform of the judiciary has not been an evolutionary process, but instead a "vicious circle", in which only the players are changing, whilst the essence stays the same – declarative devotion for the judiciary to be established and implemented for the general wellbeing, i.e. in the interest of the people.[10]

3. FOUR CONSTITUTIONAL QUESTIONS AND AN INDEPENDENT JUDICIARY

This section will touch upon the first source of independence of the court, Constitution or "constitutional framework".[11] The CRS does not contain sufficient guarantees of the independence of the court.[12] In that critical approach toward the Constitution we should not go into extremes, because the judicial power is only one part a constitutional subject matter. The Constitution should only regulate that which is necessary, and nothing more. That constitutional "core" is made up of four questions. First, the principles on which the judicial powers are founded on which they are based – constitutional principles on the judiciary. Second, the manner in which the judges are elected. Thirdly, who is the highest court in the country? Fourth, grounds for termination of judges' tenure in office. The rest, regardless of how important it is for "practical life" of the judiciary, it should be regulated by the law and other legal acts.

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10 See: Orlović, S., *Stalnost sudijske funkcije vs. opšti reizbor sudija u Republici Srbiji*, Anali Pravnog fakulteta u Beogradu, god. 57, No. 2, 2010, pp. 163-186

11 In 2014, the Commission for the Implementation of the National Strategy for the Reform of the Judicial System formed a Working group for rendering the analysis of the amendment to the constitutional framework.

12 See: Venice Commission, *Opinion on the Constitution of Serbia*, CDL-AD(2007)04, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e] Accessed 27 March 2018

With respect to the constitutional principles regarding he judicial powers, the Serbian framers of the constitution listed mainly all of them. However, this was not due to a poor systematization and stylization of norms; but in fact inconsistency and partialness in content. In one section it states that the "Courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts;"[13] in another: "in performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law"[14]; and yet in the third: "Court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law."[15] Three differing formulations of the same concept – judicial (institutional and personal) independence - in three articles of the Constitution which are related in content are inadmissible. Statements on the principles of the Constitution, and the judicial power, must be polished and precise, words carefully chosen and none of them excessive.

Essentially, the election of judges is regulated, better than in the Constitution from 1990. That Constitution prescribed that the judges be elected by the National Assembly. The Constitution of the Republic of Serbia prescribes that the permanent judges shall be elected by the High Judicial Council (in further text: HJC); made up of eight electoral members (six judges with permanent judicial function and two prominent and respected lawyers - a professor from the Faculty of law and a solicitor) and three members *ex officio* (the President of the Supreme Court of Cassation, the Minister of Justice and the President of the authorized committee of the National Assembly). Theoretically, election by the High Judicial Council contributes greatly to the achievement of judicial independence.[16]

From there, three essential reproaches can be made regarding the Serbian constitutional solution. First, the High Judicial Council appoints only the judges that will hold a permanent tenure in office. Individuals who are being elected for the first time into the judicial role, for a period of three years, are appointed by the National Assembly at the proposal of the High Judicial Council. Therefore, the constitutionalization of the model of the judicial council stopped at the half-way point; this body does not appoint all judges. Secondly, the High Judicial Council

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13 Article 142 (2) of the Constitution of Serbia, Official Gazette No. 98/2006

14 Article 149 (1) of the Constitution of Serbia from 2006, Official Gazette No. 98/2006

15 Article 145 (2) of the Constitution of Serbia from 2006, Official Gazette No. 98/2006

16 Venice Commission, *Report on the Independence of the Judicial System Part I: Independence of the Judges*, CDL-AD (2010) 0004 Or., [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e] Accessed 27 March 2018

is not solely made up of judges exclusively, which it does not have to, however it is not favorable for all of its members to be appointed by the National Assembly. Third, "the probatory mandate" of those judges who have been elected for the first time is contrary to the nature of the judicial function. According to the Venice Commission, "foreseeing a probatory period can jeopardize the independence of the judges, because they may feel pressured to make decisions in a certain manner". Therefore, the Commission proposes that "judges of the ordinary courts be elected permanently until retirement".[17]

Judges should be elected by the High Judicial Council. A singular method of electing judges should be defined, which includes the elimination of "temporary judges". Furthermore, a balanced composition of the High Judicial Council should be determined. There does not have to be an equal number of judges and politically appointed members in the Council, however there must not be explicit dominance of one or the other. Member judges must elect judges, and not the Assembly. A number of politically appointed members should remain, however their political capacity, should not be the only factor that serves as a recommendation for their membership. The Venice Commission recommends that "the majority of the members of the Judicial Council should be elected by the judiciary itself", but "for democratic legitimacy of the judicial council to be secured, the other members should be elected from amongst the individuals with adequate legal qualifications taking into consideration possible conflict of interest." That means that in the Council there is no room for Members of Parliament and membership of the Minister of Justice. The President of the highest court should not be automatically designated the President of the Council. The President, by way of a majority vote, should be elected by the Members of the Council, which does not have to be regulated by the Constitution.

With respect to the highest court, it is unclear as to why the framers of the constitution opted in for the name "Supreme Court of Cassation". In comparative law, there exist two models of organization of the highest court – the Cassation Court model and the Supreme Court model. The Supreme Court passes valid decisions resolving a dispute. The Court of Cassation decides upon the legality of decisions made by lower instance courts. Decisions made without properly adhering to the law are returned to a lower instance court to be heard again. By calling the highest instance court The Supreme Court of Cassation, the framers of the constitution have "mixed-up" these two models. The former title of the highest court – Supreme Court should be reinstated, and its competencies, as well as the competen-

[17] *Ibid.*

cies of the lower instance courts, should be regulated clearly and precisely by way of laws, not the Constitution.

According to the Constitution of the Republic of Serbia, the proceedings, basis and reasons for terminating judges tenure of office, as well as the reasons for dismissing the President of the Court, are defined by the law. The Constitution of the Republic of Serbia from 1990 regulated the grounds for terminating the judicial role as well as the dismissal of judges.[18] It should have stayed that way. "By deconstitutionalizing the grounds for termination and the reasons for dismissal from office the position of the judiciary as an independent branch of government in the systems of power is weakened."[19] Therefore, grounds for termination from the judicial role must be constitutionalized once again and in that way strengthen the guarantee of the permanency of the judicial role.

4. CONSTITUTIONAL CULTURE AND THE INDEPENDENCE OF THE JUDICIARY

If the four questions regarding the judicial branch are regulated in the proposed way, a solid normative precedent will be created for an independent judiciary; nothing more than that. Constitutional culture is necessary to be paired with good constitutional guarantees. Constitutional culture is the highest form of legal and political awareness which gathers the bearers of state powers and citizens around the fundamental values of society. Constitutional culture involves the surrender of "institutional egoism", constitutional factors and their unity in effectuating the aims of a legal state. The executive branch must not use the reform of the judiciary and the constitution as a "screen" for seeking out new methods of control of the judicial power. The judicial power must not treat its "independence" as an intangibility and irresponsibility. The people should demand an independent judiciary, but also work on building their own legal awareness, which will aid them in responsibly utilizing legal instruments available for judicial protection of law.

Good constitutional stipulations are easily written as opposed to developing constitutional culture which is adequate for a legal state. Different is the process and it should not be rushed due to "the Brussels" or other similar standards, but instead it should develop in harmonization with proven European and national constitutional values. Those values are founded on the principle of "unity of diversity", and not on generally accepted and uniform solutions. If such solutions were to exist, judges, for example, would be elected in the same way in Great Britain, Germany

[18] Article 101 of the Constitution of Serbia from 1990, Official Gazette, No. 1/90

[19] Marković, R., *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2017, p. 527

and France. In these stable democracies, they are elected in differing ways, with controlled and accountable participation of political factors.[20]

5. CONCLUSION

Amendments to the Constitution in the section pertaining to the judiciary will not be sufficient to secure an independent judiciary. There is no best solution, but one of the worst possible ones would be if under the slogan of fighting for European values to enable further Americanization of Serbian law. The system of 'checks and balances' and the judicial practice as a source of law and the Anglo-American concept of independence of the courts are not welcomed within the European legal framework. That would be a fatal disorienting blow to the judiciary in Serbia, which is slowly recovering from the detrimental consequences of earlier serial "reforms of the judiciary" (particularly the last in 2009). "If Serbia would like to change its legal system and introduce the Anglo-Saxon model ...we would need one-two hundred years for our jurists to learn and apply it. So as to avoid a legal shipwreck our jurists are decisive in their fight for the survival of our legal tradition (Milan Škulić)".[21]

In any case, quality changes to the Constitution can be implemented if political powers consult two sources: domestic constitutional sciences and the most recent, synthesized opinions of the Venice Commission regarding the judiciary. There is no discord between these sources, as is sometimes presented to the public. The viewpoints regarding this subject matter are identical. However, there is no magic formula. The independence of the judiciary in the Constitution is only the legal frame; however the brushstrokes creating the picture must be ongoing, as it remains imperfect and incomplete. In that respect, stable constitutional democracies have long ago "graduated" on that subject-matter, but Serbia has not.[22]

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20 See: Petrov, V., *Izbor sudija uporedno i u Republici Srbiji*, Šarčević, E., Petrov, V. (ur.), Sudije u pravnom sistemu, Sarajevo, 2013, pp. 39-69

21 Petrović, A., *Evropa ne prihvata amerikanizaciju našeg pravosuđa*, Politika from 6 August 2017

22 The ideas exhibited in this article was developed in the Draft of the Legal Analysis of the Constitutional Framework for the Judiciary of the Republic of Serbia [https://www.mpravde.gov.rs/files/April%20report_judicial%20power_doc.doc]. Accessed 30. March 2018

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DUBLIN IV REGULATION, THE SOLIDARITY PRINCIPLE AND PROTECTION OF HUMAN RIGHTS – STEP(S) FORWARD OR BACKWARD?

ABSTRACT

The paper analyzes the proposal to amend the core element of the Common European Asylum System, Dublin IV Regulation, from two different perspectives – principle of solidarity between Member States and protection of asylum seekers' human rights. An in-depth analysis is provided of novel solutions introduced by Dublin IV, their comparison with provisions contained in Dublin III, as well as an intersection of current state of negotiations between Member States within relevant EU institutions with a view to reach an acceptable version of the future document. The focus is on two important issues. Firstly, does Dublin IV enhance solidarity between Member States or does it do the exact opposite – further regresses the poor level of solidarity attained in Dublin III? Solidarity principle is implemented through a number of Dublin IV provisions, such as those concerning equitable distribution of applicants for international protection, the new fairness mechanisms and corrective allocation mechanisms. However, it remains to be seen whether these and other mechanisms based on solidarity principle will have any meaningful effect and whether there are any realistic prospects of applying them in practice, especially taking into account rather negative previous experiences. Secondly, changes brought by Dublin IV are analyzed from the perspective of human rights protection. This part of the paper focuses on certain problematic issues that emerge with regard to the level of human rights protection guaranteed by the Regulation and its compatibility with relevant standards established in the case-law of both the Court of Justice of the European Union and the European Court of Human Rights. Namely, application of a number of provisions contained in Dublin IV may easily result in violations of asylum seekers' human rights, right to family life and prohibition of torture in particular. This may seriously weaken the protection of fundamental rights of asylum seekers, especially rights of vulnerable asylum seekers, attained through the jurisprudence of two European courts. In the two enumerated operative parts of the paper attempts are made to assess the position of Dublin IV changes as compared not only to its currently applicable counterpart, but also to common European standards born out of application of Dublin system in practice, from the perspectives of both the principle of solidar-

ity and human rights protection. It appears that the proposed Dublin IV Regulation tends to sacrifice protection of human rights for the sake of the principle of solidarity. Since attainment of solidarity in practice is not warranted, the proposed regulation may end up making both the principle of solidarity and protection of human rights illusions rather than imperatives, making way for a preferred but highly debatable aim of a more functional asylum system.

Keywords: *Dublin system, Asylum, Solidarity, Human Rights*

1. DUBLIN IV PROPOSAL IN LIGHT OF THE DUTY OF SOLIDARITY OF EU MEMBER STATES

The principle of solidarity is usually regarded by scholars as the flip side of the general principle of loyalty,[1] which is thought to be established by virtue of Article 4(3) TEU. In his attempt to concisely describe the significance of the principle of loyalty, Klamert claims that "loyalty has been central to the development of Union law since the 1960s, and … it still shapes its structure today."[2] That author distinguishes solidarity from loyalty by assigning to the former the qualities of being "rather political and non-binding than legally binding."[3] Such perspective is deeply rooted in one of the initial provisions (Article 2) of TEU, which lists solidarity among social values that are common to the Member States (MS), together with pluralism, non-discrimination, tolerance, justice and equality. In respect of relations between MS, however, a prominent invocation of solidarity is encompassed in Art. 222 of the TFEU, in which obligation "to act jointly in the spirit of solidarity" is bestowed upon both the EU and its MS in cases of terrorist attacks and natural and man-made disasters.

The migration crisis presented test for assessing the level of solidarity among EU MS: since according to Dublin III, which was in force when the crisis broke out in 2015, the country in which an illegal immigrant first entered the EU was responsible for processing that person's asylum application, Greece and Italy were faced with the greatest burden of accommodating the tremendous influx of immigrants in order to have their asylum applications processed.[4]

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1 A comprehensive list of scholarly opinions to such effect has been offered by Klamert. Klamert M., *The Principle of Loyalty in EU Law,* Oxford 2014, p. 31, footnotes 8 and 9

2 *Ibid.,* p. 1

3 *Ibid.*, p. 35

4 For a discussion of the challenges that the migrant crisis posed to the Member States from the perspective of judicial cooperation in criminal matters and police cooperation, see Lukić, M., *The New Theatre of the Struggle for EU Unity - Judicial Cooperation in Criminal Matters and Police Cooperation Confronts Member States Sovereignty*, Annals of the Faculty of Law in Belgrade, No. 3, 2016, 140-153

According to one of the external studies commissioned and relied upon by the EU Commission, Dublin III showed significant shortcomings in respect of capacity to provide efficient mechanisms for dealing with a large influx of refugees: "Dublin III was not designed to deal with situations of mass influx, which has severely reduced its relevance in the current context and has undermined achieving its objectives... Dublin III was not designed to ensure fair sharing of responsibility and does not effectively address the disproportionate distribution of applications for international protection."[5] The large number of applicants with which Greece was faced resulted in practices that were perceived by other EU MS as amounting to "systemic flaws in asylum procedures and reception conditions."[6] Due to such perceptions most other MS assumed responsibility for asylum applications they received without undertaking formal Dublin III assessment in cases involving Greece.[7]

In response to the 2015 migrant crisis, the Council of the EU enacted two provisional measures in September 2015. Both were aimed at alleviating the burden posed by the physical presence of large number of immigrants on Italy and Greece, and both were based on TFEU Article 78(3) and Article 80, which had authorized the Council to adopt provisional measures if "one or more MS are confronted by an emergency situation characterized by a sudden inflow of nationals of third countries", in line with the "principle of solidarity and fair sharing of responsibilities." Both decisions set forth the terms of relocation of asylum seekers from Italy and Greece to other MS, and thus represented explicit departure from Dublin III criteria. The first decision of the Council enabled relocation of 40,000 asylum seekers from Italy and Greece to other MS, without stipulating the obligation of any particular MS to receive any number of subject persons.[8] The second decision, which was enacted only a week later, set forth mandatory quotas of asylum seekers that all other MS were obligated to accept from the total of 120,000 persons that were to be relocated from Greece and Italy.[9]

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5 Evaluation of the Dublin III Regulation, Final Report, DG Migration and Home Affairs, 4 December 2015, p. 4
[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf] Accessed 07 April 2018

6 *Ibid*, p. 10

7 *Ibid,* p. 10; Evaluation of the Implementation of Dublin III Regulation, Final Report, DG Migration and Home Affairs, 18 March 2016, p. 20,
[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf] Accessed 07 April 2018

8 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJL 239/146

9 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJL 248/80

Slovak and Hungarian governments sought annulment of the latter decision before the CJEU, citing, *inter alia*, breaches of the principle of institutional balance, competences of national parliaments, the principles of subsidiarity and proportionality, legal certainty, representative democracy, sound administration, essential procedural requirements, as well as the failure to meet requirements under Art. 78(3) TFEU. CJEU dismissed these actions on all counts.[10] The reasoning of the judgment is important for the interpretation of the principle of solidarity, since the Court considered application of the principle of solidarity by the Council to have been mandated by Art. 80 TFEU.[11]

The cited articulation should be juxtaposed to the role the principle of solidarity was assigned in the opinion of Attorney-General Kokott in *Pringle,* in the case in which compliance of ESM, the key instrument with which sovereign debt crisis of the Eurozone was tackled, with EU law was assessed. In that opinion, solidarity was cited as the ground for narrow interpretation of the prohibitions contained in Art. 125 TFEU (pertaining to assumption of liabilities of MS by the Union or by other MS).[12] The juxtaposition shows that the necessity of addressing the migrant crisis forced the Court to promote the principle of solidarity from an interpretative tool to a legally binding principle. The described advancement of legal significance does not contravene the common denominators of the role of solidarity in tackling the financial-sovereign debt[13] and the migrant crisis, established by Goldner Lang: in both cases solidarity-based mechanisms arose from economic necessity and political reality, and in both cases lack of mutual trust was evident.[14]

The key feature of the Dublin IV proposal[15] that concerns solidarity is the so-called corrective allocation mechanism, which would be automatically applicable if a MS is faced with a number of asylum seekers that is disproportionately high

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10 Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union,* Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631

11 *Ibid.*, paras. 251-253

12 View of Attorney-General Kokott delivered on 26 October 2012, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, Case C-370/12, ECLI:EU:C:2012:675

13 For a detailed overview of the escalating response the EU deployed against the sovereign debt crisis, including the significance the principle of solidarity had in articulation of such response, see: Lukić, M, *Transformation Through Rescue - A Legal Perspective on the Response of the European Monetary Union to the Sovereign Debt Crisis*, *Annals of the Faculty of Law in Belgrade - Belgrade Law Review*, No. 3, 2013, 187-198; Lukić, M., *The Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the Name of Austerity and Solidarity*, Pravo i privreda, No. 4-5, 2013, 555-572

14 Goldner Lang I., *The EU Financial and Migration Crises – Many Facets of EU Solidarity,* in Biondi, A., Dagilyte, E., Küçük, E. (eds.), Solidarity in EU Law: Legal Principle in the Making, Edward Elgar Publishing, 2018 (Forthcoming)

15 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for interna-

in relation to the size of its population and the level of its GDP. It is proposed that each MS been assigned a reference key, indicating the share of the burden it may share based on said criteria. The reference keys would then be applied for the purpose of determining the maximum number of asylum seekers that each MS may accommodate, which would be done by apportioning the total number of asylum seekers in the EU over the course of the preceding 12 months proportionately to reference keys. The corrective allocation mechanism would be activated if an MS would face a number of asylum seekers greater than 150% of its reference number.

If one considers the high level of economic integration of EU Member States, as well as the freedoms of movement within the EU, it becomes clear that the EU as a whole is the jurisdiction of destination for asylum seekers, and, consequently, that only acting as a whole it may address that problem both efficiently and in line with its own values. For those reasons the corrective allocation mechanism does not seem to be an ambitious articulation of solidarity, but indeed a very basic precondition, essentially a *conditio sine qua non* of the continuation of the EU. If countries exist within the EU which are not prepared to share the burden of processing of asylum applications in proportion to their strength, then such countries simply do not share the values of the EU and are not prepared to undertake obligations that are commensurate to rights they already enjoy at the level of integration that the EU has attained thus far.

2. DUBLIN IV PROPOSAL AND PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

Enhancing protection of asylum seekers' human rights was not among explicit aims of the proposal to reform the Dublin system. Instead, the proposal focuses on improving the system's capacity to efficiently determine a single MS responsible for examining the application for international protection by shortening the time limits for taking relevant steps within the asylum procedure, ensuring fair sharing of responsibilities between MS by introducing a corrective allocation mechanism in cases of large influx of asylum seekers and discouraging abuses and preventing secondary movements of the applicants within the EU.[16] The focus is thus on improving the position of MS and not the position of individuals, although individuals may and will surely benefit from making the whole Common European Asylum System more efficient. However, if one takes into consideration the fact

tional protection lodged in one of the Member States by a third-country national or a stateless person (recast), Brussels, 4.5.2016 COM(2016) 270 final, 2016/0133 (COD), (Dublin IV Proposal)

16 *Ibid.*, pp. 2-3

that application of Dublin III Regulation[17] resulted in cases of human rights violations established by the two European courts, the question to be asked is whether an opportunity has been lost to avoid or at least bring to a minimum potential future violations of basic human rights.

This part of the paper shall tackle three fundamental human rights which have proven to be prone to violations while implementing Dublin III Regulation – prohibition of torture, inhuman or degrading treatment,[18] right to liberty and security[19] and right to private and family life[20]. Even though the authors of the Dublin IV Proposal claim that it "is fully compatible with fundamental rights and general principles of Community as well as international law",[21] such an assertion needs to be tested through an analysis which would encompass a number of steps. Firstly, the comparison has to be made between provisions contained in the currently applicable Dublin III Regulation and the Dublin IV Proposal in order to check whether any modification has been introduced that would reflect human rights protection. Secondly, relevant jurisprudence of the two European courts will have to be assessed since particular provisions, although *prima facie* fully compatible with human rights standards may have adverse implications when being applied. Finally, novel solutions will be analyzed against already existing case-law so as to assess whether space for potential human rights violations has been completely avoided or at least brought to a minimum.

2.1. Prohibition of torture, inhuman or degrading treatment and its relevance for Dublin transfers – any improvement regarding the safe third country concept and vulnerable categories of asylum seekers?

Prohibition of torture is of relevance in regard to a number of Dublin Regulation provisions, namely the rules on the safe third country concept and those relating to protection of vulnerable asylum seekers, unaccompanied minors and persons with serious health problems in particular.

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17 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJL180/31 (Dublin III Regulation)

18 Article 3 of the European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights of the European Union [2012] OJC326/391, CFREU)

19 Article 5 ECHR and Article 6 CFREU

20 Article 8 ECHR and Article 7 CFREU

21 Dublin IV Proposal, p. 13

The safe third country concept is mentioned without further definition or explanation in Article 3 of both Dublin III and Dublin IV Regulation dealing with access to the procedure for examining an application for international protection. No change has been made with regard to paragraph 2 which explicitly states that the transfer of an applicant to the MS primarily designated as responsible according to relevant criteria laid down in the Regulation, will not be carried out if "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union". In such a case, two options are left at the disposal of the given MS. It shall either continue to examine other criteria in order to establish whether another MS can be designated as responsible, or if no other criterion is applicable, the determining MS will become the MS responsible for examining the application.

However, a change has occurred in the Dublin IV Proposal by deleting paragraph 3 of Article 3 of Dublin III Regulation which provides that "any MS shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU".[22] New paragraph 3 instead provides that before applying the criteria for determining a MS responsible, the first MS in which the application was lodged shall examine whether the application is inadmissible because a country which is not a MS is considered as a safe third country for the applicant, pursuant to Article 38 of Directive 2013/32/EU. The same paragraph also requires that the MS examines the application in an accelerated procedure when the applicant may, for serious reasons, be considered a danger to the national security or public order of the MS.

These modifications imply that an obligation is introduced for the MS to examine whether an application is inadmissible on the basis of the safe third country concept or prone to examination in an accelerated procedure. Should the MS consider the application as inadmissible on the aforementioned ground, there is no obstacle for the applicant to be returned to the safe third country and the MS which conducted the inadmissibility procedure will be considered to be the responsible MS. In other words, the purpose of this modification is to avoid situations in which MS transfer among each other applicants whose applications are either inadmissible or they represent a security risk. The aim is thus on reducing Member States' own burden, decreasing the number of MS which would deal with a particular applicant and cutting the financial costs of multiple procedures and transfers.

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[22] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJL180/60 (Directive on asylum procedures)

Such a conclusion should be considered from the perspective of a number of cases decided by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) dealing with Dublin transfers and the resulting violations of the prohibition of torture, inhuman or degrading treatment. Namely, would these changes have any consequences to problematic situations similar to circumstances of well-known and very important cases of *N.S. and M.E.* before the CJEU and *M.S.S. v Belgium and Greece* decided by the ECtHR? In both of these cases, asylum seekers were returned to another MS which was considered to be the MS responsible for examining the asylum application according to Dublin criteria, despite the fact that its asylum system faced systemic deficiencies and significant problems. In the case *N.S. and M.E.*, the CJEU confirmed that the obligation of a MS to respect fundamental rights in the context of applying transfers according to Dublin Regulation precludes the application of a conclusive presumption that the MS which Dublin Regulation indicates as responsible actually observes fundamental rights of the EU.[23] Article 4 of the CFREU must, therefore, be interpreted as meaning that the MS may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Dublin Regulation "where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision".[24] It may be concluded that CJEU's interpretation of relevant provisions of Dublin II Regulation actually influenced the novel provision of Article 3 of Dublin III Regulation and that no similar problems would subsequently appear in practice.[25] However, the 2015 case of *Shiraz Baig Mirza*[26] showed further prob-

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23 Case C-411/10 *N. S. v Secretary of State for the Home Department* and Case C-493/10 *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, par. 105

24 *Ibid*., par. 106; Lenart considers the *NS* judgment to be ground-breaking for a number of reasons. Not only did the CJEU consistently follow the case law of the ECtHR, it also confirmed the rebuttable character of the presumption of observance of fundamental rights among the EU MS and obliged MS to examine the situation of asylum seekers in the MS responsible in accordance with the Dublin Regulation before requesting them to take charge of the applicant. Finally, and most importantly, it imposed the obligation upon MS to apply the so called sovereignty clause in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers, rendering it in certain circumstances no longer a 'sovereignty clause' but, in fact, a duty. Lenart, J., *'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Merkourios-Utrecht Journal of International and European Law, No. 28, 2012, p. 17

25 Xing-Yin, N., *The Buck Stops Here: Fundamental Rights Infringements Can No Longer Be Ignored When Transferring Asylum Seekers Under Dublin II*, Boston College International & Comparative Law Review, No. 37, 2014, p. 84

26 Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* [2016] ECLI:EU:C:2016:188

lems in applying these provisions. A Pakistani national travelled through Serbia on its way to the EU. It applied for asylum in Hungary but continued its trip to Austria while his application was still under examination. On its way to Austria, he was stopped and interviewed in the Czech Republic. The Czech authorities issued a take back request to Hungary which was the MS responsible according to Dublin criteria and the Hungarian authorities accepted it. However, the then applicable Hungarian asylum legislation considered the admissibility of asylum application before its examination on the merits, a consequence of which would be the return of the asylum seeker to the Republic of Serbia which was on the Hungarian list of safe third countries. It appeared from the documents submitted in the course of the proceedings that Czech authorities were not informed of the Hungarian practice to consider Serbia as a safe third country. CJEU considered that "the right to send an applicant for international protection to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible".[27] Furthermore, the Court was of the opinion that Dublin III Regulation must be interpreted as not precluding the sending of an applicant to a safe third country when the MS carrying out the transfer to the MS responsible has not been informed "either of the rules of the latter Member State relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities".[28]

Such a position of the CJEU is in stark contrast with the relevant standards established by the European Court of Human Rights. The often cited judgment of the ECtHR in the case *M.S.S. v Belgium and Greece* interpreted the term "systemic flaws", later used in both Dublin III and IV Regulation, as encompassing three different aspects – conditions of reception and detention, conditions of utmost poverty to which asylum seekers were exposed and risk of chain refoulement.[29] The Court concluded that Belgium authorities could not apply the presumption that applicable standards would be respected in Greece.[30] They had to examine in which way Greek authorities actually applied their asylum legislation in practice. The Court could not accept that Belgium authorities were unaware of the existing irregularities in the Greek asylum procedures, identified in numerous reports of

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27 *Ibid*., par. 53

28 *Ibid.*, par. 63

29 Mole, N, *et al., Priručnik o medjunarodnim i evropskim standardima u oblasti azila i migracija i njihova primena i relevantnost u Republici Srbiji*, AIRE Centar i Medjunarodna organizacija za migracije, Beograd, 2018, p. 78

30 Regarding reasons for ECtHR's departure from its earlier approach in similar cases, see: Fullerton, M., *Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law*, Harvard Human Rights Journal, No. 29, 2016, p. 99

various international bodies and organizations.[31] By not requiring the relevant MS to be informed of the rules of the receiving MS relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities, CJEU obviously chose to ignore the potential risk of chain refoulement and subsequent violation of the prohibition of torture as a consequence of applying the safe third country concept and interpreted Dublin rules in a manner that cannot be said to be fully compatible with well-established human rights standards. Needless to say those adequate guarantees are also missing in the Dublin IV Proposal.

ECtHR cases in which vulnerable asylum seekers claimed that their transfer in accordance with the Dublin Regulation would lead to violations of the rights guaranteed by the Convention, prohibition of torture in particular, are also of relevance when examining the amendments introduced by Dublin IV Proposal. When it comes to particularly vulnerable categories of asylum seekers, the European Court of Human Rights introduced additional procedural restrictions in cases of the application of the Dublin system. Namely, it established requirements of procedural nature that need to be met in order for the return of the vulnerable asylum seeker to be carried out.[32] Making return within the Dublin system conditional upon the provision of individual, very specific, detailed and reliable guarantees that vulnerable asylum seekers would be received and accommodated in accordance with their special needs is definitely a positive novel in the context of standards for overturning the assumption that human rights are respected in the EU MS.[33] In the absence of systemic deficiencies in the asylum procedure and

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31 *MSS v Belgium and Greece* [GC] (2011) 53 EHRR 2, paras. 344-359

32 Applications brought against Italy have contributed to the initial introduction and further progressive development of requirements of a procedural character that need to be met in order for the return to be carried on. Namely, in *Mohammed Hussein v. the Netherlands and Italy* decided in 2013, the ECtHR considered that Dutch authorities needed to inform competent Italian authorities in due time, and that Italian authorities should have guaranteed that vulnerable asylum seekers, a mother with two minor children, would enjoy special reception conditions, in accordance with relevant Italian laws. *Mohammed Hussein v the Netherlands*, App No. 27725/10 (ECHR, 2 April 2013), par. 77. In *Halimi v Austria and Italy*, the Court accorded special significance to Italian authorities' 'observation' that the applicant would be allowed to apply for asylum upon return to Italy, as well as their 'assurance' that he would be included in protection programme and accommodated in accordance with medical documentation issued by Austrian authorities. *Halimi v Austria and Italy*, App No. 53852/11 (ECHR, 18 June 2013), paras. 68-69. The Court further raised procedural restrictions in applying relevant Dublin rules in *Tarakhel v Switzerland*, by requiring that the return would be conditional upon the provision of additional, individual, very specific, detailed and reliable guarantees by Italy that the family would be accommodated in conditions adapted for children and their age. *Tarakhel v Switzerland* (2015) 60 EHRR 28, par. 121

33 Although ECtHR did not forbid the return of the family from Switzerland to Italy, it became clear that in assessing whether human rights are respected in the EU MS, it would be necessary not only to apply the systemic deficiencies test which is of general character and applies to all asylum seekers, but also to assess these deficiencies from the stand point of individual circumstances and special needs of vulne-

reception conditions, the emphasis is placed on examining the individual circumstances of the asylum seeker in a situation of special vulnerability.[34] The *Tarakhel v Switzerland* case further elaborated on the issue of circumstances due to which violation of Article 3 ECHR may occur in cases when vulnerable categories of asylum seekers are sent back to another Council of Europe member. The Court considered that returning a family with six minors to Italy would represent a violation of Article 3 since the Italian asylum system was not able to provide for a proper response to asylum seekers in need of enhanced support. In other words, the general systemic flaws test cannot lead to a final answer to the question whether there is a risk of torture or inhuman or degrading treatment.[35] Equal relevance should, in such cases, be accorded to an assessment of individual circumstances of vulnerable asylum seekers.[36]

Returning to Dublin IV Proposal, it remains to be assessed whether its provisions adequately transpose human rights standards established through the case-law of ECtHR. The rights of unaccompanied minors have been said to be strengthened through better defining the principle of the best interest of the child and by setting out a mechanism for making a best interest of the child determination in

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rable asylum seekers. What is more, the ECtHR in the *Tarakhel* case chose not to consider conditions in which the family with six minors was placed during their first stay in Italy. Zimmermann explains such an approach by asylum seekers' special vulnerability and believes that this vulnerability released them from the obligation to prove that they were exposed to torture or human or degrading treatment during their initial stay in Italy. Zimmermann, N., *Tarakhel v. Switzerland: Another Step in a Quiet (R) evolution?*, Strasbourg Observers, December 1, 2014, available at: [http://eulawanalysis.blogspot.rs/2014/11/tarakhel-v-switzerland-another-nail-in.html] Accessed 07 April 2018

34 Krstić, I., Čučković, B., *Praksa Evropskog suda za ljudska prava u odnosu na primenu Dablin regulative*, Pravni život, No. 12, 2016, p. 114

35 Vicini is of the opinion that an "interpretation in accordance with Article 52(3) EUCFR would consider the 'systemic failures' criterion adopted by the CJEU not as a threshold under which there is no potential violation of Article 4, but rather as a condition that might exempt the asylum seeker from proving his/her individual risk". Vicini, G., *The Dublin Regulation Between Strasbourg and Luxembourg: Re Shaping Non-Refoulement in the Name of Mutual Trust*?, European Journal of Legal Studies, No. 8/2, 2015, p. 65

36 The Court found that, in the absence of reliable information on the specific institution in which the family would be placed, material reception conditions, as well as the respect of family unity, it cannot be considered that the Swiss authorities had sufficient guarantees that, if the family was to be returned to Italy, they would be treated in a manner that would be appropriate to the age of their children. *Tarakhel v Switzerland* (2015) 60 EHRR 28. In other words, the ECtHR did not completely prohibit the return of the Tarakhel family to Italy, but made the return conditional upon the provision of additional, individual, very specific, detailed and reliable guarantees by Italy that the family would be accommodated in conditions adapted for children. For divergent practice of EctHR in cases similar to *Tarakhel*, see in particular: Rubin, A., *Shifting Standards: The Dublin Regulation and Italy*, Creighton International and Comparative Law Journal, No. 7, 2016, pp. 148-151

all circumstances implying the transfer of the minor.[37] The proposal clarifies that the MS where the minor first lodged the application would be responsible, unless it is demonstrated that such a solution would not be in its best interest. The proposal further claims that this rule would allow a quick determination of the MS responsible and thus allow minors swift access to the procedure. In addition, before transferring an unaccompanied minor to another MS, the transferring MS shall make sure that that MS will take the necessary measures under the asylum procedures and reception conditions Directive without delay.[38]

However, it may be noticed that the proposal focuses on the specific category of unaccompanied minors and insists on the application of the best interest of the child principle in relation to them. It neither deals with minors in general, including accompanied minors, or with other categories of vulnerable asylum seekers such as asylum seekers with serious health problems whose transfer to another MS could be considered as violation of Article 3 of the Convention.[39] It follows that specific situation of minor asylum seekers accompanied by one or both parents, such as was the case in the *Tarakhel* judgment, would not benefit of either special guarantees or procedures in the newly to be established Dublin system. Systemic flaws test provided in Article 3 of the Dublin IV Proposal remains the only safeguard, whereas 'individual circumstances' test is left outside the Dublin system despite its growing recognition and significance in the jurisprudence of the ECtHR.

Does Dublin IV Proposal bring any improvements as regards respect for the prohibition of torture, inhuman and degrading treatment? If one leaves aside guarantees introduced for unaccompanied minors,[40] its provisions do not seem to reflect relevant human rights standards. The only consequence that follows from introduced modifications is that a MS has a duty to examine whether an application is inadmissible on the basis of the safe third country concept. Should the MS consider the application inadmissible, the applicant may be returned to the safe third country. Should the MS consider the application to be admissible, it will continue the procedure for determining the responsible MS in accordance with Dublin criteria and in the course of that procedure, it may apply the take charge or

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37 Dublin IV Proposal, pp. 13-14

38 *Ibid*., p. 17

39 For relevant ECtHR case-law regarding application of Dublin Regulation to asylum seekers with health problems, see: *D. v UK*, (1997) 24 EHRR 425; *N. v UK* (2008) 47 EHRR 39

40 However, even provisions regarding unaccompanied minors have been criticized by the doctrine from the stand point of human rights protection. For example, Hruschka believes that relevant provision of Dublin IV Proposal (Article 10(5)) "potentially infringes the rights of the child and appears to be at variance with the principle that the best interests of the child have to be a primary consideration in all action taken on behalf of minors". Hruschka, C., *Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation*, ERA Forum, No. 17, 2016, pp. 530-531

take back procedures established by the Regulation. This means that the so called Dublin transfers among MS will continue to occur with all the problems that they seem to have been causing while being applied within the Dublin III Regulation. In other words, *M.S.S.* and *Tarakhel* scenarios are still possible. The only situation in which they would not occur is the one where either Belgium or Switzerland considers that applicants come from a non-EU MS which may be assessed as safe. Otherwise, transfers to Greece or Italy, or any other MS, would be carried on with the only formal obstacle being the 'systemic flaws' test, not the 'individual circumstances' test. Such a remark calls for another observation in terms of the prohibition of torture, inhuman and degrading treatment - the safe third country concept remains to be one of the most problematic and controversial EU law inventions.

2.2. Dublin IV rules on asylum detention and their compatibility with the right to liberty and security

Detention of asylum seekers may violate a number of human rights, namely right to liberty and security, right to private and family life, as well as the prohibition of torture, especially in regard to detention conditions. Since regulation of detention conditions is the subject matter of the Directive on standards for the reception of applicants for international protection,[41] detention of asylum seekers will not be examined from the perspective of violation of Article 3 ECHR. The focus will instead be on potential repercussions of Dublin IV Proposal on the right to liberty and security of asylum seekers, i.e. Article 5 ECHR.

Dublin IV Proposal is claimed to reinforce this right only by shortening the time limits under which an asylum seeker may be detained, since other relevant guarantees, such as exceptional character of asylum detention as well as detention in accordance with the principles of necessity and proportionality, were already contained in Dublin III Regulation.[42] However, the Dublin IV Proposal itself provides for information on the review of detention practices that occurred within Dublin III Regulation. It claims that "practice of detention, reported as often used by 21 of 31 countries, varies considerably in regards to the stage of the procedure: some authorities resort to detention from the start of the Dublin procedure, others only when the transfer request has been accepted by the responsible Member State.

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41 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJL180/96 (Directive on reception conditions)

42 For a detailed analysis of Dublin III Regulation provisions dealing with detention which were completely new as opposed to Dublin II, see: Peers, S., *Reconciling the Dublin system with European fundamental rights and the Charter*, ERA Forum, No. 15, 2014, pp. 491-493

These divergent practices create legal uncertainty as well as practical problems."[43] According to new Article 29, where an asylum seeker is detained, the period for submitting a take charge request or a take back notification shall not exceed two weeks from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply on a take charge request. Such reply shall be given within one week of receipt of the take charge request. Failure to reply within the one-week period shall be tantamount to accepting the take charge request and shall entail the obligation to take the person in charge, including the obligation to provide for proper arrangements for arrival.

However, the crucial question is whether problems arising in practice were due to long detention periods and long intermediary phases in transfer procedures, or whether the problem laid in the very reasons for ordering asylum detention and the fact that Article 31 of the 1951 Geneva Convention on the Status of Refugees,[44] which is explicitly referred upon even by the Dublin IV Proposal, is often disregarded in practice.

According to ECtHR case-law, depriving asylum seekers of their liberty can be neither unreasonably long nor arbitrary. What is more, ECtHR introduced "the less stringent measures test" when assessing violation of Article 5 (1) ECHR in cases that relate to detention of migrants.[45] In a case concerning an HIV positive asylum seeker from Cameroon, the Court recalled that Article 5 (1) generally authorizes the lawful detention of a person against whom action is being taken with a view to deportation. It, however, stressed the fact that the authorities had information regarding her identity, that they knew that she lived at a fixed address known to these same authorities and that she always presented herself when required. Since the applicant was infected with HIV and her state of health had deteriorated during the detention, the Court was of the opinion that the authorities should have considered less severe measures capable of safeguarding the public interest while at the same time protecting applicant's right to liberty. The Court set a standard that there must exist a relation between the detention of the applicant and the aim pursued, in violation of Article 5 (1) ECHR.[46] The similar line of reasoning was followed by ECtHR in *Popov v France* case which concerned a family from Kazakhstan which was placed in detention after their application for inter-

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43 Dublin IV Proposal, p. 11

44 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, *United Nations, Treaty Series*, vol. 189, p. 137

45 *Yoh-Ekale Mwanje v Belgium* (2012) 56 EHRR 1140, par. 124

46 *Popov v France*, App Nos 39472/07 and 39474/07 (ECHR, 19 January 2012), par. 119

national protection was rejected. The Court found violation of Article 5 ECHR in relation to children, but could not establish the same conclusion as regards their parents. The Court considered that less severe measures were at the disposal of the competent authorities as regards children, since detention should always be considered as a measure of last resort. Finally, in *S.D. v Greece*, ECtHR stressed that, when it comes to detention, a clear distinction should be made between asylum seekers and other categories of migrants,[47] whereas in *Saadi v the United Kingdom* and *Amuur v France*, it insisted upon wide range of measures that would reflect asylum seekers' status, exceeding those that would apply to irregular migrants.[48]

It again appears that Dublin IV Proposal provisions dealing with detention of asylum seekers failed to take into account relevant standards established through the jurisprudence of the European Court of Human Rights. The exclusive focus on shortening relevant time limits does not assure the respect of the right to liberty of asylum seekers. It neither eliminates various interferences with this right that application of detention provisions may entail. As seen from the case-law analyzed above, detention of asylum seekers may lead to violation of Article 5 ECHR even in cases when applicable time frames are fully complied with. In other words, the less severe measures test combined with the individual circumstances test may prevail and, if not respected, lead to violation of the right to liberty. Dublin IV Proposal failed to take into account these considerations when allegedly reinforcing the right to liberty, just as it again simply ignored the necessity to consider specific situation of vulnerable asylum seekers by introducing clear and unequivocal safeguards in case of their detention.

2.3. The right to asylum seekers' family reunification as an element of the right to private and family life – the only genuine reinforcement of human rights that reflects the relevant case-law of ECtHR

There are two ways in which protection of family life will be reinforced by Dublin IV Proposal, one of which may be considered a consequence of a direct influence of the case law of ECtHR. Firstly, the definition of family members is extended to include the sibling or siblings of an applicant. Secondly, family relations which were formed after leaving the country of origin but before arriving to the territory of the MS will also be considered as protected by the principle of family unity.[49] These two novelties have different justifications. Siblings are considered as family members by the ECtHR in its jurisprudence and by widening the definition

47 *S.D. v Greece*, App no 53541/07 (ECHR 11 September 2009), par. 65

48 *Saadi v UK* (2008) 47 EHRR 17, par. 75, *Amuur v France* (1996) 22 EHRR 533, par. 43

49 Article 2(1)(g) Dublin IV Proposal

of family relations to encompass siblings, authors of Dublin IV Proposal showed readiness to include this important right to family life standard.[50] On the other hand, the extension to families formed during transit may be considered to reflect realities brought about by recent migratory crisis since asylum seekers tend to spend longer time in the transit countries, i.e. countries situated between the country of origin and the MS of first entry.

Both changes will undoubtedly enhance protection of family life which may be violated in asylum cases in two ways. First of all, principle of family unity may, under certain circumstances, become a criterion for determining MS responsible for examination of an asylum application.[51] Dublin IV Proposal rules are rather clear in this regard and there seems to be no space for further enhancing right to family life through ECtHR standards since the Court itself applies a restrictive approach by considering that States should control entry and stay of foreign nationals on their territories and that Article 8 does not imply that States have to respect the choice of family members to gather on the territories under their respective jurisdictions.[52] The Dublin IV Proposal, what is more, appears to introduce higher standards in this regard by making the family unity principle the only relevant criterion for applying the so called sovereignty or discretionary clause provided in Article 19(1).[53] Secondly, Article 8 ECHR may become of relevance in cases of Dublin transfers and deportation. However, in this regard standards established in the case-law of ECtHR seem to be met since Dublin IV Proposal explicitly provides that family members to whom the allocation procedure applies will be allocated to the same Member State and that the corrective allocation mechanism should not lead to the separation of family members.[54]

3. CONCLUDING REMARKS

Even more than during the financial and sovereign debt crisis, the migrant crisis brought the principle of solidarity into the limelight of policy-making and legislative action. Mandatory quotas for accepting asylum seekers, which constituted a provisional measure of the Council, have been fiercely disputed by certain Central

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50 See: *A.S. v Switzerland* App No 39350/13 (ECHR, 30 June 2015), paras. 44-52

51 Articles 11, 12 and 13 of Dublin IV Proposal

52 See: *Gül v Switzerland* (1996) 22 EHRR 93, par. 38

53 New Article 19 states that "(B)y way of derogation from Article 3(1) and only as long as no Member State has been determined as responsible, each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person based on family grounds in relation to wider family not covered by Article 2(g), even if such examination is not its responsibility under the criteria laid down in this Regulation"

54 Article 41(2) Dublin IV Proposal

European countries. Dublin IV is designed to transform such provisional measure into a permanent corrective mechanism. The principle of solidarity is cited as grounds for enactment of both mechanisms.

From a conceptual and logical perspective, however, one may argue that dealing with the migrant crisis was not a matter of solidarity, for solidarity assumes existence of two distinct subjects, whereby one acts in line with solidarity with the other. The migrant crisis, however, targeted the EU as a whole, and, consequently, required the response of the entire EU. The fact that most migrants attempted to reach Germany or the United Kingdom was of secondary significance, since the high level of economic integration and freedoms of movement within the EU meant that an immigrant, once admitted, would have been effectively free to choose where to reside.

Furthermore, although the sudden and large influx of asylum seekers concerned the EU as a whole, it had a direct negative effect on only certain parts of certain countries. In view of the burden it presented upon affected local communities, such influx was comparable to terrorist threats and natural and man-made disasters in respect of which solidarity was mandated under Art. 222 TFEU.

Considering the stated perspective, the corrective allocation mechanism proposed within Dublin IV seems to be a natural and minimal means for preserving the integrity of EU legal system, values and political interests, as well as for upholding solidarity with the regions most affected with the influx of asylum seekers. Such an assessment is further affirmed if the issue is conceived from a broader perspective of the present phase of EU unification: an union which on the verge of becoming a full-fledged, and sovereign, super-state, should be able to distribute the burden of coping with extraordinary challenges equitably among its constituents.[55]

Protection of human rights, although not envisaged as one of the aims of replacing Dublin III Regulation with its Dublin IV successor, will face enhancement in certain aspects whereas in others it may be expected to either regress or at best stay at the same unsatisfactory level. ECtHR's constantly growing case-law relating to Dublin system will further continue to evolve, and even though ECtHR has no competence to review applications against acts of the EU, it still may assess compatibility with ECHR of MS measures that apply or implement EU law. The presumption that fundamental rights protection in the EU system can normally

[55] A brief overview of the degree of progress towards a sovereign super-state may be found in: Lukić, M., *How Long Before Bundle of Treaties Becomes Sovereign? A Legal Perspective on the Choices before the EU*, *South Eastern Europe and the European Union - Legal Aspects*, SEE/EU Cluster of Excellence in European and International Law (ed.) Verlag Alma Mater, Vol. 1, 2015, 127-137

be considered to be equivalent to that of the Convention system, established in the *Bosphorus* case,[56] has often been rebutted on a case-by-case basis where it is shown that the protection of ECHR rights was manifestly deficient.[57] By not including ECtHR standards relating to prohibition of torture and right to liberty in asylum cases, particularly those concerning vulnerable categories of asylum seekers, drafters of the Dublin IV Proposal obviously chose to disregard basic human rights on account of making the Dublin system more functional and tailored according to Member States' preferences, at the same time leaving the door wide open for further Dublin case-loading before ECtHR.

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[56] *Bosphorus Airways v. Ireland* (2006) 42 EHRR 1, par. 165

[57] Brouwer names this approach principle of 'rebuttable trust' and welcomes it as an important and necessary deviation from a systematic application of the Dublin system. Brouwer, E., *Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof*, Utrecht Law Review, No. 9, 2013, p. 145

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EU COMPETITION LAW IN THE DIGITAL ERA: WHAT TO TELL ABOUT *INTEL*?*

ABSTRACT

Intel, a US-based company, was fined by the European Commission in 2009 for abusing its dominant position at the computer processor market intended to exclude its competitor AMD from that market. The penalty amounting to €1.06bn was the largest antitrust fine in the Commission's history at the time. As the EU General Court had rejected Intel's appeal in 2014, the matter was brought before to EU Court of Justice. The CJEU judgment, rendered in September 2017, is controversial for at least two reasons. First is the territorial reach of the EU competition law outside the EU borders, and second relates to the treatment of exclusivity rebates. With regards to the former, for the first time the CJEU confirmed the position of the Commission and the General Court regarding the extended territorial reach of the EU antitrust legislation. Quite the opposite, the CJEU quashed the General Court ruling as to the former, arguably rejecting the traditional per se infringement of exclusivity rebates and embracing the effects-based analysis. The doctrine is somewhat divided as to whether this judgment is a much needed clarification of the two issues or it indicates a new direction in EU competition law analysis. This paper is addressing the most important ideas in the doctrinal interpretations and related arguments, and provides critical assessment of the present state of affairs. It also raises certain points relevant to the Intel judgment, which so far have not been given sufficient attention in the case comments and scholarship.

Keywords: *Intel , CJEU , EU competition law*

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1. INTRODUCTION

There is hardly another judgement of the Court of Justice of the EU (CJEU)[1] that sparked so much attention over the last couple of years as the one in *Intel*.[2] This was a long awaited judgement for at least two reasons. For one thing, in its overturning quality this judgment is paving a way for the new direction of antitrust enforcement in respect of exclusive dealings and fidelity rebates.[3] And for another, it is no less than a clear endorsement of the effects doctrine in determining the reach of the EU competition law beyond the EEA borders.

The newly accepted legal test for determining the outer reach of the EU competition law, which comes on top of the formerly established doctrine of "single economic unit" steaming from the *Dyestuffs*[4] line of case law and "implementation" doctrine that emerged out of *Wood Pulp*,[5] is one of the crucial issues in the judgment. At the centre of the judgment is also the principle that exclusive dealing and fidelity rebates under Article 102 of the Treaty on the functioning of the European Union[6] (TFEU) must be treated as effect-based infringements. This approach departs from the traditional presumption of unlawfulness of such practices established by the CJEU in a sequence of cases starting with *Suiker Unie*[7] in 1975 and *Hoffmann la Roche*[8] in 1979. Legal scholarship is somewhat divided as to whether this judgment is a much needed clarification of the analytical framework of fidelity rebates or it indicates a new direction in EU competition law analysis.

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1 In this paper, the name Court of Justice of the EU and the acronym CJEU are, for the purpose of simplicity, used regardless of whether the reference is made to the CJEU or the court under its pervious name, the European Court of Justice. The same is true when it comes to the General Court of the EU and its acronym GCEU, in relation to the previous name of the Court of First Instance

2 CJEU, judgment of 6 September 2017, *Intel Corp. v European Commission*, C-413/14 P, EU:C:2017:632

3 The term overturning is used to denote the *de facto* shift in approach taken by the CJEU, as CJEU does not abide by the doctrine of precedents and thus does not formally overturn its previous judgments. On that point see Petit, Nicolas, The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases (December 12, 2017), *European Law Review*, October 2018 (forthcoming), available at SSRN: [https://ssrn.com/abstract=3086402] or [http://dx.doi.org/10.2139/ssrn.308640219] Accessed 23.03.2018, p. 19

4 CJEU, judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69, EU:C:1972:70

5 CJEU, judgment of 27 September 1988, *Ahlström Osakeyhtiö and others v Commission of the European Communities* and other, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1988:447

6 OJ C 326, 26.10.2012, pp. 47–390 (consolidated version)

7 CJEU, judgment of 16 December 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, C-40/73 etc., EU:C:1975:174

8 CJEU, judgment of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, C-85/76 EU:C:1979:36

In order to understand the context of this judgement and its likely impact on future conduct, it is first necessary to briefly mention the facts of the case. This is followed by the chapter intended to provide insight into the essential criteria when it comes to defining the reach of EU primary competition law; while the next chapter is offering discussion on pros and cons of the new approach to exclusive dealing and fidelity rebates. Both chapters are structured in a way to contrast the previous developments to the CGEU and CJEU judgments in *Intel*.

2. CASE BACKGROUND

In 2009, the EU Commission found that Intel Corp., a US based chipset manufacturer, had abused its dominant position on the market for processors, in particular x86 CPUs, by implementing a strategy aimed at excluding its main competitor AMD from the market. Essentially, the Commission found that between 2002 and 2007 Intel engaged in two types of unlawful conduct – fidelity rebates and "naked restrictions".[9] The former consisted of granting rebates to four original equipment manufacturers (Dell, Lenovo, HP and NEC) under the condition that they purchase all or almost all of their x86 CPUs from Intel. An important segment to the Commission's findings concerned the exclusivity rebates paid to two computer manufacturers (Acer and Lenovo) established in Asia, regarding a notebook computer for the domestic Taiwanese and Chinese markets, respectively. In addition, Intel granted payments to one trading partner, MSH, under the condition that it sells exclusively computers containing Intel's x86 CPUs, which, according to the Commission, had the same economic mechanism as the described fidelity rebates. The second type of conduct, the "naked restrictions", consisted of payments that Intel made to several manufacturers so they would delay, restrict or cancel the marketing and distribution of Intel's competitor AMD's competing products.

The Commission found that because of Intel's conduct, competitors had a significantly diminished ability to compete, which harmed competition and resulted in reduction of consumer's choice. In addition, it found that each of these infringements was also a part of a single strategy aimed at excluding the only significant competitor from the market and thus found the existence of a single infringement of Article 102 of the TFEU. As a result, the Commission imposed on Intel a penalty amounting to €1.06bn, the largest antitrust fine in the Commission's history at the time.

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[9] Commission Decision C(2009) 3726 final of 13 May 2009 in case COMP/C-3/37.990 — *Intel*

Following the unsuccessful action for annulment of the Commission decision before the General Court of the EU (GCEU),[10] Intel brought an appeal against the GCEU judgement before the CJEU. It argued that the GCEU erred in law by failing to examine the rebates in light of all the relevant circumstances and assess the likelihood of a restriction to competition and by holding that the Commission had jurisdiction to apply Article 102 of the TFEU as regards the agreements concluded between Intel and Lenovo.[11] While the CJEU quashed the GCEU judgement rejecting the applied traditional *prima facie* infringement of exclusivity rebates and embraced the effects-based analysis, it confirmed the reach of the EU competition law over the Intel's dealings with the Chinese company.

3. TERRITORIAL SCOPE OF EU COMPETITION LAW

3.1. Pre-*Intel* case law

Being one of the areas of law essential for preserving the sound economic organisation of the state, competition law has always been an expression of sovereign power. For the EU it is even more than that, it is foundation on which the ever closer union among Member States is built. Therefore, it is not surprising that confronted with the globalisation challenges, EU responds by defying territoriality and extending the scope of the competition law to persons and actions beyond its geographical borders. EU is certainly not alone in this as other big players on the global market show the same propensity.[12] As discussed below, these players, US in particular, will strongly affect the EU position on the issue.

As a preliminary point it has to be noted, that the basic EU competition provisions, Articles 101 and 102 of the TFEU, have been interpreted not to restrict the territorial scope of competition law.[13] In its 1964 decision in *Grosfillex-Fillis-*

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10 GCEU, judgment of 12 June 2014, *Intel Corp. v European Commission*, T-286/09, EU:T:2014:547

11 CJEU, *Intel*, EU:C:2017:632, para. 31

12 The most prominent example is US. The central place belongs to the 1945 case *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945), setting the precedent in favour extraterritorial application of competition law – the Sherman Act, on the bases of the "effects" doctrine. This inclination has continued to date with some adjustments and variances in the intensity owing to the political pressures from UK and some other US trading partners. During late 1970s and early 1980s, the notion of comity was temporary brought back into the equation, to lose its importance since the 1990s against the policy protecting US based companies against anti-competitive conduct abroad. Akbar, Y., *The Extraterritorial Dimension of US and EU Competition Law: A Threat to the Multilateral System?,* Australian Journal of International Affairs, 1999/53 (1), pp. 113-125, especially 115-119; Alford, R. P., *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, Virginia Journal of International Law, 1992/33 (1), pp. 1-50, especially 6-27

13 CJEU judgment of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*, joined cases 6 and 7-73., EU:C:1974:18, para

torf, the Commission first asserted jurisdiction over a Swiss undertaking which together with French undertaking concluded an agreement to be performed in Switzerland, to determine that no action shall be taken as competition in the then common market was not restricted or distorted.[14] The position that the relevant criterion for application of the EU competition law is the affected common market, regardless of the jurisdiction in which the undertaking involved in concerted practise is established, was repeated in the subsequent Commission decision in what is often referred to as *Dyestuffs* case or *Aniline Dyes Cartel* case.[15] The Commission, and later on the CJEU deciding on the appeal,[16] asserted jurisdiction over a parent company, whose registered office was in UK which at the time was not a Member State.

However, unlike the Commission, the CJEU in *Dyestuffs* did not overtly rely on the effects on the common market. Instead, the CJEU established the doctrine of a "single economic unit". It held that a parent company may be responsible for the conduct of its subsidiaries, in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances, such as where the parent company holds all or majority of shares in subsidiary, be attributed to the parent company.[17] Consequently, parent company's conduct amounting to "decisive influence" justifies exercise of EU legal jurisdiction. The doctrine of "single economic unit" served the CJEU for the purpose of avoiding explicit recognition of the effects doctrine, although essentially the broadening of the scope of application of EU competition law was all about the effects on the then common market. While the decision is based on "the unity of their conduct on the common market",[18] in the opening of the argument on Commission's jurisdiction the CJEU states that it should be verified "whether the conduct of the applicant has had effects within the common market".[19]

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31. Confirmed recently in GCEU, *Intel*, EU:T:2014:547, para. 248

14 64/233/CEE: Décision de la Commission, du 11 mars 1964, relative à une demande d'attestation négative présentée conformément à l'article 2 du règlement nº 17 du Conseil (IV/A-00061 - Grosfillex-Fillistorf), OJ 58, 9.4.1964, pp. 915-916

15 69/243/CEE: Décision de la Commission, du 24 juillet 1969, relative à une procédure au titre de l'article 85 du traité C.E.E. (IV/26.267 - Matières colorantes), OJ L 195, 7.8.1969, pp.11-17

16 CJEU, judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, case 48-69, EU:C:1972:70. See also CJEU, judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, case 6-72, EU:C:1973:22

17 CJEU, *Imperial Chemical Industries – Dyestuffs*, EU:C:1972:70, paras. 132-136

18 CJEU, *Imperial Chemical Industries – Dyestuffs*, EU:C:1972:70, paras. 140

19 CJEU, *Imperial Chemical Industries – Dyestuffs*, EU:C:1972:70, paras. 126

The weakness of the "single economic entity" doctrine soon became evident when the participants in the concerted practices were all established outside the common market: Without a subsidiary in the EU territory, a foreign-based company cannot be captured under Article 101 of the TFEU. In *Wood Pulp*[20] the single link to the EU territory was sale of the products into the EU market. Again, the CJEU was not prepared to embark on the "effects doctrine" but looked for an alternative way to justify the EU jurisdiction. The reason was probably the political position in EU, especially in UK, against the "effects doctrine" in the US,[21] to which legal scholars provided scientific support by labelling it contrary to the principle of the sovereignty of States.[22] The CJEU reasoned that an infringement of Article 101 of the TFEU, such as the conduct of a horizontal agreement with the aim of exchanging price information which has the effect of restricting competition within the EU market, consists of conduct made up of two elements: the "formation" of the agreement, decision or concerted practice and the "implementation" thereof. The CJEU went on to say that if the applicability of prohibitions laid down under competition law are to depend on the place where the agreement, decision or concerted practice is formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. Whether the producers use subsidiaries, agents, sub-agents, or branches inside the EU as under the doctrine of the "single economic unity", or act directly on the EU market makes no difference for the application of the EU law. It is the place where the prohibited concerted practice is implemented that is relevant for application of EU competition rules. Such party's conduct is covered by the territoriality principle as universally recognized in public international law.[23]

The reception of the "implementation" doctrine was evident in both the European Commission and the GCEU practice. A year later, Commission relied on the judgment in *Wood Pulp* when issuing decisions against foreign companies.[24]

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20 CJEU, *Ahlström*, EU:C:1988:447

21 Gradine, D., Reyesen, M., Henry, D., *Extraterritoriality, Comity and Cooperation in EU Competition Law*, in: Guzmán, A. T. (ed.), Cooperation, Comity, and Competition Policy, Oxford University Press, 2011, pp. 21-44, 26; Braakman, A. J., *Brexit and its Consequences For Containerised Liner Shipping Services*, The Journal of International Maritime Law, 2017/23 (4), pp. 254-265, 257; Cannon, R., *Laker Airways and the Courts: A New Method of Blocking the Extraterritorial Application of U. S. Antitrust Laws*, Journal of Comparative Business and Capital Market Law, 1985/7, pp. 63-87

22 See e.g. Robertson, A., Demetriou, M., *"But that was another country...": The Extra-Territorial Application of the US Antitrust Laws in the US Supreme Court*, International and Comparative Law Quarterly, 1994/43, pp. 417-425

23 CJEU, *Ahlström Osakeyhtiö*, EU:C:1988:447, paras. 16-18

24 89/190/EEC: Commission Decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC), OJ L 74, 17.3.1989, p. 1-20: the Commission stated: "The fact that Norsk Hydro had its main business centres and production facilities outside the Com-

A decade later, the GCEU applied it in *Gencor*.[25] This was a case involving Gencor, a company incorporated under South African law, and Lonrho, a company incorporated under English law, both operating in mining and metals sectors. They proposed concentration between the South-African interests in subsidiary companies: to acquire joint control of Implats, where Gencor held 46.5%, and then to grant Implats sole control of Eastplats and Westplats, where Lonrho held 73% and Gencor 27%. Whereas the South African competition authority did not oppose the concentration under its competition law, the Commission was of the opposite opinion. According to the Commission, if that transition was carried out Implats would have acquired sole control of Eastplats and Westplats, eliminating competition between those two undertakings, not only in platinum group metals sector in South Africa but also in the EU where Implats, Eastplats and Westplats achieved significant sales. Actually, it would have led to a collective dominant position in the world platinum and rhodium market on the part of the entity arising from the concentration and Amplats, the leading supplier worldwide. Gencor went for the annulment of the Commission decision contending in particular that the Merger Regulation[26] sanctioned only mergers carried out within the EU. The CGEU pointed out that the Regulation applies to all concentrations with a "Community dimension" and that it does not require that either the undertakings in question must be established in the EU or that the production activities covered by the concentration must be carried out within EU territory.[27]

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munity does not affect its liability in respect of any agreement implemented within the Community. The Community is a primary market for Norsk Hydro and accounts for some 60 % of its turnover in PVC. […] In so far as the agreements were implemented inside the Community, the applicability of Article 85 (1) of the EEC Treaty to a Norwegian producer is not precluded by the free trade agreement between the European Economic Community and Norway"; 89/191/EEC: Commission Decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE), OJ L 74, 17.3.1989, p. 21-44: The Commission stated: "Dow is a United-States-owned company but is one of the largest LdPE undertakings operating in the Community and its European LdPE production facilities are located in the Netherlands and in Spain. The fact that Chemie Holding, Neste Oy and Statoil have their LdPE production as well as their main business centres outside the Community does not affect their liability in respect of any agreement implemented within the Community. […] In so far as the agreements were implemented inside the Community, the applicability of Article 85 (1) of the EEC Treaty to the Austrian, Finnish and Norwegian producers is not precluded by the free trade agreements between the European Economic Community on the one hand and Austria, Finland and Norway on the other"

25 CGEU, judgment of the of 25 March 1999, *Gencor Ltd v Commission of the European Communities*, T-102/96, EU:T:1999:65

26 The Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1-12, was invoked in the case. This Regulation is no longer in force as it was repealed and replaced by the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22

27 CGEU, *Gencor*, EU:T:1999:65, para. 79

The CGEU declared itself about the "implementation" doctrine, which Gencor invoked to support its interpretation of the restricted territorial scope of the Regulation. However, the GCEU held that criterion for assessing the link between an agreement and EU territory in fact precludes such narrow interpretation. According to the judgment in *Wood Pulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the EU, irrespective of the location of the sources of supply and the production plant. The CFI further held that Gencor was captured by the EU competition law on the non-disputed fact that Gencor and Lonrho carried out sales in the EU before the concentration and would have had continued to do so thereafter.[28] Thus, EU competition authorities have jurisdiction in a situation where a foreign undertaking sells its products directly to purchasers in EU. But the GCEU went further by stating that in addition to certain volume of sales in EU, the Merger Regulation in *Gencor* is justified as a matter of public international law because "the three criteria of immediate, substantial and foreseeable effect [in the EC] are satisfied in this case".[29]

Regardless of this and other references to the "effects" doctrine, such as by the European Commission[30] and Advocate Generals,[31] at the time of the *Gencor* judgment the "implementation" doctrine was still sufficient. Thus, the rule at the time was that the location where an agreement, decision or a concerted practice is formed does not play a role, while the decisive element was the implementation within the EU.[32] It has been noted in the scholarship that reasonableness of the reasoning depends on whether both, the "formation" of the restraint of competition and the "implementation" of the restraint of competition, make part of the

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28 CGEU, *Gencor*, EU:T:1999:65, para. 87

29 CGEU, *Gencor*, EU:T:1999:65, para. 92 along with 90-111

30 64/233/CEE: Décision de la Commission, du 11 mars 1964, relative à une demande d'attestation négative présentée conformément à l'article 2 du règlement nº 17 du Conseil (IV/A-00061 - Grosfillex-Fillistorf), OJ 58, 9.4.1964, pp. 915–916; 2006/897/EC: Commission Decision of 19 January 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Akzo Nobel NV and others, OJ L 353, 13.12.2006, p. 12-15. See further references in Wagner-von Papp, F., *Competition Law in EU Free Trade Cooperation Agreements (and What the UK Can Expect After Brexit)*, in: Bungenberg, M., et al. (eds.), European Yearbook of International Economic Law, Springer, 2017, pp. 301-360, 311, n. 35. See also Working Party No. 3 on Co-operation and Enforcement, *Roundtable on cartel jurisdiction issues, including the effects doctrine*, 21.10.2008, p. 4. available at [http://ec.europa.eu/competition/international/multilateral/oecd_submissions.html] Accessed 23.03.2018

31 Opinion of Advocate General Mayras of 2 May 1972, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, joined cases 48-69 - 57-69, EU:C:1972:32, section II.A et seq.; Opinion of Advocate General Damon of 7 June 1992, joined cases C-89/85, *Ahlström Osakeyhtiö et al. V. Commission*, EU:C:1988:258, para. 4 et seq.

32 Frenz, W., *Handbook of EU Competition Law*, Springer, 2016, p. 135; Katzorowska, A., *European Union Law*, Routledge, 2013, p. 780

conduct prohibited by EU competition rules. As such it amounts to objective territoriality principle which covers conduct originating abroad but completed within the territory of the State (or EU, as in this case) applying its law.[33]

However, just like the doctrine of a "single economic unit", the "implementation" doctrine soon revealed its practical limitations. Under these doctrines combined, EU competition law operates with a requirement that there be an adequate link to the EU territory, be it in the form of the presence of a subsidiary, or the implementation of anticompetitive conduct within that territory. However, when comparing the EU "implementation" doctrine and the US "effects" doctrine, the noted divergence arises out of the fact that under the former the EU law would not apply to a situation where an agreement entered into outside the EU prohibits sales within the EU or purchases from EU producers, whereas under the latter the US competition law would be applicable provided that such an agreement is directed at the US market.[34] This proved to be true in *Intel* where the CJEU eventually ceased avoiding the "effects" doctrine.

3.2. The CGEU judgment

Deciding on the challenge against the European Commission decision in *Intel*,[35] the CGEU had to decide, not only on the substantive issues dealt with in chapter 4 of this paper, but also on the EU jurisdiction. Intel's plea was limited solely to the conduct vis-à-vis Acer and Lenovo. Intel argued that manufacturing facilities of the two companies were outside the EU, and that they did not purchase the processors in the EEA from Intel or AMD, but that the conduct at issue concerned sales of processors to customers in Asia, namely in Taiwan as regards Acer and in China as regards Lenovo, and that conduct was implemented in Asia. Intel claimed that the fact that a certain number of Acer and Lenovo computers might subsequently have been sold within EU is irrelevant to the question of the implementation of the allegedly illegal conduct. The effects of Intel's conduct would be felt in Asia, not EU, while only the sales of computers in EU was carried out by third parties, Acer and Lenovo, which were not controlled by Intel. Intel also

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33 Behrens, P., *The extraterritorial reach of EU competition law revisited – The "effects doctrine" before the ECJ*, Discussion paper 3/2016, Europa-Kolleg Hamburg Institute for European Integration, 2016, [https://www.econstor.eu/bitstream/10419/148068/1/87238506X.pdf] Accessed 23.03.2018, p. 11

34 Griffin, J., *Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction*, George Mason Law Review, 1998/6 (3), pp. 505-524. See also Whish, R., Bailey, D., *Competition Law*, 7th ed., Oxford University Press, 2012, p. 467.; Opinion of the Advocate General Wahl of 20 October 2016, *Intel Corp. v European Commission*, C-413/14 P, EU:C:2016:788, para. 294

35 GCEU, *Intel*, EU:T:2014:547

claimed that the volume of computers concerned was very small do that if there were any effects at all in EU, it would not have been substantial.[36]

The GCEU stated that the CJEU and GCEU case law follow two approaches in order to establish that the Commission's jurisdiction is justified under the rules of public international law: the "implementation" doctrine and the "qualified effects" doctrine, which apply as the alternative grounds.[37] In applying the "implementation" doctrine to the case at hand, the GCEU stated it is not necessary to examine whether there were any effects in order to establish jurisdiction, but only existence of a dominant position within the common market or in a substantial part of it and that trade between Member States was capable of being affected.[38]

To satisfy the requirements of substantial, direct and foreseeable effects in the EU, it is not necessary to prove that the actual effects have taken place, it suffices that a threat to the effective competition structure in the common market is demonstrated, which did not materialize or has not yet materialized. Otherwise, the Commission's task to ensure that competition within the internal market is functioning would not be fully attainable.[39] This GCEU's holding was followed by testing each of the prohibited conduct against the three qualifiers (foreseeability, directness and substantiality[40]), with the positive result justifying the Commission jurisdiction in this case.[41] This a highly fact-sensitive analysis which is discussed in the next section.[42]

3.3. The CJEU judgment

The GCEU judgment was appealed before the last instance – the CJEU. While the CJEU found that the GCEU should have addressed Intel's arguments about

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36 GCEU, *Intel*, EU:T:2014:547, paras. 225-228

37 GCEU, *Intel*, EU:T:2014:547, para. 244

38 GCEU, *Intel*, EU:T:2014:547, para. 247, and corresponding arguments in paras. 301-320. See also Cardoso Pereira, J., *Intel and the Abuse of Dominant Position: the General Court Upholds the Highest Fine Imposed on a Single Company for a Competition Law Infringement*, European Law Reporter, 2017/7-8, pp. 204-209, especially, 207

39 GCEU, *Intel*, EU:T:2014:547, paras. 250-252

40 The effects test, including the three qualifiers, has been made part of the recent legislation pertinent to financial market sector. See, e.g. Article 28(2) of the Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84–148, and Article 4(1)(a)(v) and 11(12) of the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1–59. See more, Joanne. Scott, The new EU "extraterritoriality", *Common Market Law Review*, 2014/ 51(5), pp. 1343-1380, especially 1356-1359

41 GCEU, *Intel*, EU:T:2014:547, paras. 259-282

42 See section 3.3

the economic impact of its conduct as discussed below,[43] Intel's arguments on the Commission's territorial jurisdiction and scope of EU law were rejected. Intel argued in its appeal that Commission has no jurisdiction to apply EU competition law in respect of agreements entered into with Lenovo.

The part of the CJEU judgment regarding the jurisdiction confirms the GCEU position that the "qualified effects test" is a self-sufficient base for establishing territorial jurisdiction,[44] and not a simple corollary to the "implementation test" as was suggested due to ambiguity in the *Gencor* judgment. It explains that both doctrines pursue the objective of preventing conduct, which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market. As such, these tests derive from Articles 101 and 102 of the TFEU.[45] Intel argued that the GCEU erred in establishing that the 2006 and 2007 agreements with Lenovo concerning processors for delivery in China would have qualified effects in the EU.

In response, the CJEU for the first time affirmed the position of the Commission and the GCEU that, under the "qualified effects test", the application of EU competition law is consistent with public international law provided it is foreseeable that the conduct in question has an immediate and substantial effect on the EU internal market. To satisfy the requirement of foreseeability of effects, the CJEU explained that it is sufficient to consider the probable effects of the conduct on competition. The CJEU further agreed with the GC that Intel's conduct *vis-à-vis* Lenovo formed part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels. It was determined that Intel's intent from the agreement with Lenovo was to impede any Lenovo notebook equipped with an AMD processor from being marketed anywhere, including on the internal market. As such, Intel's conduct was capable of producing an immediate effect on the EU.[46] In carrying on this analysis, in particular the substantial nature of effects on the market, the CJEU emphasised the need to consider the company' conduct in question as a whole. Otherwise, one risks that the conduct is artificially fragmented into a number of separate forms of conduct and, consequently, prone to escape EU law and affect construction of the internal market.[47]

This was the first time that the CJEU expressly relied on the "qualified effects" doctrine justifying the application of EU competition law to foreign companies

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43 See section 4.4

44 CJEU, *Intel*, EU:C:2017:632, para. 240

45 CJEU, *Intel*, EU:C:2017:632, paras. 42 and 45

46 CJEU, *Intel*, EU:C:2017:632, paras. 48-52

47 CJEU, *Intel*, EU:C:2017:632, paras. 54-57

concluding agreements abroad to be implemented abroad, but with effects on the EU market. Recognition of the "qualified effects" doctrine was probably due to the existing global state of affairs when it comes to acknowledging the need to control huge players on the global market, which in the absence of global supervision has to take place on a national or regional level. US approach, once politically intolerable to EU, became acceptable to it. This caused the positions in international public law to take the "new orientation" more permissive of what some term as "extraterritoriality" in competition law.[48] In practical terms this does not mark a completely new era in application of EU competition law because large amount of cases are already falling within the formerly established doctrine of "single economic unit" and in particular the "implementation" doctrine. Merely cases concerned with negative conducts, such as prohibiting sales within the EU or purchases from EU producers will necessitate the operation of the "qualified effects" doctrine. Having said that, acceptance of "qualified effects" doctrine is still an important development in EU competition law in a view of increasing global conduct with potential effects in the internal market. This is particularly true if one takes into account the current Commission cases concerning Qualcomm[49] and Google[50].

4. EXCLUSIVE DEALING AND FIDELITY REBATES

4.1. Pre-*Intel* case law

Article 102 of the TFEU prohibits the abuse of dominant position within the internal market or a substantial part of it, inasmuch as it affects trade between Member States. In order to find the abuse of dominant position, the conduct in question must produce anticompetitive effects on the relevant market. This criterion is not detailed in Article 102 of the TFEU, rather it originates from the CJEU case law where the main issue was the standard of anticompetitive effects amounting to abuse of dominance and the related standard of proof. The CJEU held that detriment to competition does not have to be actual;[51] however, it neither suffices

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48 Basedow, J., *Competition policy in a globalized economy: from extraterritorial application to harmonization*, in: Neumann, M., Weigand, J. (eds.), *The International Handbook of Competition*, Edward Elgar, 2004, pp. 321-338, 323

49 See details of the case before the Commission at [http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40220] Accessed 23.03.2018

50 See details of the two cases before the Commission at [http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411] (AdSense) and [http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099] (Alphabet) Accessed 23.03.2018

51 CJEU, judgment of 15 March 2007, *British Airways plc v Commission of the European Communities*, C-95/04 P EU:C:2007:166, para. 145: The CJEU stated that "there is nothing to prevent discrimina-

for it to be only hypothetical.[52] Within this span, the CJEU developed a nuanced approach to this issue, depending on the type of conduct in question, differentiating between, what have been termed as "rule-based" and "effects-based" abuses.[53] The divide is very important in practice as it entails a different approach to the evidentiary burden and standard of proof, the standard of anticompetitive effects and its significance.[54]

In 1979, in the seminal case *Hoffman la Roche*,[55] the CJEU held that fidelity rebates granted by dominant undertakings are subject to rule-based presumption of illegality because they are "designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market".[56] According to the CJEU, this assumption extended to all practices of dominant undertakings that tie purchasers "by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking".[57]

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tion between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually."

52 CJEU, judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerâdet. (Post Danmark II)*, C-23/14 EU:C:2015:651 paras. 65-67.: "[T]he anticompetitive effect of a particular practice must not be of purely hypothetical. In that regard, […], the anticompetitive effect of a particular practice must not be of purely hypothetical. The Court has also held that, in order to establish whether such a practice is abusive, that practice must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking (judgment in *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, para. 64). It follows that only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article 82 EC."

53 Commentators of Article 102 do not use consistent terminology to differentiate between the two categories of abuses. Most terminological differences relate to the first category of abuses. Some refer to them *per se* abuses, *quasi per se* abuses, *prima facie* abuses, abuses by object, or rule-based abuses. This differentiation in terminology is not accidental; each of the terms indicates a different understanding of what actually is the underlying requisite legal standard developed in EU Courts case law. While all agree that this type of abuse rests on the presumption of illegality, some disagree that such presumption is in effect rebuttable, thus they often refer to this type of abuses as *per se* abuses. See more in this article in the text accompanying note 65

54 See Kadar, M., *The meaning of "Anticompetitive Effects" Under Article 102 TFEU*, CPI Antitrust Chronicle, March 2016(1), available at: [https://www.competitionpolicyinternational.com/wp-content/uploads/2016/03/The-Meaning-of-Anticompetitive-Effects.pdf] Accessed 23.03.2018

55 CJEU, *Hoffmann-La Roche*, EU:C:1979:36

56 CJEU, *Hoffmann-La Roche*, EU:C:1979:36, para. 90

57 CJEU, *Hoffmann-La Roche*, EU:C:1979:36, para. 89: The CJEU also held that this included tying at purchasers' request and regardless of whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate

This rule applied irrespective of the quantity of purchases, a long-term contractual relationship between the dominant undertaking and the purchaser, or the request of the purchasers to grant rebates or a unilateral decision by the dominant undertaking to do so.[58] Under this traditional approach, the presumption of illegality may be rebutted by showing that the conduct in question is "objectively necessary or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers."[59] This essentially means that, absent an objective justification, any type of exclusive dealing and fidelity rebates would have been found illegal because they were considered to be capable of restricting competition by their very nature, and thus it was not necessary to establish actual or potential anticompetitive effects on a case-by-case basis.[60] With these kinds of abuses, it is up to the dominant undertaking to rebut the presumption of illegality by demonstrating the existence of an objective justification.

Unlike the described rule-based abuses of dominant position, there are a number of other practices on the market that may be found abusive only insofar as the Commission proves, based on an effects-based analysis, that the actual conduct is likely to produce exclusionary effects on the market. An example of this type of conduct would be various pricing practices, such as margin squeeze, as confirmed by the CJEU in *Deutsche Telecom*,[61] *TeliaSonera*[62] and more recently *Telefónica de España*.[63] Under this approach, the CJEU requires the Commission to take into account all particulars of the case, and demonstrate the likelihood of negative effects on the market. Here the burden of proof rests with the Commission to demonstrate that the conduct in question is likely to produce anticompetitive effects.

The idea that some conducts by dominant undertakings are presumably unlawful while others are considered unlawful only insofar as they are likely to have anti-

58 CJEU, *Hoffmann-La Roche*, EU:C:1979:36, para 89

59 CJEU, judgment of 27 March 2012, *Post Danmark A/S v Konkurrencerådet (Post Danmark I)*, C-209/10., EU:C:2012:172, para. 41

60 GCEU, *Intel*, EU:T:2014:547, paras. 71 and 143

61 CJEU, judgment of 14 October 2010, *Deutsche Telekom AG v European Commission*, C-280/08 P, EU:C:2010:603

62 CJEU, judgment of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83

63 CJEU, judgment of 10 July 2014, *Telefónica SA and Telefónica de España SAU v European Commission,* C-295/12 P, EU:C:2014:2062. Citing the T*eliaSonera* judgement, in para. 124, the CJEU held: "In order to establish that a practice such as margin squeeze is abusive, that practice must have an anti-competitive effect on the market, although the effect does not necessarily have to be concrete, it being sufficient to demonstrate that there is a potential anti-competitive effect which may exclude competitors who are at least as efficient as the dominant undertaking."

competitive effects is comparable to the divide between infringements by *object* or *effect* under Article 101 of the TFEU.[64] Unlike Article 102, Article 101 expressly provides that agreements between undertakings are prohibited if they have as "object or effect" the prevention, restriction or distortion of competition. It is a settled case law under Article 101 that agreements which are anticompetitive by object do not necessitate an analysis of actual of potential effects on competition. The rationale behind it is that restrictions by object are presumed to have anticompetitive effects. Although not normatively expressed, this same underlying principle is at the heart of Article 102 as demonstrated by the CJEU case law. However, there is as a view expressed that under *prima fac*ie illegality of fidelity rebates, objective justification cannot be used to rebut the presumption of illegality as it already assumes that the restriction exists.[65] Often such infringements are thus referred to as *per se* infringements, which, according to some commentators are unjustifiably equated with the treatment of cartels under Article 101.[66]

4.2. Adoption of the Guidance paper

The rule-based approach to abuses of dominant position has been criticized heavily over the years, on other grounds as well. Most of the criticism pointed out that such a formalistic approach to abuse of dominance does not correspond to economic findings indicating that there are many occasions in which such practices in fact do not restrict competition through foreclosure, and thus should not be treated as *prima facie* abuses.[67] The proponents of this view insisted on an effects-

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64 For a more detailed discussion on infringements by object versus infringements by effect see Ibáñez Colomo, P., *Editorial: The divide between restrictions by object and effect: why we discuss it and why it matters*, Competition Law Review 2016/1 (2), pp. 173-180, especially p. 174. See also Ibáñez Colomo, P., *Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy (November 26, 2014)*, LSE Legal Studies Working Paper No. 29/2014, available at SSRN: [https://ssrn.com/abstract=2530878] or [http://dx.doi.org/10.2139/ssrn.2530878] Accessed 23.03.2018

65 See Lamadrid, A., *More questions (and some answers) on, and beyond, Intel (C-413/14P)*, 6 September 2017, available at: [https://chillingcompetition.com/2017/09/06/more-questions-and-some-answers-on-and-beyond-intel-c-41314-p/] Accessed 23.03.2018

66 Ibáñez Colomo, *Intel and Article 102 TFEU… op. cit.* note 64, p. 174; Ibáñez Colomo, P., *More on Intel: some thoughts after the IBA Conference in Florence*, 12 September 2017, available at: [https://chillingcompetition.com/2017/09/12/more-on-intel-some-thoughts-after-the-iba-conference-in-florence/] Accessed 23.03.2018; Geradin, D., *Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche*, Journal of Competition Law & Economics, 2015/11 (3), pp. 579–615

67 See Ibáñez Colomo, *Intel and Article 102 TFEU…*, *op. cit.* note 64, p. 19-20 and accompanying note 78; Geradin, *ibid.* page 580 and accompanying note 5

based approach to exclusionary practices in general, including fidelity rebates.[68] In 2005, with a view of modernising enforcement under Article 102 of the TFEU, the Commission published a Staff Discussion paper on the application of EC Treaty competition rules on the abuse of a dominant market position,[69] provoking a long and heated public debate,[70] which resulted in the adoption of the Guidance paper to exclusionary abuses of dominance[71] (Guidance paper) in 2009.

While recognising that there may be instances in which a conduct is anticompetitive by its nature, as it can only raise obstacles to competition and create no efficiencies, the Guidance paper generally embraces new economic findings, departing from the CJEU traditional case law on rule-based abuses of dominant position.[72] According to the Guidance paper, the Commission should intervene under Article 102 only where the conduct is *likely* to lead to anticompetitive foreclosure[73] having negative impact on consumer welfare. In order to determine whether this is the case, the Commission is to take into account a number of qualitative and quantitative criteria of assessment such as the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of costumers or input supplies, the extent of the allegedly abusive conduct, possible evidence of foreclosure, and direct evidence of exclusionary strategy.[74] Particularly helpful in that regard should be the applica-

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68 See Report by the EAGCP, An economic approach to Article 82, July 2005 [http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf] Accessed 23.03.2018, arguing in favour of an economic based approach to Article 102 of the TFEU as opposed to form-based approach to competition policy

69 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005, [http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf] Accessed 23.03.2018

70 Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses (March 2006), [http://ec.europa.eu/competition/antitrust/art82/contributions.html] Accessed 23.03.2018

71 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20

72 In point 22 of the Guidance paper, the Commission concedes by stating that where certain conduct can only raise obstacles to competition and creates no efficiencies, its anticompetitive effect may be inferred. However, this type of approach is not rule, and it does not apply to conditional rebates

73 According to point 19 of the Guidance paper, "term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels."

74 Point 20 of the Guidance paper

tion of the "as efficient competitor test" (AEC test),[75] which will later on find its way into the CJEU judgment in *Intel*.

The AEC test consists of a detailed cost analysis based on the comparison of product prices and costs of its production, which enables estimation of the effective price that a competitor would have to offer for the contestable portion of demand in order to compensate the buyers for the loss of conditional rebate.[76] As a measure of the effective price level of competitors' products, the Commission uses the cost-based analysis rooted in long run (average) incremental costs (LRIC) and average avoidable cost (AAC).[77] Generally, the lower the effective price that a competitor has to offer compared to the average price of the dominant undertaking, the greater the fidelity-inducing effect.[78] Abuse is measured against an equally efficient competitor and not actual or potential competitors that may be less efficient.[79] The dominant undertaking thus becomes a cost benchmark for a hypothetical, equally efficient competitor.[80]

At the time the Guidance paper was adopted a large gap was created between the new analytical framework suggested by the Commission on one side, and the traditional analytical framework applied by the EU Courts on the other. The gap has been pointed to many times over the years as the question lingered: Will CJEU

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75 Point 23 of the Guidance paper states: "The Commission will normally intervene only when the action in question has already prevented competition or is capable of preventing it, excluding competitors deemed to be equally effective as the dominant undertaking."

76 Points 40-47 of the Guidance paper

77 Point 44 of the Guidance paper states: "Where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors. Where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected."

78 Point 43 of the Guidance paper

79 Point 23 of the Guidance paper

80 This analysis has its opponents as well, pointing to its deficiencies. For a summary of arguments see, Jones, Alison, Fidelity Rebates, a note submitted to Organisation for Economic Co-operation and Development Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP/WD (2016) 62, 30 June 2016., available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)62&docLanguage=En] Accessed 23.03.2018, pp. 11-12 citing Krattenmaker, T. G., Salop, S. C., *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, Yale Law Journal, 1986/96, pp. 209-293; Salop, S. C., *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard,* Antitrust Law Journal, 2006/73, pp. 311-374. See also Wright, J. D., *Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Bates White 10th Annual Antitrust Conference, Washington, D.C., 3 June 2013, accessible at: [https://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf] Accessed 23.03.2018

embrace the proposed effects-based analysis and thus transform soft into hard law? So far, the Commission had a rather comfortable position because all of the cases it dealt with related to facts that took place before the adoption of the Guidance paper. Consequently, the Commission was not obliged to apply its own criteria set in the Guidance paper (although it did so on a number of occasions). The same happened in *Intel*. The facts in *Intel* took place years before the Guidance paper was adopted, and thus, it came as no surprise that the Commission applied the traditional *prima facie* infringement rule and found that the rebates offered by Intel were by their very nature capable of restricting competition.[81] Accordingly, the Commission stressed out that the assessment based on all the circumstances of the case and, in particular an AEC test, was not necessary in order to find the infringement of Article 102 of the TFEU. Having said that, the Commission did perform a thorough analysis of all the circumstances under the AEC test, which led it to conclude "that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor."[82] Although presented by the Commission as corroborative evidence, the analysis opened the door to a heated debate eventually leading to the overturning judgement by the CJEU in favour of the more economic approach to fidelity rebates. As will be seen below, this practically converted the Guidance paper from a Commission self-imposed soft-law document, into EU competition hard law.[83]

The Guidance paper is a very specific type of soft law instrument adopted by the Commission, inasmuch as it did much more than simply summarise the existing case law on Article 102 of the TFEU. Instead, the Guidance paper had the ambition to influence the interpretation of Article 102 and widen its scope.[84] However, having in mind the institutional divide within the EU, the Commission did not have the authority to do so, as the CJEU is the only institution entrusted with the task to interpret EU law. In order to overcome this institutional boundary, the Commission came up with the document that is formally declared to serve the sole purpose of defining its enforcement priorities, an issue falling within its competence.[85] The Guidance paper explicitly states that it is not intended to constitute a statement of law and is without prejudice to the interpretation given to

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81 Commission decision — *Intel*, para 916

82 CJEU, *Intel*, EU:C:2017:632, para. 142; Commission Decision — *Intel*, paras. 925 and 1760

83 See Lamadrid, *op. cit.* note 65, p. 2

84 Ezrachi, Ariel, *EU Competition Law, An Analytical Guide to the Leading Cases*, 5th ed., Hart Publishing, Oxford and Portland, Oregon, 2016, p. 211

85 GCEU, judgment of 18 September 1992, *Automec Srl v Commission*, T-24/90, EU:T:1992:97, para 77

Article 102 by the CJEU.[86] However, many commentators would agree that Guidance paper is in effect substantive guidelines rising legitimate expectations in that regard.[87] Welcoming this development, they hoped that the economic approach found in the Guidance paper "would serve as an inspiration to the EU Courts to change case-law"[88] to the effect that this approach becomes the substantive standard of assessment when determining illegality rather than a mere procedural standard of assessment when determining priority. As judgment in *Intel* shows, the high expectations and exercised pressure though public debate, delivered.

4.3. The CGEU judgement

In its judgment, the GCEU, dismissed in its entirety the action brought by Intel abiding by the traditional approach to fidelity rebates, making this s "significant victory" for the Commission.[89] The heart of the GCEU decision was its classification of rebates into: 1) quantity rebates,[90] presumed to be legal as they generally do not raise competition concerns, 2) exclusivity rebates,[91] presumed to be illegal as they are anticompetitive by their very nature and, 3) "other rebates",[92] necessitating the consideration of all circumstances of the case in order to determine if

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86 Point 3 of the Guidance paper

87 See Lovdahl Gromsen, L., *Why the European Commission's enforcement priorities on article 82 EC should be withdrawn*, European Competition Law Review, 2010/31 (2), pp. 45-55

88 Wils, W. P. J., *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance (September 19, 2014)*, World Competition: Law and Economics Review, 2014/37 (4), pp. 405-434, available at SSRN: [https://ssrn.com/abstract=2498407] Accessed 23.03.2018, citing Allan, B., *Rule-making in the context of Article 102 TFEU*, Competition Law Journal 2014, pp. 7 et seq. especially 20-21; Ibáñez Colomo, P., *Intel v Commission and the problem with wrong economic assumptions*, Chillin' competition, 16 June 2014, [https://chillingcompetition.com/2014/06/16/intel-v-commission-and-the-problem-with-wrong-economic-assumptions/] Accessed 23.03.2018; Venit, J. S., *Case T-286/09 Intel v Commission – The Judgement of the General Court: All steps Backward and no Steps Forwards*, European Competition Journal 2014/10 (2), pp. 203-230

89 Cardoso Pereira, *op. cit.* note 38, p. 208

90 According to the GCEU, "quantity rebate systems ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC." GCEU, *Intel*, EU:T:2014:547, para. 75

91 According to the GCEU, "there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position." GCEU, *Intel*, EU:T:2014:547, para. 76

92 According to the GCEU, "there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect ('rebates falling within the third category'). That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking.." GCEU, *Intel*, EU:T:2014:547, para. 78

they are capable of restricting competition. Within this classification, the GCEU placed the rebate scheme offered by Intel into the category of exclusive rebates and, relying on the case law stemming from *Hoffmann La Roche*, it did not find necessary either to consider all the circumstances of the case to determine if the scheme was capable of restricting competition[93] or to carry out the ACE test.[94] The GCEU stated that when it comes to exclusivity rebates the capability to restrict competition can be assumed because, except for exceptional circumstances, such conduct lacks an economic justification.[95] In addition, it observed that "the capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates",[96] adding that "a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult."[97] Finally, the GCEU stressed out the possibility of a dominant undertaking to rebut the presumption of abuse, which Intel failed to do. In fact, the GCEU stated that Intel did not bring forward any argument to that effect.

This approach to exclusive dealing is different from the approach taken by the CJEU in cases of exclusive dealing within the ambit or Article 101 of the TFEU. In the famous *Delimitis*[98] judgment, exclusive dealing was found to be a conduct that may have beneficial effects on competition and thus it was necessary to assess its effects on the market in order to decide whether it infringed Article 101.[99] In other words, exclusive dealing under Article 101 is considered to be an infringement *by effect* while the same type of behaviour within the context of Article 102 is considered to be an infringement *by object*. This dichotomy has been criticised for inconsistency.[100] The GCEU, however, argued that the more stringent approach to exclusive dealing under Article 102 is justified by the fact that it is precisely because of the very existence of a dominant position that the competition is already impaired.[101] The GCEU continued by restating the famous principle underpinning the normative approach to dominant undertakings – the special responsibil-

93 GCEU, *Intel*, EU:T:2014:547, paras. 76-77

94 GCEU, *Intel*, EU:T:2014:547, para. 85

95 GCEU, *Intel*, EU:T:2014:547, paras. 76-77

96 GCEU, *Intel*, EU:T:2014:547, para. 86

97 GCEU, *Intel*, EU:T:2014:547, para. 88

98 CJEU, judgment of 28 February 1991, *Stergios Delimitis v Henninger Bräu AG*, C-234/89, EU:C:1991:91

99 CJEU, *Delimitis*, EU:C:1991:91, paras. 14-27

100 See Ibáñez Colomo, *op. cit.* note 88

101 GCEU, *Intel*, EU:T:2014:547, para. 89

ity of a dominant undertaking not to impair genuine undistorted competition[102] and held that "exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market."[103]

Rather convincingly, this differentiation has been emphasised in support of the GCEU judgement by Wils who reminds that „the nature and effects of what may look like the same practice can be very different depending on whether the undertaking adopting the practice is dominant or not. Moreover, by providing for Article 102 [of the] TFEU in addition to Article 101 [of the] TFEU, the EU Treaties have chosen to treat dominant undertakings differently from non-dominant undertakings."[104] These fundamental principles of EU competition law cannot be overestimated. It is the economic rationale and the legal aim behind the wording of 102 – the preservation of undistorted competition – that should not be lost out of sight. And it is exactly the same as the economic rationale and legal aim that underlies the presumption of illegality of exclusivity rebates, as explained by the GCEU in *Intel*.[105] As Whish rightly points out, "it is not clear why the differentiation between the treatment of exclusive dealing under Article 101 and 102 [of the] TFEU should be regarded as wrong in principle – to apply a stricter standard to exclusivity when a firm is dominant."[106] It is precisely because of the dominant undertaking that the competition is already impaired. Moreover, as recognised by the CJEU, such undertakings should not carry out any conduct which could affect competition on the market.[107] This also includes the conduct that would otherwise be legal, i.e. if undertaken by a non-dominant undertaking, such as refusal of supply.

It is not only the more stringent approach to exclusive dealing under Article 102 of the TFEU that was under criticism by the commentators. The very classifi-

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[102] The most famous and cited quote from *Hoffmann la Roche* relates to defining the concept of abuse: „The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." CJEU, *Hoffmann la Roche*, EU:C:1979:36, para 91

[103] GCEU, *Intel,* EU:T:2014:547, para. 90

[104] Wils, o*p. cit*. note 88, p. 24

[105] *Ibid.* p. 23

[106] Whish, R., *Intel v Commission: Keep Calm and Carry on!,* Journal of European Competition Law & Practice, 2015/6 (1), pp. 1-2

[107] CJEU, *Hoffmann-La Roche*, EU:C:1979:36 para 91; CJEU, *Intel*, EU:C:2017:632, para. 135

cation of rebates as done by the GCEU has been criticised by many,[108] including the Advocate General Wahl,[109] for being overly formalistic, artificial and thus arbitrary,[110] because boundaries between those categories are difficult to define.[111] The critics are particularly pointing to the subcategory of rebates – the exclusivity rebates, which was at the centre of the GCEU judgement.[112] However, as presented by the GCEU, such categorisation appears to be nothing more than the systematisation of the previous case law. While the first category – quantity rebates and their presumption of legality, restates the findings of the CJEU in the case *Michelin II*,[113] the second category of exclusivity rebates and the accompanying presumption of illegality rest on judgments in *Hoffman la Roche*[114] and more recently *Tomra*.[115] The third category of "other rebates" relates to factual in which "the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect", as was the case in *Michelin I*[116] and *British Airways*.[117]

Not everyone agreed with this reading of the existent case law of EU Courts. This fact alone indicates that there is not enough consistency or clarity in the treatment

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108 See Colangelo, G., Maggiolino, M., *Intel and the Rebirth of the Economic Approach to EU Competition Law (January 18, 2018)*, International Review of Intellectual Property and Competition Law – IIC, 2018/49, available at SSRN: [http://dx.doi.org/10.2139/ssrn.3104850] Accessed 23.03.2018, p. 6; Petit, N., *The Advocate General's Opinion in Intel v Commission: Eight Points of Common Sense for Consideration by the CJEU (November 24, 2016)*, Concurrences Review, No. 1, available at SSRN: [https://ssrn.com/abstract=2875422] Accessed 23.03.2018, p. 3-5; Geradin, *op. cit.* note 66, pp. 599-600

109 Opinion of the Advocate General Wahl, *Intel*, EU:C:2016:788, paras. 80-93

110 Ibáñez Colomo, *Editorial: The divide…, op. cit*. note 64, p. 178.; Marco Colino, S., *All Eyes on Intel: A Stepping Stone to a Fresh Legal Framework for the Analysis of Rebates Under EU Competition Law (January 4, 2017)*, Concurrences Review, 2017/1, available at SSRN: [https://ssrn.com/abstract=2893792] Accessed 23.03.2018, p. 4

111 This difficulty is well demonstrated in CJEU, *Post Danmark II*, EU:C:2015:651

112 In his opinion in *Intel*, para 84, the Advocate General Wahl criticised the GCEU for having „distinguished one sub-type of loyalty rebate, which it termed 'exclusivity rebates', from other types of rebates that induce loyalty. In doing so, it created a 'super category' of rebates for which consideration of all the circumstances is not required in order to conclude that the impugned conduct amounts to an abuse of dominance contrary to Article 102 [of the] TFEU. More importantly, the abusiveness of such rebates is assumed in the abstract, based purely on their form."

113 GCEU, judgment of 30 September 2003, *Manufacture française des pneumatiques Michelin v Commission of the European Communities (Michelin II)*, T-203/01, EU:T:2003:250, para. 58

114 CJEU, *Hoffmann-La Roche*, EU:C:1979:36

115 GCEU, judgment of 9 September 2010, *Tomra Systems ASA and Others v European Commission*, T-155/06, EU:T:2010:370, paras. 72 and 209-210

116 CJEU, judgment of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission (Michelin I)*. 322/81, EU:C:1983:313

117 CJEU, *British Airways ,* EU:C:2007:166

of specific types of abuse of dominant by the EU courts. An attempt to categorise in a precise and clear manner existent case law is welcome and important from the perspective of legal certainty and intelligibility of rules applied,[118] particularly considering that such rules are not void of economic rationale.[119] Legal rules are meant to be as unambiguous and straightforward as possible and should be applicable at the lowest cost encompassing the majority of situations.[120] This is exactly what a rule-based approach does. Under assumption that in majority of situations exclusive dealing by a dominant undertaking distorts competition, a presumption of illegality makes perfect sense from the perspective of law enforcement. The approach to infringements by object have been very plastically described by Advocate General Kokott in *T-mobile* under Article 101. Advocate General Kokott used the analogy of drunk drivers: "In most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant."[121] Arguments stressing that fidelity rebates may have mixed effects on competition, and thus that the assumption of illegality is "not just disproportionately harsh; it is outright inadequate"[122] fail to recognise the important enforcement-related advantages of the presumption of illegality. As long as this presumption is rebuttable, there is no risk for dominant undertakings being fined for an objectively justified conduct.

The CJEU was not convinced of these arguments, and instead it ruled in favour of the "more economic approach" to fidelity rebates and overturned the existent line of case law.

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118 Wils, o*p. cit*. note 88, p. 23; Wardhaugh, B., *Intel, Consequentialist Goals and the Certainty of Rules: The Same Old Song and Dance, My Friend*, Competition Law Review, 2016/11 (2), pp. 215-238: "While the Commission's desire to promote consumer welfare may be laudable, the achievement of the goal needs to be done through a system which provides the needed ex ante certainty for decisions to be predictably made in a workable legal system."

119 See Wils, o*p. cit*. note 88, p. 31

120 *Ibid.* pp. 23-26: "When choosing between one or the other interpretation of Article 102 of the TFEU (for instance, between the existing EU case-law and the so-called 'more economic approach'), all relevant effects of the choice of interpretation should be taken into account, including enforcement costs, and the degree of legal uncertainty and the corresponding allocation of risk." p. 26

121 CJEU, judgment of of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:110, para. 47

122 Marco Colino, *op. cit.* note 110, p. 4

4.4. The CJEU judgement

The CJEU quashed the judgment of the GCEU on the argument that, because the AEC test played an important role in the Commission's findings, the GCEU was required to examine all of Intel's arguments concerning that test.[123] It was an error in law, according to the CJEU, that in examining the circumstances of the case, even if only for the purpose of completeness, the GCEU attached importance to AEC test performed by the Commission while refusing to take into consideration the arguments of Intel pointing to the incorrectness of the performance if this test.[124] The CJEU's logic seems to suggest that if such arguments were used by the Commission, then counter arguments must be examined as well.

The CJEU employed an essentially procedural line of reasoning to refute a substantive approach to abuse of dominance. However, had this been the only point in its judgment in *Intel*, it would have implied that in the absence of such analysis by the Commission, the GCEU would not be under such duty either. Accordingly, the discretion on whether or not to treat rebates as rule-based infringements of Article 102 would sit with the Commission. Given that this approach would be unacceptable in principle, the CJEU put forward clear rules on the Commission's duty to perform AEC test and analyse other circumstances of the case in order to prove the capability of foreclosure. It is with this part of the judgment that CJEU overturned the *Hoffmann la Roche* line of reasoning.

The CJEU commenced by restating how dominant undertakings have a special responsibility not to impair undistorted competition on the internal market. It then repeated the traditional approach to fidelity rebates from *Hofmann la Roche* only to continue by stating that case-law should be further clarified.[125] The clarification of the CJEU relates to situations when a dominant undertaking during the administrative procedure, on the basis of supporting evidence, submits that "its conduct was not capable of restricting competition and in particular, of producing the alleged foreclosure effects."[126] In such situations, according to the CJEU, the Commission is required to analyse all circumstances of the case including "the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy

123 CJEU, *Intel*, EU:C:2017:632, para. 141

124 See CJEU, *Intel*, EU:C:2017:632, para. 147

125 CJEU, *Intel*, EU:C:2017:632, para. 138. Here we would have to agree with Lamadrid, *op. cit.* note 65, that this was just a euphemism for an overturning judgement

126 CJEU, *Intel*, EU:C:2017:632, para. 138

aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market."[127] In addition, dominant undertaking is allowed to claim efficiencies or objective justification for its conduct. According to the CJEU, "balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking."[128]

This analysis is clearly directed to the Commission and the administrative procedure. The Commission is required to perform full analysis only when a dominant undertaking submits that its conduct is not capable of distorting competition. With such position the CJEU does retain the presumption of illegality, but this appears rather formalistic as the dominant undertaking will always submit that its conduct was not capable of distorting competition. Then it is back to the Commission to prove anticompetitive effect based on all evidence including the AEC test. Then again, the burden of proof switches back to the dominant undertaking to prove the existence of an objective justification of efficiencies. These are rules of the game, the procedural framework supporting the findings of the CJEU in *Post Danmark*.

Several issues emerge from the *Intel* judgment. The first one relates to proving the *capability* of foreclosure effects. What does it mean? Much has been written about the standard of proof as the EU Courts have used interchangeably the terms such as "capability", "likelihood", "probability", and "potential".[129] In *Intel*, however, the CJEU uses only the term "capability" to define both the standard of proof by the dominant undertaking and the Commission. Ibáñez Colomo rightly observes that there are two possible interpretations of this standard. The first interpretation could be that "dominant firms would have to satisfy the same level of evidence that the Commission has to meet to discharge its legal burden of proof." The sec-

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127 CJEU, *Intel*, EU:C:2017:632, para. 139

128 CJEU, *Intel*, EU:C:2017:632, para. 140

129 On a difference between capability and likelihood see See Ibáñez Colomo, *op. cit.* note 88; cit.; Ibáñez Colomo, The future of Article 102 TFEU..., cit., pp. 14-20. For a different view see Kadar. *op. cit.* note 54*:* "It is clear that, from a strictly linguistic perspective, the fact that a conditional rebate scheme is likely or probable to produce anticompetitive effects is different from the fact that that scheme is 'only' capable of doing so, or that it tends to do so, or that it is potentially anticompetitive. Nevertheless, this apparent inconsistency can be reconciled if one leaves aside arguments 'based on a purely semantic distinction' (Opinion of AG Kokott in British Airways, para. 76) and acknowledges that the Courts use these terms as synonyms to identify a middle ground between purely hypothetical effects and actual effects. This middle ground, which can be perhaps best captured with the expression 'potential anticompetitive effects," can be considered as the point at which a given conduct by a dominant undertaking becomes abusive."

ond interpretation, based on the principle of presumption of innocence and the principle that the burden of establishing an infringement lies with the authority or claimant, would imply that "it would be sufficient for the dominant firm to raise doubts about the capability of the practice to restrict competition."[130] Having in mind that in *Intel* the CJEU actually abandoned the rule-based approach to rebates, we would have to go for the second opinion.

Another important issue dealt with by the CJEU concerns dominant undertaking's possibility to use the efficiency defence within the ambit of Article 102 of the TFEU. The wording of Article 102 does not envisage the possibility of exceptions based on efficiencies. To the contrary, Article 101(3) explicitly provides for this possibility. The difference in wordings derives from the assumption that where a dominant undertaking is present on the market stricter rules apply because its very presence impairs competition. This is the reason why within the ambit of Article 102 dominant undertakings could have only relied on objective justification. In 2009, when Guidance paper was adopted, the gap created with the case law existing at the time, related to efficiencies as well. Namely, the Guidance paper explicitly introduced the possibility to use efficiency arguments to offset the finding of abuse of dominance contrary to the then case law. Subsequently, in a sequence of cases related to abusive pricing practices, the CJEU endorsed this approach, confirmed in *Post Danmark I*[131] and now explicitly in *Intel*. As a result, efficiency gains are now a matter of public policy underlying Article 102,[132] and effect-based analysis is applicable across the range of abuses. Colangelo and Maggiolino wrote that without even being mentioned in the CJEU judgment, the Guidance papers is the "real moral winner of the Intel affair."[133] For all we have stated above, it seems that the real winners in *Intel* are dominant undertakings. The question remains as to whether this was a win-win situation or perhaps there will be a losing party.

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130 Ibáñez Colomo, The future of Article 102 TFEU..., cit., pp. 23-24

131 To succeed with an efficiency defence in the context of unilateral conduct, "it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition." CJEU, *(Post Danmark I)*, EU:C:2012:172, para. 42

132 Petit, *op. cit.* note 3, p.15

133 Colangelo,Maggiolino, *op. cit*. note 108, p. 12

5. CONCLUSION

The above analysis demonstrates that there is a lot to tell about *Intel*. Although this case has initially provoked the interest of the public due to the then highest fine ordered by the Commission, it has nevertheless stirred to academic and professional waters much more concerning its legal implications.

On the scope of application of the EU competition law and the associated Commission jurisdiction to decide the antitrust cases against persons and activities located outside the EU, the CJEU judgment in *Intel* finally settles the long-lasting dilemma of whether the effects doctrine is part of the EU competition law. With the explicit confirmation of the "qualified effects" doctrine, the triangle of alternative legal bases has been completed. This "extraterritoriality triangle" now should capture all anti-competition situations, which might be detrimental to the competition structure on the internal market.

Regarding the exclusive dealings and fidelity rebates under Article 102, the declared clarification in this judgment in fact amounts to analytical shift, embracing the effect-based approach to these types of dealings. This will bring about more economic analysis in the process of assessment of the illegality of conduct of dominant undertaking concerned, but at the same time it will enable more room for the undertaking to justify the disputed conduct. The *Intel* judgment is definitely a positive development in this sense as this approach is more aligned with the Commission practice described already in the 2009 in the Guidance paper.

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OVERVIEW OF THE RELATIONSHIP BETWEEN THE ITALIAN CONSTITUTIONAL COURT AND EU LAW, WITH PARTICULAR REFERENCE TO THE ITALIAN CONSTITUTIONAL COURT'S APPROACH TO RENEWABLE ENERGY POLICY

ABSTRACT

The paper aims to analyse how European Union law and the jurisprudence of the EU Court of Justice currently influence the interpretation of the Italian Constitution and, at the same time, whether there are still limits to the 'internationalisation' and 'Europeanisation' of national constitutional laws that are relevant for the analysis of the Constitution.

Until 2001, there was no mention in the Italian Constitution of the European Union or the interaction between the national and the European legal system.

Following the 2001 reform, a reference to European Union law was introduced in Article 117 of Italian Constitution, and the relationship between the Italian Constitutional Court and EU law changed entirely. For many years, it had been based on the theory of counter-limits (Italian Constitutional Court judgments in Frosini n. 173/1973 and Granital n. 170, 5 June 1984).

As an example of the new relationship mentioned above, we use the Italian Constitutional Court's approach to renewable energy policy.

Keywords: *Theory of counter-limits, Italian constitutional reform, Monist theories, EU law as a constitutional parameter*

1. INTRODUCTION

This paper will answer the following questions: 1) does the Italian Constitutional Court refer to EU law when interpreting the Constitution? 2) does the law of the European Union and the jurisprudence of the EU Court of Justice influence constitutional interpretation? and 3) why, in order to reply to these questions, do we use the case of the Italian Constitutional Court's approach to renewable energy policy? The answer to this last question is that one of the first times that EU law

was used by the Italian Constitutional Court as a parameter was in the interpretation of the division of competence for environmental protection between the central government and the regions.

Before 2001, there was no mention in the judgments of the Italian Constitutional Court to European Union laws or the interaction between the national and the European legal systems.

Following the 2001 reform, a reference to European Union law was introduced into Article 117 of the Italian Constitution, so the relationship between the Italian Constitutional Court and EU law changed entirely.

The chapter is organised as follows. In Section 2 we provide an overview of the historical roots of the approach of the Italian Constitutional Court to Community law. We discuss how the theory of counter-limits formally internalised these historical roots. In the following section (Section 3), we show how the approach mentioned above changed completely after the 2001 constitutional reform. We explain that Article 117 of the Italian Constitution was amended in various ways: on the one hand, EU law and international obligations became limits to the legislative power not only of the state but also of the regions; on the other hand, the division of competences between the national government and the regional governments was reformed. Article 117 explicitly provided the central government with exclusive competence for environmental protection (and, at the same time, entrusted the enhancement of the cultural and environmental heritage to the concurrent power of the state and the regions). Given this new situation, in Section 3 we analyse judgment n. 166/2014, which, like others that preceded it, displays the Italian Constitutional Court's apparent preference for the development of renewable energy over environmental protection, in accordance with EU laws in this area. Section 4 provides an overview of the Italian Constitutional Court's position on EU law as a parameter for the interpretation of the competence for environmental protection between central government and the regions. Our conclusions are in Section 5.

2. THE ITALIAN CONSTITUTIONAL COURT'S APPROACH TO THE EUROPEAN UNION LEGAL SYSTEM

The Court of Justice identified the existence of the EU legal system in its judgment in *Van Gend en Loos*.[1] Recognising individuals as subjects of the law, and

[1] C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR, 1. See Vauchez, A., *The transnational politics of judicialization. Van Gend en Loos and the making of EU polity*, European Law Journal, 2010, No.16, pp. 1–28

providing remedies (from the Court), was one way to strengthen the Community *primauté*. The Court used the strategy of declaring that individuals had rights as grounds for its 'constitutional' intuition that a Community legal system existed.

The same was true in the field of fundamental rights: 'For years, the Luxembourg Court has had to rule on fundamental rights cases affecting individuals.[2] Early in the past it also had to face conflicting cases that concerned the level of protection afforded by national and supranational law.'[3]

At the same time, on the national side, the relationship between the Italian Constitution and the Community legal system was for a long time based on the theory of counter-limits (Italian Constitutional Court judgments in *Frosini* n. 173/1973 and *Granital* n. 170, 5 June 1984), in the same way as in the judgment of the German Constitutional Court of 29 May 1974 in the *So Lange* case.

The *Frontini v Ministero delle Finanze* case (Judgment of Italian Constitutional Court n. 183 of 18 December 1973) is the first case in which the Italian Constitutional Court dealt with the problem of the role of the EU Treaties in the Italian legal system.

This judgment developed from the law through which Italy incorporated the institutional Treaty of the European Economic Community (the EEC Treaty) into its legal system (see Article 2 of Law n. 1203 of 14 October 1957). By introducing Article 189 of the EEC Treaty, the Italian parliament had accepted that European regulations have the same value as primary legislation. This Article states that European Regulations have general application, are mandatory in all their parts and are directly applicable in all the Member States.

Thus, the Italian Constitutional Court affirmed that Article 189 of the EEC Treaty did not overstep the sovereignty of the state. As matter of fact, rather than any denial of national freedom or any change in the fundamental constitutional structure of the Italian legal system (neither of which were permitted by Article 11 of the Italian Constitution), by joining the EEC Italy had acquired powers in new international bodies, such as the right to appoint its own representatives to the

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2 Since the *Stauder* case the European Court of Justice has protected the fundamental rights of both individuals and legal persons, as principles of European Community law (Case 29/69, *Erich Stauder v City of Ulm, Sozialamt*, [1969] ECR, 419)

3 Caballero, S., *Court of Justice and national courts: The system of legal protection of EU individual rights*, in Colcelli, V., Arnold, R. (eds.), Europeanization through private law instruments, Entwicklungen im Europischen Recht – Developments in European Law – Developpements en droit européen – Herausgegeben von Rainer Arnold, Vol. 6, Regensburg, 2016, p. 21

European institutions and the right to participate in the European Commission and the European Court of Justice.

In order to declare that European laws are not in conflict with the sovereignty of the state, the Italian Constitutional Court specified that Article 11 of the Italian Constitution only permits limitations on sovereignty in some circumstances. Such limitations could only be to accomplish peace and fairness among the nations. Therefore, such limitations are not acceptable if they would violate the fundamental principles of the Italian constitutional system or the fundamental rights of individuals, or the form of the state as a republic. As matter of fact, Article 139 of the Italian Constitution states that the republican structure of the state cannot be changed even by a constitutional law. Article 139 imposes unequivocal limitations on possible constitutional reforms. In this case, the Court addressed the question of the admissibility of other implicit limits on constitutional reform and whether compliance with these limits can be reviewed by the Constitutional Court itself.

According to the Italian Constitutional Court's interpretation, this was the appropriate justification for Article 189 of the EEC Treaty. Likewise, the Italian Constitutional Court declared that, if there was a different interpretation, only the Court itself has the power to perform a constitutional review of any of the Treaty's rules, because anything else would be contrary to the fundamental principles of the Italian Constitution: 'it is obvious that if even Article 189 had to be given such aberrant interpretation, in such case a guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above mentioned fundamental principles'.[4] Thus Article 11 of the Italian Constitution 'has formed the basis for the Italian court's acceptance of the Community law, although as in the case of the other Member States, this acceptance has not been unconditional'.[5]

Anyway, the main point of these judgments relates to the admissibility of constitutional control over Community laws.

Because the law was an expression of the legislative power of a foreign legal system, it was doubtful whether the Italian Constitutional Court in fact had the power to assess whether it was consistent with the Constitution.

The Constitutional Court decided that the law, although it is an expression of the legislative power of another legal system, must be consistent with the fundamental

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4 *Frontini v Ministero delle Finanze*. For an unofficial translation, see Gaja, G., *Unofficial translation of Frontini v Ministero delle Finanze* , in CMLR No. 2, 372, 1974, p. 384, p. 384

5 Craig, P., de Búrca G., *EU law. Text, cases and materials*, Oxford, 2008, p. 363

principles of the Italian constitutional system. In order to ensure compliance with these fundamental principles, the Court stated that it had the power to review EU laws.

In other words, the main problem for the Italian Constitutional Court was a procedural problem: whether and how the Court can exercise a form of ultra vires review of Community acts[6] under Article 11 of the Constitution.

At the same time the Court of Justice leapt forward with the above-mentioned debate. In the judgment of the Court of 9 March 1978 in *Simmenthal SpA v Amministrazione delle Finanze dello Stato* (Case 106/77), the debate centred around three main aspects: whether national law was a defence to a breach of Community law, whether the national court had a duty to give precedence to Community law, and whether a national judge had to wait for conflicting national legislation to be set aside by the Constitutional Court. The answer given by the Court of Justice was that the former Article 189 of the ECC Treaty 'was based on a distinct separation of function between national Courts and ECJ' and 'was based on a clear division of function' (…) 'from determining whether concept of Community law really was applicable to the case before the national court'.[7]

Thus, 'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means'.[8]

The theory of counter-limits was also confirmed in the *Granital* case (Italian Constitutional Court judgment n. 170, 5 June 1984),[9] but in this decision the Italian Constitutional Court conformed its judgment to that in the *Simmenthal* case mentioned above: 'The case is mainly important because the Constitutional Court overruled its jurisprudence. Indeed, since 1984, if Italian laws were in contrast to the European law, they were considered unconstitutional for violation of art. 11 Const. This solution was founded on the idea that, to not reduce the sovereignty

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6 Ruggeri Laderchi, P., *Report on Italy*, in Slaughter, A.-M., Stone Sweet, A., Weiler, J.H.H., (eds.) The European Court and the national courts – Doctrine and jurisprudence, Oxford, 1998, No. 22, ch. 5

7 Craig de Búrca, *op. cit.* note 5, p. 484

8 C-106/77, *Simmenthal SpA v Amministrazione delle Finanze dello Stato*, [1978] ECR, 629

9 *Spa Granital v Amministrazione delle Finanze*, Judgment of Italian Constitutional Court n. 170 of 5 June 1984. For an unofficial translation, see G. Gaja, Constitutional Court (Italy), Decision No. 170 of 8 June 1984, S.p.a. Granital v Amministrazione delle Finanze ;Common Market Law Review, No. 21 , 1984, p. 756

of Parliament, the European law was not directly applicable. Therefore, the application of incompatible European law was possible only in cases of declaration of unconstitutionality of national law.'[10]

Thus, in the Court's opinion, the question of the unconstitutionality of national law on the basis that it is contrary to Article 3(1) of the Treaty was not admissible under Article 11 of the Italian Constitution.

Therefore, in the event of incompatibility between national and European law, the judge is not obliged to appeal to the Constitutional Court, but may decide to apply European law instead of national law. National laws are inapplicable if they conflict with the effects envisaged by EU rules. Disapplication, and an obligation to interpret national law in conformity with Community law, is required from the judiciary of a Member State if the national law does not safeguard the effectiveness of the protection of Community rights. Disapplication, and an obligation to interpret national law in conformity with Community law laid down by the European legal system for the protection of the Community, comes into action.[11] However, what about the application of EU law by the Italian Constitutional Court?

It is possible to say that, despite the above-mentioned position, the Italian Constitutional Court had never, until the 2001 constitutional reform, used EU law as a constitutional parameter in its constitutional review.

This approach completely changed after the 2001 constitutional reform.

3. THE ITALIAN CONSTITUTIONAL COURT'S APPROACH TO EUROPEAN LAW AFTER THE 2001 REFORM OF ARTICLE 117 OF THE CONSTITUTION

Paragraph 1 of the new Article 117 of the Italian Constitution stated for the first time that: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.' EU law and international obligations were brought in as a limit to the state's, but also to the regions', legislative power.

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[10] Dicosola M., *The interaction between EU and national law in Italy. The theory of 'limits' and 'counter-limits'*, in The Interaction between European Law and National Law in the Case Law of Constitutional Courts. Co.Co.A. Comparing Constitutional Adjudication – A Summer School on Comparative Interpretation of European Constitutional Jurisprudence, 2nd Edition, Trieste, 2007, p. 3

[11] Colcelli V., *Understanding of the built of European Union legal system: The function of individual rights*, J. Soc. Sci., 8, 2012, p. 388

This express reference to EU and international law in the Italian Constitution immediately reminded scholars of monist and dualistic theory in relation to the meaning and interpretation of the new Article 117 of the Italian Constitution.

As a matter of fact, 'with regard to the relationship between international and domestic law, two theories can be proposed: the monist and dualistic theory. On the one hand, the monist thesis, according to which international law and national law of each State must be considered as part of unified system of norms; on the other hand, the dualist thesis according to which domestic law and international law are two independent legal systems. As consequence of this, international norms are not directly applicable in the Italian legal system, where they assume efficacy according to a process of incorporation. (….) The monist theories are characterized by the idea of a structural homogeneity between the international and national level of experiences. The unified scheme in which the various sources of law are subsumed is built up like a pyramid in which each norm draws its foundation from the higher.'[12]

According to some scholars, Article 117, paragraph 1, simply codified the previous situation without any innovation: it just provided a form of retrospective approbation to European primacy.

However, some other scholars emphasised the prominence that the Constitution gave to European primacy, arguing that Article 117 had paved the way for the acceptance of the Italian monistic thesis.

Such codification centralises the conflict between EU law and the control of national law or, at least, provides a more active role for the national courts, which would retain their role as the principal guardians of the primacy of EU law.

The effective protection of individual rights in the EU legal system derives from the possibility of using those rights in actions before the national courts.[13]

The recourse to remedies goes beyond the approach – which we could define as continental – that makes rules the locus of the importance and effectiveness of individual rights. Thus, individual rights are defined when judges apply rules that conform to and make concrete the objectives pursued by the European Union.

In the EU, individual rights in horizontal and vertical relationships are protected by the national courts.

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12 Mezzetti L., Polacchini, F., *Primacy of supranational law and supremacy of the Constitution. The Italian legal system*, in Mezzetti L., *et al.* (eds.), International Constitutional Law, 2015, pp.141-142

13 C-208/90, *Theresa Emmont v Minister for Social Welfare*, [1991] ECR, I-4269

It is for 'the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case'.[14]

When the national system of protection is not able to guarantee Community rights sufficiently, the 'equipment' provided by the EU legal system comes into action. The EU legal system has established a uniform network of safeguards of rights for Community individuals (liability of the Member State, recovery of sums paid but not due, disapplication and obligation to interpret national law in conformity with Community law) when the judicial system of the Member State does not safeguard the effective protection of Community rights. The EU legal system does not envisage specific or special protection for individual rights. It envisages that the national legal protection provided by the Member States should be effective.[15]

An opportunity to test these theories arises from an analysis of judgment n. 166/2014 of the Italian Constitutional Court. This decision follows quite a number of pronouncements by the Italian Constitutional Court on the particular topic of the conflict in competence between the state and the regions regarding the location of renewable energy plants.

Judgment n. 166/2014, like the others that preceded it, addresses the authorisation and certification procedures, including the planning systems, for renewable energy installations, and emphasises two primary aspects:

- The rules on the location of biomass plants form a point of comparison or contrast between energy development and environmental protection in the Italian legal system;

- The prevailing thoughts regarding the Italian Constitutional Court's apparent preference for the development of renewable energy over environmental protection, according to EU laws on this matter.

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14 C-179/84, *Bozzetti v Invernizzi*, [1985] ECR, p. 2317

15 On the origins and scope of the general principle of effective judicial protection in EU law, see Arnull, A., *The principle of effective judicial protection in EU law: An unruly horse?*, Eu L Rev. 2011, 36, 1, p. 51; Colcelli, V., *Il sistema di tutele nell'ordinamento giuridico comunitario e selezione degli interessi rilevanti nei rapporti orizzontali*, Europa e Diritto Privato, 2, 2009, pp. 557-585

3.1. EU law as a parameter for the interpretation of the competence for environmental protection between central government and the regions.

In 2001, Article 117 of the Italian Constitution was amended, explicitly providing the central government with exclusive competence in relation to the protection of the environment (and, at the same time, entrusting the enhancement of the cultural and environmental heritage to the concurrent power of the state and the regions).[16]

The production, transport, and distribution of national energy are also concurrent competences of the state and the regions[17].

'This new structure has provoked many competence conflicts between the State and the Regions, increasing their number and the relevance. The Regions had previously played a substantial role in protecting the environment (mainly in the context of town and land use planning, but also through other matters of regional competence) and the reform of 2001 appears to significantly limit their competence on environmental issues.'[18]

The starting point for the analysis of the Italian Constitutional Court's attitude in the field of the location of biofuel plants and the Italian Constitution's approach to environmental protection is the European and national legal framework on renewable energy.

3.1.1 Juridical framework for renewable energy plants at the EU and national level

In the framework of the EU's fight against climate change (European Commission, European Climate Change Programme (ECCP) 2000), the EU attempted to accelerate its existing policy approach towards biofuels with a view to reducing its dependency on foreign sources of energy, reducing greenhouse gas (GHG) emissions, and supporting farmers' incomes by providing new outlets for agricultural products.

Directive 2009/28/EC, Directive 2011/92/EU and Directive 2012/27/EU are usually identified as the second generation of EU legislation on renewable energy and biomass plant location. These core Directives relate to the Member States'

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16 Lugaresi, N., *Introduction: Italian environmental law framework*, IUCN Academy of Environmental Law e-Journal Issue 2010, No. 1, p. 7

17 Hansen, W., Christopher, M., Verbuecheln, M., *EU waste policy and challenges for regional and local authorities*, Ecologic – Centre for International and European Environmental Research, Berlin, 2002

18 Lugaresi, *op. cit.* note 16

obligations to remove non-cost barriers and, in particular, administrative barriers to the increased deployment of renewable energy systems (RES) (Article 13 Directive 2009/28/EC). In fact, the lack of transparent rules and coordination among the competent authorities is recognised as one of the major obstacles to the deployment of RES projects at the national level (Recital 41 of the Preamble to the Directive 2009/28/EC . The EU also adopted Directive 2009/30/EC, which aimed to promote the use of biofuels and other renewable fuels for transport by setting a target of 5.75 per cent for biofuels in the transportation fuel market by 2010. Moreover, in order to support Member States' compliance with this target, the Commission already introduced Directive 2003/96/EC, which allowed the Member States to reduce excise duties to compensate for the higher costs of producing biofuels.[19]

Biomass plants need to comply with the relevant local authority's policies and rules on renewable energy and its transport, and with any policies adopted for a particular location. These policies are different in each Member State. There are also regional arrangements regarding the planning procedures for certification, and educational issues in relation to achieving the targets set in the Directive and at the sub-regional level. Furthermore, biomass plants must also comply with EU Regulation No 1307/2014 and with the sustainability criteria laid down in Article 7b of Directive 98/70/EC and Article 17 of Directive 2009/28/EC.

Communication 2010/C 160/02 does not have a binding character. It is designed to assist the Member States and to facilitate the consistent implementation of the sustainability criteria. However, EU Regulation No 1307/2014 became applicable from 1 October 2015.

For the location of future biomass plants, it will be very relevant to understand whether, and, if so, how, the Member States will in practice implement the sustainability criteria and the Renewable Energy Directive's (Directive 2009/28/EC) counting rules for biofuels in the light of EU Regulation No 1307/2014.

The sustainability principles are the overarching goals that the individual producers should strive to achieve.

In this framework, a very important role is also played by economic operators, because Communication 2010/C 160/02 additionally sets out how economic operators can implement the sustainability criteria and the above-mentioned Renewable Energy Directive. Communication 2010/C 160/02 is accompanied by

[19] Colcelli, V., *Institutional factors as limitation for biomass circulation in the internal market (Conference paper)*, UACES 46th Annual Conference, 5-7 September 2016

voluntary schemes, default values and Commission guidelines for the calculation of land carbon stocks. These represent valuable tools for economic operators who wish to declare that their products comply with the required sustainability standards, even in the absence of effective enforcement by the various Member States.

The Member States are required to coordinate their regulatory approaches on a series of issues, ranging from the arrangement of planning procedures to certification and educational issues, with the aim of achieving the target set forth in the Renewable Energy Directive.

National rules concerning authorisation and certification procedures, including planning procedures, for renewable energy installations should respect the principles of objectivity, transparency, non-discrimination and proportionality (Article 13, including Recitals 40, 41 and 42 to the Preamble of the RED Directive), and, thus, the European Union legislature has respected the principle of procedural autonomy regarding their establishment.[20]

Thus, national legislation on RES is important, not only from an environmental or social point of view, but also from an economic perspective, in the sense that it is closely related to the acceptability of a project to the local society, and the creation of legal certainty for investors. Institutional and administrative legislation may strongly influence the economic and technical choices.[21] Authorisations may occur through simplified and accelerated procedures, or they may not be relevant in a particular renewable energy project.

3.1.2. Renewable Energy Directive (RED) transposed into Italian national legislation

The Renewable Energy Directive (RED) was transposed into Italian national legislation on 3 March 2011 pursuant to Legislative Decree 28/2011, while Directive 2009/30/EC was transposed on 31 March 2011 pursuant to Government Decree 55/2011. According to Italian legislative practice, any provision contained in these Decrees must be implemented through another specific Decree. All the provisions referring to biofuels (energy from renewable sources for transport, sustainability criteria, etc.) were implemented and became effective on 1 January 2012.

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[20] Edward, V., *A review of the Court of Justice's case law in relation to waste and environmental impact assessment: 1992–2011,* J Environmental Law, 2013, 25, 3, pp. 515–530; Engle, E., *Environmental protection as an obstacle to free movement of goods: Realist jurisprudence in Articles 28 and 30 of the E.C. Treaty*, J.L. & Com., 27, 2008-2009, p. 113

[21] Sonneborn, C. L., *Renewable energy and market-based approaches to greenhouse gas reduction opportunity or obstacle*, Energy Policy, 2004, No. 32, 1799, p. 1805; Cheyne, I., *The definition of waste in EC law*, EC Law J Environmental Law, 14, 1, 2002, pp. 61–73

The Decree set Italy's obligatory share of biofuels in the car fuel mix at 4.0 per cent for 2011; this was due to rise to 4.5 per cent in 2012 and to 5.0 per cent by 2014 in order to reach the 10 per cent target by 2020.

The Italian framework on RES and plant location provides a system based on both economic incentives and a simplified administrative procedure for the authorisation of a large-scale plant. The procedure is called *Autorizzazione Unica* (AU).

The AU procedure should be used for biofuel plants with a size equal to or greater than 200kW.

The AU is the legitimate procedure that must be followed for building and managing a biomass plant in Italy. The AU procedure is managed by the relevant Italian region, and, therefore, applications need to be addressed to the region where the plant will be located. An AU application starts an administrative procedure called the *Procedimento Unico*, which is realised by means of a *Conferenza di Servizi*.[22]

In the AU procedure, there could also be a mandatory requirement for compensation for the municipal areas involved. According to the national guidelines, the compensation cannot exceed 3 per cent of the income.

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[22] The list of the documents and administrative authorisations covered in the Autorizzazione Unica includes:
-Environmental authorisation (Dlgs 18 February 2005 n. 59);
-Landscape authorisation (Article 146 Dlgs 42/2004);
-Environmental assessment (Dlgs 152/2006);
-Authorisation for air quality and atmospheric protection based on regional legislation (Dlgs 152/2006);
-Authorisation for waste (Dlgs 152/2006);
-Declaration of non-impediments for building by the Area Protected Authority (L. 6 December 1991 n. 494);
-Municipal authorisation to build in accordance with urban planning (Dpr. 380/2001);
-Declaration by the local firefighter authority of the rules respecting fire prevention (Article 2 Dpr. 12 January 1998 n. 379);
-Declaration of non-impediment for buildings too close to a military zone;
-Declaration of respect for geological and water flow restrictions (Regio decreto 30 December 1923 n. 3267 and Article 61, comma 5, Dlgs 152/2006);
-Declaration of respect for seismic rules (L. 2 February 1974 n. 64);
-Declaration of respect for fly zone security by the ENAC/ENAV Authority (Regio Decreto 30 March 1942 n. 327);
-Authorisation for tree cutting in accordance with the regional cutting service;
-Authorisation for the vocational change of the common local use of a rural area (L. 1766/1927);
-Compliance certificate for noise emissions (L. 447/1995);
-Authorisation by the economic development ministry (Article 95 Dlgs 259/2003);
-Authorisation to use and cross public roads;
-Authorisation for plumbing (Dlgs 152/2006);
-Compliance certificate of non-interference with the country's mineral resources (Article 120 Regio Decreto 1775/1933)

3.2. The legal framework on renewable energy in light of the conflict regarding the norms on competence between the Italian state and the regions.

The core directives relate to the Member States' obligation to remove non-cost barriers and, in particular, administrative obstacles to the increased deployment of renewable energy systems (Article 13 Directive 2009/28/EC).

In fact, the lack of transparent rules and coordination among the competent authorities is recognised as one of the major obstacles to the deployment of renewable energy system projects at the national level (Recital 41 of the Preamble to the Renewable Energy Directive).

EU Regulation No 1307/2014 of 8 December 2014 only defined the criteria and the geographic range of highly biodiverse grasslands for the purposes of Article 17 of Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources.

The Regulation underlines that the harvesting of raw materials is necessary to preserve the grassland status.

The D.lgs. 29 December 2003, n. 387 applied Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market at the national level; thus, the Italian framework on renewable energy systems and plant location provides a system based on economic incentives and a simplified administrative procedure for the authorisation of a massive plant. The procedure is called *Autorizzazione Unica* (AU). As mentioned above, this means a decision that collects the opinions of the various public administrations involved in the proceedings.

The AU is managed by the relevant Italian region, and, therefore, applications need to be addressed to the region where the plant will be located. An AU application initiates an administrative procedure called the *Procedimento Unico*, which is realised by means of a *Conferenza di Servizi* that brings all the relevant public administrations around the same table in order to protect the public interest regarding the location of the plant and renewable energy production.

Under Article 12, paragraph 10 of the national d.lgs. 29 December 2003, n. 387 on the promotion of electricity produced from renewable energy sources, guidelines have to be approved to identify the criteria for the location of plants powered by renewable energy sources.

However, the text of the Italian Constitution, for historical, social and political reasons (and because of the difficulty in amending it), does not expressly consider the environment as a value to be protected.

The most closely related explicit provision is in Article 9 of the Constitution, pursuant to which the Republic must safeguard the landscape and the historical and artistic heritage of the nation. In any event, the environment has been accorded politically unchallenged protection as the result of an evolving interpretation of Articles 9 and 32 (which protects individual and public health) of the Constitution in the case law of the Constitutional Court.

The new structure of Article 117 of the Italian Constitution "has provoked many competence conflicts between the State and the Regions, increasing their number and the relevance. The Regions had previously played a substantial role in protecting the environment (mainly in the context of town and land use planning, but also through other matters of regional competence) and the reform of 2001 appears to significantly limit their competence on environmental issues.'[23]

4. THE ITALIAN CONSTITUTIONAL COURT'S POSITION ON EU LAW AS A PARAMETER FOR THE INTERPRETATION OF THE COMPETENCE FOR ENVIRONMENTAL PROTECTION BETWEEN THE CENTRAL GOVERNMENT AND THE REGIONS

The Court has pointed out that, for the local legislature, the 'identification of criteria on the plant location powered by renewable energy sources' is forbidden in the absence of guidelines approved according to Article 12, paragraph 10, of the d.lgs. 29 December 2003, n. 387 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

The legislative history of the above-mentioned guidelines will not be addressed in this paper, as it is too vast to explain here. It is sufficient to state that the guidelines only entered into force in 2010, which was two years after the relevant law in the region of Puglia (an Italian region; part of judgment n. 166/2014).

However, in 2009, in judgment n. 282, the Italian Constitutional Court stated that the national rules regarding the promotion of electricity produced from renewable energy sources in the internal electricity market contained the fundamental principles of the Italian legal system for the concurrent competences on the production, transport and distribution of national energy. No local rules can derogate or contradict the national rules in this regard.

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[23] Lugaresi, *op. cit.* note 16

In judgments n.119/2010, n. 44/2011 and 224/2012, the Constitutional Court reinforced the above-mentioned position.

Thus, in the particular case of judgment n. 166/2014, it was said that the region of Puglia cannot depart from the provisions of the national laws for this area of competencies; if this were to occur, the regional law would be in violation of Article 117 of the Italian Constitution.

Therefore, the region of Puglia cannot establish a prohibition on building a biomass plant in an agricultural area, because Article 12, paragraph 7 of the d.lgs. n. 387 of 2003 establishes that energy plants from renewable sources – including large-scale plants subject to the AU – can be located in agricultural areas.

The national law, specifically Article 12, paragraph 7 of d.lgs. 387/2003, complies with the Renewable Energy Directive, pursuant to which biofuels cannot be obtained from raw materials grown on land with a high biodiversity value.

As matter of fact, an authorisation for a renewable energy plant will take into account the rules that support the agricultural sector, with particular reference to the production of traditional local foods, and the defence of biodiversity, the cultural heritage, and the rural landscape; however, an authorisation will also take into account the purpose of the EU law, which is to increase the production of energy from renewable sources (judgment n. 275 of 2012).

By contrast, where the law tempers this principle – by considering, among other things, the needs of the agricultural sector – it could be defined as an exception to the main rule. Any exception is to be applied and treated as limited (judgments n. 275 of 2012 and n. 278 of 2010).

In other words, the national law, by permitting certain limits to the location of plants in agricultural areas, preserves the 'correct insertion of the plants' in the landscape (Article 12, paragraph 10, of the d.lgs. n. 387 of 2003) and prevents damage from being inflicted on the environment and on agriculture. Nevertheless, the pursuit of the development of agricultural production does not assume the role of a fundamental principle in the matter, since this interest is far from the principal aim of the EU law and the national rules.

The Constitutional Court reaffirmed its criteria that the environment is both a constitutional value and a constitutional subject matter, and it made those criteria stronger and clearer.

In any case, this subject matter differs from the others, because its cross-sectional nature affects other matters.

5. CONCLUSION

The Court is entirely aware that other disputes will arise, because 'there is no way to foresee the extreme multiplicity of environmental and connected issues'[24].

Environmental protection is extremely broad and is subject to the goal of a high level of protection. It should also include the purposes of increasing the production of energy from renewable sources and complying with EU law.

National rules concerning authorisation and certification procedures, including planning systems for renewable energy installations, should respect the principles of objectivity, transparency, non-discrimination and proportionality (see Article 13 and Recitals 40, 41 and 42 to the Preamble of the Renewable Energy Directive) because the European Union legislator has respected the established principle of procedural autonomy.

Thus, national legislation on renewable energy is essential not only from an environmental and social perspective or an economic point of view but also to give an understanding of how the law of the European Union and the jurisprudence of the EU Court of Justice have influenced the interpretation of the Italian Constitution.

The Italian Constitutional Court's opinion is that that provision is linked to the fundamental rights enshrined in Article 11 of Constitution, and presupposes respect for the fundamental rights and principles guaranteed by the Italian Constitution.

The judgment n. 166/2014 was referred to the Italian Constitutional Court by the President of the Council of Ministers under the procedure for a declaration of the unconstitutionality of a law at the regional level. Given the decision of the Constitutional Court (judgment n. 166/2014), we must consider Article 117 of the Constitution a new step in the evolution of the model of interaction between the European and the Italian legal systems.

This was the first time, after 2001, that EU law was used by the Italian Constitutional Court as a parameter for the interpretation of the competence for environmental protection between the central government and the regions. Before 2001 there was no mention in the Italian Constitution or in any judgment of European Union law or the interaction between the national and the European legal system.

[24] *Ibid.*

In this new context, the Italian Constitutional Court, in a growing number of judgments, has started to use EU laws, and also principles from the EU Court of Justice, to analyse Italian rules in constitutional reviews.

We can consider the Italian Constitutional Court judgment n. 178/2015, and its reference to the Charter of Fundamental Rights of the European Union as an interpretation parameter; this judgment was given when the ordinary tribunals submitted to the Constitutional Court the question of the constitutional legitimacy of some provisions of Law Decree n. 98, July 6, 2011, relating to urgent acts for financial stabilisation.

The ordinary tribunals expressed doubts about the legitimacy of the suspension of collective bargaining and actions by civil servants, which, under the provisions mentioned above and subsequently Article 1, paragraph 255 of the Law of 23 December 2014, n. 190, laying down provisions for the preparation of the annual and multi-annual state budget (the 2015 Stability Law), was extended from 2011 until the end of 2015. This choice was made by the Italian government with the aim of cutting public spending. It was considered possible that the decision violated constitutional rights, such as the right to strike and to be represented by a trade union (Article 39 of the Italian Constitution), that are strongly linked to the possibility of negotiating and concluding collective agreements and implementing collective action.

After analysing the provisions contested by the ordinary tribunals, the Italian Constitutional Court held that the suspension of collective bargaining and the actions of public employees should be considered as being in conflict with the Italian Constitution, as such actions violate not only Article 39 of the Italian Constitution, but also all the provisions of international law that establish a secure connection between the right to union activity and collective bargaining action. One of the provisions of international law explicitly mentioned by the Constitutional Court was Article 28 of the Charter of Fundamental Rights of the European Union, which guarantees the 'right to collective bargaining and action'. The 'right to negotiate and conclude collective agreements' is recognised by Article 28 of the Charter of Fundamental Rights of the European Union, which was proclaimed on 7 December 2000 in Nice. Trade union freedom is protected by Article 39, paragraph 1 of the Italian Constitution, in both its individual and its collective dimension, and finds its fulfilment in negotiating autonomy. Various sources of international law help to define the functional link between a collective right, such as the right to collective bargaining, and trade union freedom; among these is Article 28 of the Charter of Fundamental Rights of the European Union. The

interpretation of the Italian constitutional source is therefore closely related to the evolution of European Union laws, and its coherence depends on the latter.

Judgment n. 129/2006 of 23 March 2006 is important because in it the Constitutional Court declared that European Directives are interposed rules, which is one of the parameters for assessing the conformity of regional laws with Article 117, paragraph 1 of the Constitution.

In the judicial developments (judgment 102/2008 and order no. 103/2008) regarding the Court of Justice, the Constitutional Court defined itself, for the first time, as a 'Court of a Member State' within the meaning of the former Article 234 of the EC Treaty, which allowed it to present a request for a preliminary ruling on the interpretation of Community law to the Court of Justice of the European Communities. It should be remembered that in its previous jurisprudence, in particular order no. 536/1995, the Italian Constitutional Court had always excluded this possibility in general terms. In 1995, the Constitutional Court, emphasising the nature of its functions and the peculiarities of its task, had refused to raise a preliminary question to the Court of Justice of the European Communities. Some scholars have argued that such a recognition, given by a request for a preliminary ruling, must be limited to main proceedings in which the Constitutional Court is the judge of the matter. In any case, the latest judicial developments (judgment 102/2008 and order no. 03/2008) in the jurisprudence of the Constitutional Court are a partial renewal of the strategy of the Italian Constitutional Court, which can be appreciated by looking at this jurisprudence. It has been stated correctly that the constitutional review of legislation shares specific characteristics with the normal jurisdictional function.

Through the road mentioned above, the Italian Constitutional Court reminds us how each constitutional court is the master of its own processes, and how each has designed its own structure and rules.

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23. Decreto Legislativo 31 marzo 2011, n. 55 Gazzetta Ufficiale, Serie Generale n. 97 del 28-04-2011
24. Decreto Legislativo 15 gennaio 2016, n. 7 Disposizioni in materia di abrogazione di reati e introduzione di illeciti con sanzioni pecuniarie civili, a norma dell'articolo 2, comma 3, della legge 28 aprile 2014, n. 67. (GU Serie Generale n.17 del 22-01-2016)
25. Decreto Del Presidente Della Repubblica 6 giugno 2001, n. 380, Testo unico delle disposizioni legislative e regolamentari in materia edilizia, Gazzetta Ufficiale - serie generale - n. 245 del 20 ottobre 2001)
26. Regio Decreto Legislativo 30 dicembre 1923, n. 3267. Riordinamento e riforma della legislazione in materia di boschi e di terreni montani, G.U. 17 maggio 1923, n. 117
27. Regio Decreto 30 marzo 1942, n. 327. Approvazione del testo definitivo del Codice della navigazione. Gazzetta Ufficiale n.93 del 18-4-1942
28. Regio Decreto 11 dicembre 1933, n. 1775, G.U, 8 gennaio, n. 5
29. Legge Regionale 21 ottobre 2008, n. 31, Norme in materia di produzione di energia da fonti rinnovabili e per la riduzione di immissioni inquinanti e in materia ambientale, Bollettino Ufficiale della Regione Puglia n. 167 del 24 Ottobre 2008

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THE POSSIBILITY OF DIRECT APPLICATION OF DIRECTIVES IN THE CASE PRACTICE OF THE CONSTITUTIONAL COURT OF MONTENEGRO

ABSTRACT

Analysis of the practice of the Constitutional Court of Montenegro in the last few years shows an evident increase in the number of cases in which the applicant is asking for an assessment of the compatibility of national legislative acts with the Constitution of Montenegro, asking for annulment because of alleged incompatibility with a certain EU directive. Therefore, this article discusses one of the most interesting questions which countries in the process of the accession to the European Union are facing – the status of the sources of EU law in the legal system of candidate countries before they become members of the European Union. In this context, the authors will examine the case law of the Constitutional Court of Montenegro related to situations where the Montenegrin legislator has transposed a directive into the domestic legal order. After comparative analysis, the article will shed more light on the subject stances and will discuss possible solutions depending on the facts of the case when the principle of the direct application of directives can be established.

Keywords: *directives, direct application, Association Agreement, Constitutional Court of Montenegro*

1. INTRODUCTION

The legal regime of the association of Montenegro to the European Union (hereinafter: EU) is defined by the Stabilisation and Association Agreement between the European Communities and its member states on the one side, and Montenegro on the other[1] (hereinafter: SAA) which entered into force on 1 May 2010. This is a type of international agreement that the EU concluded with "Western Balkans" countries, which establishes specific relations with the subject countries, giving them the possibility to became an EU member state (hereinafter: Member State). As a precondition for this political goal, the SAA requires the harmonisation of the Montenegrin legal system with the *acquis*. Regarding the secondary sources of EU law, directives represent the most important tool of this harmonisation. In this process Montenegro, according to the SAA, has the obligation to adopt all the directives from the *acquis* before it can become a full member of the EU.

Because the association process lasts for an uncertain period of time, the status of EU law sources – primary and secondary – in the Montenegrin legal system will represent a major challenge for all national state institutions, especially for the judiciary. Therefore this article deals with the question of the application of directives in the domestic legal system with special reference on the potential direct application of this secondary EU law sources before the Montenegrin judiciary. In this respect, significant guidelines can be found in the case law of the Constitutional Court of Montenegro (hereinafter: Constitutional Court) and the case law of the Court of Justice of the European Union (hereinafter: CJEU). In 2014 the Constitutional Court delivered its first decision in which it assessed the compatibility of domestic legislation with a directive which was incorporated into the domestic legal system. Until today the Constitutional Court had a few similar cases on the same subject and today we can say that those positions can be regarded as settled case law. However, reality creates specific legal situations which produce new challenges for the judiciary, including the possible "direct application" of directives that are not implemented in the Montenegrin legal system before the end of the association process.

2. THE STATUS OF EU LAW IN THE MONTENEGRIN LEGAL SYSTEM

One of the most important legal questions for every candidate state during the EU association process is the status of EU law in the national legal system. The legal basis for the application of EU law in the Montenegrin legal system is the

[1] Stabilisation and Association Agreement between the European Communities and its member states on the one side, and Montenegro on the other, Official Gazette No. 7/07

SAA, which represent a specific type of international agreement. A similar type of agreement, so-called "European agreements", represents the legal basis for the association process of Central and South-East European countries, therefore in this article we will use the term "association agreements" for both categories of international agreements. With the goal of ascertaining, the basic concepts of the SAA application in the Montenegrin legal system, comparative analysis shows that because of the lack of special constitutional provisions on the effects of EU law, in the majority of candidate countries association agreements were treated in the same way as any other international treaty or agreement.[2] Following this concept, the Constitution of Montenegro (hereinafter: Constitution) has provided direct application of the SAA, in the sense that citizens can exercise their rights and duties before the Montenegrin judiciary.[3] In other words, the founding fathers of the Constitution opted for a monistic approach which assumes that ratified and published international agreements make up part of the domestic legal order and have the supremacy over national legislation – laws and secondary legislation.

After entering into force, the SAA's provisions provide protection for citizens and legal persons directly acquiring rights on which they can rely before the judiciary of the contracting states.[4] Because of the fact that the preliminary ruling reference can be made only from the state courts of the Member States, the judiciary of the candidate state does not have this possibility, and they give an interpretation of the SAA's provisions or certain provisions from EU law. More precisely, interpretation of the association agreement's provisions in the domestic legal system of the candidate state is made by the highest national court instances – the supreme courts or constitutional courts.[5] The Montenegrin constitutional configuration of the judiciary gives this role to the Constitutional Court. This jurisdiction of the supreme court instances has brought about the question of whether legislative harmonisation should be accompanied by judicial harmonisation, that is, whether the national courts should apply the interpretation of the CJEU and take account of EU legislation when applying the provisions of domestic laws or the provisions of the association agreements?[6] Some authors define this process as "voluntary

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2 Rodin, S., *Pridruživanje Hrvatske Europskoj uniji – Preobrazba pravnog sustava*, in: Ott, K., (ed), Pridruživanje Hrvatske Europskoj, Institut za javne financije, Zaklada Friedrich Ebert, 2006, p. 224

3 Articles 9, 17 and 118 Constitution of Montenegro, Official Gazette of Montenegro, 01/07

4 Stanivuković, M., Đajić, S., *Sporazum o stabilizaciji i pridruživanju i prelazni trgovinski sporazum Srbije i Evropskih zajednica – pravno dejstvo i značaj*, Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008. p. 398

5 Stanivuković, M., *Pojedinac pred Sudom evropskih zajednica*, Službeni glasnik, Beograd, 2007, p. 161

6 Albi, A., *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, 2005, p. 52

harmonisation"[7]. This dilemma is more emphasised because, unlike the European Economic Area Agreement, the association agreements contain no provisions to the effect of consulting EU secondary legislation and the case law of the CJEU in the interpretation of its provisions.[8]

Since the judiciary is bound by the Constitution, legislation and international agreements which have the primacy over the law and are directly applicable, the logical conclusion is that in cases where a provision of the law represents a violation of a right which an individual has according an international agreement, the subject law cannot be applied, or – in the CJEU vocabulary – the legislative provision must be "set aside"[9]. In other words, it is possible to challenge the validity of the national legislative act before the Constitutional Court when it is not in line with the international agreement, claiming that is not in conformity with the Constitution. Confirmation of the subject statement can be found in the case law of the Croatian Constitutional Court, which considers that in cases where the law is contrary to an international agreement, it is at the same time contrary to the Croatian Constitution because there is a breach of the constitutional principle of the rule of law.[10]

Confirmation of this stance can be found in the general principle of interpretation of international agreements – *favour conventionis*. According to this principle, all the legislation must be interpreted by the courts in the context of international agreements, which represent part of the domestic legal system. This principle can be found in the case law of the German Constitutional Court:

"…*taking into account the guaranties of the European Convention for Human Rights and the Court for Human Rights decisions when interpreting the law*…"[11]

It follows that when it comes to the interpretation of a certain legal provision related to the application of the *acquis*, national law is the first interpretative tool that must be used. However, if there is a lack of valid indicators in the framework of the national legal system, it is logical to look through the guidelines in the EU law. One of the most significant SAA provisions – the "general harmonisation clause" – represents the best confirmation of this logic.[12]

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7 Evans, A., *Voluntary Harmonization in Integration between the European Community and Eastern Europe*, Eur. L. Rev., (22) 1997, p. 204

8 Albi, *op. cit*. note. 6, p. 52

9 Case C-106/77 Amministrazione delle finanze dello stato v Simmenthal, paragraph 22

10 Constitutional Court of Croatia U-I-925/95 and U-I-950/96

11 BVerfGE 111, 307 (Berücksichtigung der EMRK), in: Izabrane odluke Njemačkog Ustavnog suda, Konrad Adenauer Stiftung, 2009, p. 600

12 Article 72 paragraph 1 of the Stabilisation and Association Agreement between the European Communities and its member states on one side, and Montenegro on the other, Official Gazette No. 7/07

These legal positions are in line with the Constitutional Court's settled case law regarding the "interpretative effects of EU law", which provides the legal basis that in certain situations assesses the compatibility of national legislation with EU law sources. The Constitutional Court confirms the obligation that Montenegro has to harmonise its legal system with the *acquis* on the basis of the SAA and the fact that the dynamics of this process are governed by the National Programme of Integration of Montenegro into the EU (hereinafter: NPI):

"*…the Constitutional Court in this case had in mind the relevant provisions of the SAA…by which Montenegro took on the obligation to harmonise its legal order with the EU legal order before it became a member of the EU…and the dynamics of harmonisation is defined by the NPI.*"[13]

In the beginning of the analysis the Constitutional Court took a conservative approach considering that, at this moment of EU integration, Montenegro is a candidate state and therefore the Montenegrin legal system is still not a part of the EU's "constitutional legal order". This point of view was supported by the fact that the Constitution has not one provision that, in an explicit manner, clarifies the application of EU law in the national legal system. On the other hand, this circumstance means that the constitutional text also does not contain a prohibition preventing the provisions which are adopted in the process of harmonisation of the Montenegrin legal system with the *acquis* being interpreted in conformity with EU law:

"*A member state, in which status Montenegro is at this moment, is not part of the EU constitutional order. The Constitution does not contain provisions on the interpretations of EU law to which the Constitutional Court has to adhere, but also there is no (legal) ban against the Constitutional Court interpreting provisions which are adopted in the process of harmonisation of Montenegrin law with EU law.*"[14]

The principle of "interpretative effects of EU law" has its legal basis in the "general obligation to harmonise" the national legal system as a precondition of EU membership. In addition, Montenegro has agreed to harmonise certain parts of the domestic legal system within "clearly defined time limits":

"*This primarily comes out of the fact that harmonisation with the whole acquis is a necessary precondition for EU membership. Taking into account the interpretative effects of EU law by Montenegrin state bodies, and also by the Constitutional Court, represents an instrument of legal harmonisation, considering that Montenegro accepted*

[13] Constitutional Court of Montenegro U-I No. 29/16, 31 October 2017, paragraph 10.3.2

[14] Constitutional Court of Montenegro U-I No. 29/14, 21 April 2015, paragraph 11.3

the legal obligation to harmonise certain parts of its domestic law within clearly defined time limits."[15]

3. COMPARATIVE APPROACH IN THE APPLICATION OF DIRECTIVES IN THE CANDIDATE STATES

The "EU friendly" approach in interpreting association agreements was demonstrated by several highest national instances of countries that afterwards became EU Member Sates. Already in the 1997, the Polish Constitutional Court stated this Euro-friendly general rule of construction of domestic law:

"*Of course, EU law has no binding force in Poland. The Constitutional Court wishes, however, to emphasize the provisions of Article 68 and Article 69 of the (Polish Association Agreement)…Poland is thereby obliged to use "its best endeavours to ensure that future legislation is compatible with Community legislation"… The Constitutional Court holds that the obligation to ensure compatibility of legislation (born, above all, by the Parliament and Government) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility*".[16]

The Polish Supreme Administrative Court exploited this position in a statement that the obligation under the association agreement was violated not only by an unproper legislative implementation at the national level, but also by a judicial interpretation of the respective national legislative act, disregarding the acquis communautaire as a subsidiary source of law.[17]

The Chech Constitutional Court faced a claim of petitioners in the *Milk Quota* case which argued that EU could not be applied because it was not binding (note here a tension between binding and persuasive sources of law, typical for post-communist legal thinking, often unable to realize the importance of the latter sources). The Court rebuffed this idea, emphasizing the existence of general principles of law, common to all EU Member States. The content of these principles is derived from common European values; the general principles imbue with content the abstract concept of the state governed by the rule of law, which includes

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15 Constitutional Court of Montenegro U-I No. 35/10, 28 February 2014, paragraph 10.3

16 Kühn, Z., Arbor, A., *Making of European Transnational Constitution – Some Central European Perspectives*, in: Pernice I., Zemánek J. (eds.), The Treaty on a Constitution For Europe Perspectives After The IGC, NOMOS, 2005, p. 10

17 Zemánek, J., *The Constitutional Courts in the New Member States and the Uniform Application of European Law*, in: Pernice I., Kokott J.,Saunders C. (eds.), The Future of European Judicial System in a Comparative perspective,), NOMOS 2006, p. 258

human rights. The Constitutional Court must apply these principles - thus it must follow European legal culture and its constitutional traditions:[18]

"*Primary Community law is not foreign law for the Constitutional Court, but to a wide degree it penetrates into the Court's decision making – particularly in the form of general principles of European law*."[19]

Similarly, the Czech antitrust authority, staffed by young lawyers, many of whom have the benefit of foreign legal education and knowledge of foreign languages, has taken into account EU law in almost every important case. This practice was approved by the Czech High Court in the Skoda Auto case. In that case, the appellant, the most important Czech company, challenged the decision of the antitrust authority with the argument that EU law was not a binding source of lawin the national legal system and that, therefore, it could not be taken into consideration in the interpretation of the domestic law. The High Court rejected this claim, emphasizing the international links between national antitrust laws[20]:

"*The protection of free trade is specific in the way that national law is often not sufficient, and therefore is often enriched by the application of rules used in the countries with a long tradition of antitrust law (Germany, the United States). For that matter [the Czech antitrust law of 1991] received the basic ideas of the Treaty of Rome, particularly already mentioned articles 85, 86 and 92; this was from the perspective of harmonization of the legal systems of the European Communities and the Czech Republic an absolute necessity*."[21]

Subsequently the High Court concluded that it was not error of law if the public authority interpreted the Czech antitrust law consistently with the case law of the European Court of Justice and the Commission. The decision of the Constitutional Court validated this approach, emphasising that both the Treaty of Rome and the EU Treaty result from the same values and principles as Czech constitutional law; therefore, the interpretation of European antitrust law by European bodies is valuable for the interpretation of the corresponding Czech rules.[22]

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18 Kühn, Z., *The Application of European Law in the New Member States: Several (Early) Predictions*, German Law Journal, Vol. 06 No. 03, 2005, p. 568

19 Milk Quota Case, published as No. 410/2001 Official Gazette (English translation available at [http://www.concourt.cz])

20 Kühn, *op. cit.* note 18, p. 566-567

21 *Ibid.*, p. 566-567

22 Kühn, Z. *European law in the empires of mechanical jurisprudence: the judicial application of European law in Central European candidate countries*, Croatian Yearbook of European Law and Policy; Vol.1. No. 1, 2005, p. 7

But notwithstanding the general position of the highest national courts that EU law must be taken into account when interpreting domestic legislation, the question remains: what place do the EU's sources of law have in the national legal system? The Croatian Constitutional Court faced this dilemma in 2007 in the *Volkswagen* case. The highest Croatian court instance decided that EU law must be taken into account, but not as the primary source of law, but that its criteria, standards and instruments could be used as a supplementary interpretative tool:

"*In this way the Association Agreement and the Temporary Agreement obligate the bodies responsible for the protection of competition when delivering decisions in certain cases, to apply not only Croatian competition law but also to take into consideration the relevant EU Communities law… The EU Communities' interpretative criteria, standards and instruments are not applied as a primary source of law, but only as a supplementary interpretative tool*."[23]

More precisely, EU law has the purpose of filling in legal loopholes, taking into consideration the spirit of the national law and in a manner that is not contrary to domestic legislation:

"*It concerned the filling of legal loopholes in such a manner that it is appropriate to the spirit of the national law and is not contrary to the explicit solutions of the Law on competition…which was applied in this case*."[24]

Maybe the most complex legal situation arose when the applicant recalled the application of a certain EU law source which had not been implemented into the national legal order. In 1996 Professor Berke of ELTE University (Budapest) filed a submission with the Hungarian Constitutional Court contesting the constitutionality of certain provisions of the competition cooperation regime established by Article 62 EA and its Implementing Rules. In particular, Berke claimed that, by agreeing to directly apply the law of a foreign sovereign, the future formation of which cannot be influenced by Hungary, the Hungarian Republic had unconstitutionally transferred part of her legislative powers to that foreign sovereign. The Hungarian Constitutional Court rejected the possibility of applying the 'criteria' referred to by Article 62 (2) EA as private international law on the basis of the public nature of the competition law. Similarly, it rejected the possibility that the 'criteria' could enter the Hungarian legal system as generally accepted rules of international law on the basis that[25]:

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23 Constitutional Court of Croatia U-III-1410/2007

24 Constitutional Court of Croatia U-III-2934/2011

25 Volkai, J., *The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions*, Harvard Jean Monnet Working Paper 8/99, p. 4, 5, 14, 15

"*...the relevant criteria of the Community law cannot be equated in any respect with the generally accepted rules of international law or the norms of international ius cogens*."[26]

Finally, the Hungarian Constitutional Court found the law implementing the accession agreement partially unconstitutional, by ruling that EU law had no direct effect or direct applicability before accession. It highlighted that:

"*The mechanism of direct applicability is a typical characteristic of the relationship between the Community's legal system and the EU Member States. However, the situation following from the combination of Article 62(2) EA and Article 11R has to be assessed in the course of constitutional control with regards to the fact that the Hungarian Republic is not presently a Member State of the European Union*."[27]

Typical example of the subject legal dilemma was when the applicant alleged a violation of right contained in a certain directive before the Czech Constitutional Court and the Supreme Court in the case *Sugar Quota*[28], tako i pred Vrhovnim sudom. Both court instances supported the idea that directives are not directly applicable in the Czech legal order because the Czech Republic at the time was not EU Member State:

"*…validity of the agreement made between the parties on August 31, 1993 must be decided according to the then valid law, as both lower courts did. In contrast, laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the Community, and that is why the Czech Republic is not bound by these laws...*"[29]

Another example is the decision of the Slovak Supreme Court of August 25, 1999.[30] In that case the Supreme Court was invited by the parties to consider the fact that the interpretation of the law employed by the lower courts was contrary to the EU directive which the law was intended to transpose. The Court openly refused to consider EU law as an argumentative tool to interpret domestic law in a Euro-friendly way. The Court did not distinguish authoritative and persuasive arguments because in the world of limited law only binding sources exist; anything else is not the law and cannot be taken into consideration by a court. In the

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26 *Ibid.*, p. 16

27 Piqani, D., *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration*, European Journal of Legal Studies, Vol. 1, No. 2, p. 8

28 Kühn, *op. cit.* **note 22**, p. 9

29 Czech Supreme Court of December 12, 2000, 25 Cdo 314/99 (not published, but available at [http://www.nsoud.cz])

30 Kühn, Z., *The Application of European Law…op. cit.* note 18, p. 569

Slovak Supreme Court's view, "considering the current stage of EU integration," an argument based upon a European directive was not relevant.[31]

4. THE APPLICATION OF DIRECTIVES IN THE CASE LAW OF THE CONSTITUTIONAL COURT

Notwithstanding the fact that the SAA is directly applicable before the Montenegrin judiciary, there is a question mark over the application of a directive whose provision is contrary to a certain domestic provision when the text of the SAA does not mention at all the text of the subject directive. The Constitutional Court, according the principle of interpretative effect of EU law, has developed case law which can be considered as settled case law in situations where the directive has been implemented in the Montenegrin legal system. In this line of cases, the Constitutional Court assessed the constitutionality of the national legislation:

"*…taking into consideration the possibility of the interpretative effect of EU law, the Constitutional Court has assessed that the disputed provision of Article 27 paragraph 7 of the Law…is not contrary to the provisions of Article 135 paragraph 1(i) of Council Directive 2006/112 EC...*"[32]

The Constitutional Court treats directives as any other international source – an international agreement or generally accepted international rules – which means that the directive must be properly implemented in the national legal order. In other words, there is no direct applicability of directives, and their provisions must be incorporated into the national legislation – as laws or secondary legislation:

"*The Constitutional Court points out that only confirmed international agreements and generally accepted international rules form part of the Montenegrin legal order, in the sense of Article 9 of the Constitution, and that directives … notwithstanding whether they are legally binding secondary source of international law, are not directly applicable, but EU Member States and also states that want to become members of EU or are in the process of negotiations, implement them in national law in a manner that they regard as appropriate and determine in their own form and methods of implementation... For directives (in principle), legal acts which transpose them into the domestic legal order are necessary*."[33]

We consider it important to clearly define the difference between the notion of "direct application" and the notion of "direct effect" of a certain EU law source.

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31 *Ibid.*, p. 569

32 Constitutional Court of Montenegro U-I No. 11/15, 25 July 2017, paragraph 13

33 Constitutional Court of Montenegro U-I No. 29/14, 21 April 2015, paragraph 11

The difference between those two notions is not always clearly visible because both have the purpose of providing enforceable rights for individuals. When it comes to direct application, then the issue is about the way that an international source becomes valid law in the internal legal order of the state. In other words, it represents their applicability before the courts in actual cases. Direct effect, on the other hand, concerns the possibility of an individual to acquire certain subjective rights directly on the basis of international agreements and to claim this right before the national judiciary. Therefore, the fact that a certain international agreement fulfils the requirements of being directly applicable does not automatically mean that it will have a direct effect. On the other hand, there is no direct effect without direct applicability.[34]

The position of the Constitutional Court implies the logical conclusion that, if a directive is not transposed into the Montenegrin legal order, an individual cannot claim rights from the directive. In other words, if the directive is not implemented, the Constitutional Court has to refuse to assess the constitutionality of the national provision. Therefore, notwithstanding that this case law can be viewed in general terms as clear and precise, real life can be much more complicated and create legal situations the facts of which are not covered by those two clear-cut situations. The first example is the situation in which the SAA or NPI contains explicit time limits for the harmonisation of a certain part of the Montenegrin legal order with EU law, but the legislator fails to transpose a directive. A similar situation could arise when the time limit for harmonisation has expired and the EU legislator adopts changes to a certain directive which has already been implemented in the Montenegrin legal order. So, can the individual obtain legal protection before the Montenegrin judiciary in situations when the time limit for the implementation of a directive in the domestic legal system has elapsed? In this case Montenegrin citizens are in the same situation as EU citizens when n Member State fails to implement a certain rule from a directive within a time limit explicitly defined by this EU legislative act. At the level of the EU legal order, in this sort of legal situation EU citizens have the possibility to claim direct applicability of a directive which was not properly transposed or where there is a delay in its implementation in the domestic legal system.

The question is: could the Constitutional Court in this legal situation create a similar "principle of direct application of directives" based on the subject CJEU case law, before Montenegro gains full membership of the EU? We regard that this scenario is not impossible and that the legal basis for this view can be already found in the case law of the Constitutional Court. Namely, this conclusion is

[34] Medović. V., *Međunarodni sporazumi u pravu Evropske unije*, Službeni glasnik, Beograd, 2009, p. 133

made by combining two positions. Firstly, the Constitutional Court adopted a position that the directive "in principle" had to be transposed into the domestic legal order in the form of a general legal act – law or secondary legislation. This legal position does not sound final or exclude the possibility of exceptions. In other words, the fact that there is a legal principle does not mean that there are no situations when it may not be applied if there is a valid justification. Precisely for this reason, the CJEU has developed the doctrine of "direct application of directives" as an exception from a general principle, which the Constitutional Court has already emphasised in its case law:

"*Exceptionally, directives in EU Member States can have a direct vertical effect (an individual in relation to the state) but not a horizontal direct effect (an individual in relation to another individual). The direct effect of directives is exclusively the consequence of the failure of an EU Member State to implement in a proper manner a directive in the domestic legislation. In this case national courts recognize the direct effect of a directive (if the nature of the subject provision provides this possibility)… If it is not possible to apply the directive directly the provision of the domestic law is applicable, but in this case the subject provision must be interpreted in the spirit of the directive*."[35]

The second position from the case law of the Constitutional Court which is relevant for this subject is the explicit assertion that Montenegro has accepted "the legal obligation to harmonise certain parts of domestic law within clearly defined time limits". Therefore, if there is a delay in implementing a directive in part of the Montenegrin legal system for which the SAA establishes an explicit time limit for its harmonisation, the omission to transpose this EU source of law could be regarded as a breach of the obligations that Montenegro accepted on the basis of an international agreement. This omission could create the basis for individuals to claim direct effect of the provision of international law (directive) before the Montenegrin judiciary. This assertion is clearly related to the time limits contained in the SAA but, in regard to the time limits defined by the NPI, the situation is not so certain. Hence, the NPI is a general legal act which is adopted by the Government of Montenegro relating to the obligations that Montenegro has from the SAA. Therefore, this document is not an international agreement which is ratified in the Parliament of Montenegro. On the other hand, if we look at the case law of the CJEU regarding legal acts delivered in the implementation and execution of association agreements, there could be positions that support the idea that individuals can rely also on the time limits provided by the NPI. Namely, the CJEU has developed clear guidelines regarding the legal effects of decisions delivered by the Council for the implementation of association agreements in the EU legal

[35] Constitutional Court of Montenegro U-I No. 35/10, 28 February 2014, paragraph 10.2

system. Even though the CJEU has confirmed the direct effect of the association agreements provisions it has also confirmed the direct effect of decisions of bodies that have the jurisdiction to implement the SAA referring to same criteria:

"*The same criteria apply in determining whether the provisions of a decision of the Council of Association can have direct effect... Article 2(1)(b) of Decision No 2/76 and the third indent of Article 6(1) of Decision No 1/80 uphold, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years' legal employment in a Member State, to enjoy free access to any paid employment of his choice*."[36]

5. CONCLUDING REMARKS

The idea of "direct application of directives" in situations when the national legislator of a candidate state omits to transpose the directive into the particular area of the legal system for whose harmonisation the SAA provides explicit time limits basically relies on the fact that this legal document represents an international agreement which is signed, ratified and published, and is therefore binding for the parties. Therefore, the SAA is an international agreement that is legally binding for Montenegrin institutions and especially the judiciary. The fact that the SAA has the political goal of Montenegro becoming a full Member State does not mean that the subject fact must occur. In other words, the SAA has an indefinite duration and it will be applicable until Montenegro becomes a full Member State, or until it is cancelled. But while this international agreement is valid its provisions will be in force and "will have supremacy over national legislation and will be directly applicable when regulating relations differently from internal legislation", according to the explicit wording of Article 9 of the Constitution. Namely, the goal of the explicit time limits provided by the SAA is to ascertain that legal harmonisation in certain parts of the Montenegrin legal system will not depend on an uncertain political event – full EU membership – and to create a stable legal regime which will be in force regardless of the future development of the EU accession process. The question is: why should Montenegrin citizens and citizens of EU suffer negative consequences in situations when the Montenegrin legislator fails to implement a certain directive given that the SAA provides for an explicit time limit?

The relevant guidelines for the development of the "direct application of directives principle" can be found in the CJEU case law relating to similar legal situations. It is precisely the goal of this CJEU doctrine to give protection to an EU individual against the irresponsible behaviour of Member States when they fail to comply

[36] Case C-192/89 S. Z. Sevince v Staatssecretaris van Justitie, paragraphs 15 and 17

with international obligations, in the subject situation – to implement the rules contained in the directives. The article shows that the same case law of the Constitutional Court has not shut the door on this possibility. Despite the fact that the Constitutional Court took the position, as did practically all other national supreme court instances in the process of EU accession, that "for directives (in principle), legal acts which transpose them into the domestic legal order are necessary", the specific facts of a future case could create exemptions from this general principle.

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COMPENSATION FOR MIGRANTS DAMAGES FROM GUARANTEE FUND

ABSTRACT

This article will deal with the question of whether migrants from Asian and African countries are entitled to a compensation for the damage caused by a motor vehicle for which a compulsory insurance contract has not been concluded, from the assets of the guarantee fund. Migrants who were injured by the use of an uninsured vehicle in the Republic of Serbia addressed the Association of Serbian Insurers with a claim for damages. The Association of Serbian Insurers refused such requests on the grounds that the Serbian citizen in the country from which the migrant originated could not receive such compensation in the same case.

By an inductive method the author will, proceeding from individual decisions of the Association of Insurers of Serbia answer the question whether migrants in the Republic of Serbia can receive compensation for damage from the assets of the guarantee fund. By the dogmatic method, the author will come to the conclusion that the positive regulations of the Republic of Serbia grant migrants the right to compensation from the guarantee fund, but only if there is a guarantee fund in the country from which the migrant comes from, from which a Serbian citizen could be compensated. The axiological method will be applied at assessing the value by the specified conditions. The comparative method will be used to clarify whether according to the regulations of other countries located on the so-called "the Balkan route", migrants are entitled to receive compensation from the funds of the guarantee fund. The author will conclude that the countries, while adjusting to EU membership, should acknowledge migrants compensation for damages from the guarantee fund.

Keywords: *insurance, migrants, compulsory insurance in traffic, guarantee fund*

1. INTRODUCTION

The European migrant crisis reached its peak in 2015. It did not equally affect all European countries, and those exposed to the crisis had various reactions. Some of the European countries, which are the ultimate destination of migrants, including refugees and economic migrants, patiently kept receiving and taking care of them, some countries only allowed their free passage, and some countries viewed mi-

grants as a security threat that can emerge on their borders.[1] More than 769,000 migrants to Europe entered the so-called Balkan route[2]. Migrants on this route kept coming from Greece, via Macedonia (in fewer cases through Bulgaria) to Serbia. At the end of 2015, Hungary raised a wired fence and closed the border first towards Serbia (in mid-September), and then towards Croatia (in mid-October), which is why Croatia was on the path to the final destination of migrants - Austria and Germany.[3]

Migrants are exposed to various risks on their journey. In the course of the year 2015, accidents occurred when traveling at sea,[4] but also in motor vehicles.[5] In the aspirations of people from war-affected, unstable or poor countries to emigrate and the restrictive immigration policies of more stable and advanced countries, the idea of smuggling people has been encouraged.[6] Human smugglers use motor vehicles for their forbidden deals. It is possible that the documents for these vehicles are forged, that the license plates are false, that the ownership data are not true, or that vehicles that are not properly registered or insured are used during the transportation of illegal migrants. Migrants are therefore at risk of being victims of traffic accidents caused by uninsured motor vehicles.

Such accidents happen and leave serious consequences. One of them happened on February 24, 2015, about 4 hours after midnight in southern Serbia, on the road between the Macedonian border and the city of Niš, near the town of Leskovac, or the village of Donje Krajince. In this accident, 41 people from Asian and African countries were injured and all of them were transported in one Fiat Ducato van.

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1 Tatalović, S., Malnar, D., *Sigurnosni aspekti izbjegličke krize,* Političke analize, Vol. 6, No. 23, 2015, p. 23

2 Grba-Bujević, M., Dragosavac, M., Janev-Holcer, N., Važinić, D., *Odgovor zdravstvenog sustava Republike Hrvatske na migrantsku krizu u razdoblju od 16. rujna do 31. prosinca 2015*, Liječnički vjesnik, Vol. 138, No. 3-4, 2016, p. 99

3 Čapo, J., *The security-scape and (In)Visibility of Refugees: Managing Refugee Flow through Croatia,* Migracijske i etničke teme, Vol. 31, No. 3, 2015. p. 387

4 E.g. In the shipwreck which took place on April 19, 2015 between the coast of Libya and the Italian island of Lampedusa 700 migrants perished, Kingsley, P., Bonomolo A., Kirchgassner, S. , *700 Migrants Feared Dead in the Mediterranean Shipwreck.* The Guardian April 19. 2015 [https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwrek-wo-rst-yet] Accessed 24 February 2018

5 E.g. On August 27, 2015, a truck was found in Austria, near the Hungarian border, in which there were bodied of 71 persons who suffocated. Angerer, C., Jamieson, A., 71 *Dead Refugees Found in a Truck on Austria Highway: Officials.* NBS News 28. August 2015 [https://www.nbcnews.com/storyline/europes-border-crisis/71-dead-refugees-found-truck-austria-highway-offi cials-n417536] Accessed 24 February 2018

6 Mijalković, S., Petrović, I., *Bezbednosni rizici savremenih migracija*, Nauka, bezbednost, policija, Vol. 21. No. 2. 2016. p. 3

The accident did not involve another vehicle, nor a pedestrian. Shortly before the accident, the van swept to the right, then crossed over the emergency stopping lane and rolled out of the road. The van had the registration plate NI 051-ĆH.[7] These license plates have not been issued for the van, but for the Ford Fiesta economy car.[8] So the Fiat Ducato van was an unregistered and uninsured vehicle.

The injuries of some victims from this traffic accident were particularly severe. At least three people remained permanently disable - immobile due to injuries sustained in the accident.[9] Due to injuries from the mentioned accident, O. S. from Bangladesh remained permanently immobile (quadriplegia). He was 17 years old at the time of the accident.[10] Due to such a serious consequence of a traffic accident, the issue of damages is necessarily raised.

The guarantee fund, or similar legal institute exists in European countries. Such an institute in Europe allows the damaged person to receive compensation if damage is caused by vehicles for which the compulsory insurance contract has not been concluded. The main purpose of this institute is to provide compensation for damages in the same scope and under the same terms and conditions as if a compulsory insurance contract was concluded.[11]

The author will try to answer the question of whether migrants from Asian and African countries are entitled to compensation for damage caused to them by an uninsured motor vehicle in countries on the Balkan route. Most attention will be paid to the law of the Republic of Serbia. The author believes that this is justified because the accident that is the reason for the writing of this article occurred in Serbia and because the largest land part of the Balkan route passes through the territory of the Republic of Serbia. Also, Serbia is expected to amend regulations on compulsory insurance in traffic.[12] A planned legal change may be an opportu-

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7 Basic Public Prosecutor's Office in Leskovac, Record of the investigation Ktr. 321/2015 dated February 24, 2015

8 A check was made through the site of the Association of Serbia Insurers, [http://uos.rs/servis-za-gradjane/ for the date 24 February 2015] Accessed 25 March 2018

9 Association of Srbian Insurers case file No. Gf-00734/18 and case file No. Gf-00028/18

10 Association of Srbian Insurers case file No. Gf-00028/18

11 Cerović, M., *Uloga i cilj organizacije garantnog fonda u zemljama u okruženju i nekim zemljama Evropske unije,* Zbornik radova Udruženja za pravo osiguranja Srbije, Palić, 2009, pp. 241-242

12 In an interview published in July 2017, the Secretary General of the Association of Serbian Insurers in the magazine Svjet osiguranja (World of Insurance) - Release for Serbia, Montenegro and Macedonia, announced the revision of the amendments to the Serbian regulation on the insurance of motor vehicles. Lapčić V., *Srpsko tržište osiguranja se menja na bolje*, Svjet osiguranja – Izdanje za Srbiju, Crnu Goru i Makedoniju, No. 7, 2017 [http://www.svijetosiguranja.eu/sr/clanak/2017/7/srpsko-trziste-osiguranja-se-menja-nabolje,1623,21305.html] Accessed 18 March 2018

nity to regulate the position of migrants who have been injured in traffic accidents caused by uninsured motor vehicles in a more equitable way.

The approach of the European Union to the issue of accession of the Western Balkan countries to the Union is called the stabilisation and association process. The aim of this process is regional and bilateral activities in order to achieve the stabilisation of the countries of the Western Balkans, and then their accession to the European Union.[13] An integral part of the process is conclusion of the Stabilisation and Association Agreements between the countries of the Western Balkans and the European Communities and its members. [14] The Republic of Serbia has concluded and ratified by law the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part in 2008, Official Gazette of the Republic of Serbia – International Contracts, no. 83/2008 (hereinafter: SAA). The fair regulation of compensation for damages caused to migrants by an uninsured motor vehicle would contribute to the European integration of the Republic of Serbia, as well as the fulfillment of the obligations that the Serbia undertook with SAA.

2. GUARANTEE FUND IN EU LAW

The first attempt to harmonize motor vehicle insurance regulations was made by the European Convention on Compulsory Insurance against Liability in respect of Motor Vehicle Damage (hereinafter: the Strasbourg Convention), which was concluded in 1959 under the auspices of the Council of Europe.[15] The provision of Article, 9 paragraph 1 of this international treaty stipulates that each Contracting Party shall establish a guarantee fund or to make other equivalent arrangements in order to compensate the injured parties for damages caused by a vehicle for which the compulsory insurance contract has not been concluded. Paragraph 2 of this Article gave countries the freedom to require the recourse to foreign nationals the right to compensation through reciprocity.[16]

The Strasbourg convention had never become effective, due to the fact that there were very few ratifications, but it had a very strong influence on later European

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13 Radivojević, Z., *Sporazumi o stabilizaciji i pridruživanju u pravu Evropske unije*, Zbornik radova Pravnog fakulteta u Nišu, No. 62, 2012, pp. 60-61

14 Glintić, M., *Sporazum o stabilizaciji i pridruživanju pred Evropskim sudom pravde,* Strani pravni život, No. 3, 2013, p. 107

15 Pak, J., *Pravo osiguranja,* Univerzitet Singidunum, Beograd, 2013, p. 100

16 Council of Europe, European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles
[https://rm.coe.int/16800656cd] Accessed 24 February 2018

regulations.[17] However, EU directives have gone further than the Strasbourg Convention in an effort to provide even wider protection to the injured persons.[18]

The Second Directive of the Council of the European Economic Community 84/5/EEC of December 30, 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L 8 (hereinafter: the Second Directive) is the first regulation which obliged countries to set up a guarantee fund. By virtue of Article 4, paragraph 1 of the Second Directive, Member States are liable to establish or authorize an existing body which will provide damages to damaged persons in the event of damage caused by a vehicle for which compulsory insurance has not been concluded. Provision of Article 10, paragraph 1 of the current Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability OJ L 263/11 (hereinafter: the Codified Directive) is essentially identical to the said provision of the Second Directive.

The Directives did not retain reciprocity as a condition for the compensation of foreign nationals from the guarantee fund, although the Strasbourg Convention prescribed that condition. The Second Directive and the Codified Directive do not prescribe that the right of a foreign citizen to compensation for damage caused by an uninsured vehicle may be ruled out due to lack of reciprocity.

Countries with which Stabilisation and Association Agreement has been concluded should, inter alia, harmonize their law with acquis communautaire.[19] By signing SAA Serbia committed itself to harmonizing its existing and future regulations with the Community acquis. [20] Serbia's obligation to harmonize existing and future laws with acquis communautaire began to apply form the date of conclusion of the SAA, and it should be fully completed within six years of it becoming effective.[21] The SAA entered into force on September 1, 2013.[22] Serbian law should

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17 Ćurković, M., *Zaštita žrtava cestovnog prometa kroz instituciju garancijskog fonda,* Zbornik radova sa 26. susreta osiguravača i reosiguravača Sarajevo, Sarajevo, 2015, p. 206

18 Pak, *op. cit.* note 13, p. 102

19 Vukadinović, J., *Stabilization and Association Agreement as a special instrument of EU foreign policy*, Strani pravni život, No. 4, 2015, p. 96

20 See: Article 72 of the SAA

21 Stanivuković, M., Đajić S., *Sporazum o stabilizaciji i pridruživanju i prelazni trgovinski sporazum Srbije i Evropskih zajednica – pravno dejstvo i značaj,* Zbornik radova Pravnog fakulteta u Novom Sadu, No. 1-2, 2008, p. 398

22 The Delegation of the European Union to the Republic of Serbia, *Stabilisation and Association Agreement*.

therefore be aligned as soon as possible with the acquis communautaire. Codified Directive is one of the European regulations with which Serbian law should be harmonized.

When determining the true meaning of the provision to be interpreted, its objective must be also taken into account. International general acts on motor vehicle liability insurance, including EU directives, aim to provide simple and fair compensation for injured parties.[23] Court of Justice of the European Union in the judgment *Vnuk v Zavarovalnica Triglav* noted that motor vehicle insurance directives were aimed at liberalizing the traffic of good and services, and protecting victims from the accidents caused by a motor vehicles. The development of communal regulations in the field of compulsory insurance in traffic confirms that these regulations aim to protect the injured persons from a traffic accident. The obligation of Member States to set up bodies with the task of providing compensation for damage caused by uninsured vehicles (guarantee fund), is one of the proofs that European legislator sought to strengthen the economic protection of victims of traffic accidents during the adoption and amendment of directives.[24]

When rendering the judgment in the case *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España u Unespa — Unión Española de Entidades Aseguradoras y Reaseguradoras the Court of Justice of the European Un*ion assessed whether the right of the injured person to compensation for damage caused by the use of motor vehicle could be denied without explicit reference in a provision of the Codified Directive. By interpreting the said judgment, we can conclude that the right to compensation of damages to the injured party under the Codified Directive cannot be excluded by national legislation, except in the cases expressly provided for in the Codified Directive.[25]

With in the judgment in case *Vnuk* the Court of Justice of the European Union pointed out that the provisions of the Directive should be interpreted in accordance with their objective, which is the protection of the injured parties. According to the judgment in the case *José Luís Núñez Torreiro*, it can be concluded that the Court of Justice of the European Union considers that the injured parties

[https://europa.rs/serbia-and-the-eu/keydocuments/stabilisation-and-association-agreement/?lang=en] Accessed 5 May 2018

23 Čolović, V., *Međunarodno osiguranje autoodgovornosti,* Dosije, Beograd, 2007, p. 104

24 C-162/13 *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] ECLI:EU:C:2014:2146, par 49, 50, 52, 53

25 C-334/16 *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unespa — Unión Española de Entidades Aseguradoras y Reaseguradoras* [2017] ECLI:EU:C:2017:1007, par. 36

under the Codified Directive may be restricted by national legislation only if there is an explicit basis for the restriction in a provision of the Codified Directive.

Based on the understanding of the above mentioned judgments and the fact that the Codified Directive tells nothing about possibility of foreign citizens to compensate damage caused by uninsured vehicle, it can be concluded that the law of the European Union does not leave possibility for the Member States to restrict the right of a foreign nationals to compensate damage caused by an uninsured vehicle. European Union law does not allow the right of a foreign national to compensation for damages caused by an uninsured motor vehicle, to be excluded due to lack of reciprocity.

Recognition of the right to compensation of damages from the assets of the guarantee fund, regardless of the nationality of the injured party, is a standard that is desirable to be met from the standpoint of the law of the European Union.

Guarantee fund or a similar institution liable for damage caused by uninsured motor vehicle, exists and operates in the Member States of European Union. For example it Germany *Verkehrsopferhilfe e.V,*[26] in France *Fonds de Garantie des Assurances Obligatoires de dommages,*[27] and in Italy *Fondo di garanzia per le vittime della strada.*[28] In these countries, damage to a foreigner caused by an uninsured motor vehicle will be compensated under the same conditions as the damage caused to a domestic person.[29]

3. REGULATIONS OF THE REPUBLIC OF SERBIA

The guarantee fund in Serbian law was first established by the Law on the Insurance of Property and Persons, Official Journal of SRY, No. 30/1996, 57/1998,

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26 See: Verkehrsopferhilfe e.V.
URL= http://www.verkehrsopferhilfe.de/en/, Accessed 6 May 2018

27 See: Fonds de Garantie des Assurances Obligatoires de dommages
[https://www.fondsdegarantie.fr/fgao/fonctionnement/] Accessed 6 May 2018

28 See: Fondo di garanzia per le vittime della strada
[https://www.consap.it/servizi-assicurativi/fondo-di-garanzia-per-le-vittime-della-strada/] Accessed 6 May 2018

29 See: Council of Bureaux, *Guarantee Fund Compendium D – Germany*, p. 3
[http://www.cobx.org/content/default.asp?PageID=58&DocID=67083] Accessed 6 May 2018
See also: Council of Bureaux, *Guarantee Fund Compendium F – France,* p. 2
[http://www.cobx.org/content/default.asp?PageID=58&DocID=67135] Accessed 6 May 2018
See also: Council of Bureaux, *Guarantee Fund Compendium I – Italy*, p. 3
[http://www.cobx.org/content/default.asp?PageID=58&DocID=67141] Accessed 6 May 2018

53/1999, 55/1999 (hereinafter: ZOIL).[30] After this law, the Law on Compulsory Traffic Insurance was adopted, Official Gazette of the Republic of Serbia, No. 51/2009, 78/2011, 101/2011, 93/2012, 7/2013 (hereinafter: ZOOS).

ZOOS provides for the incorporation of the Guarantee Fund as a separate legal entity founded by the Republic of Serbia.[31] The primary function of this legal entity is the compensation for damage caused by a motor vehicle for which a compulsory liability insurance contract has not been concluded.[32] The initial version of the ZOOS stipulated that this legal entity should start performing its activities within two years of the Law becoming effective.[33] This deadline expired on October 13, 2011. The Law on Amendments to the Law on Compulsory Traffic Insurance, published on October 19, 2011 in the Official Gazette of the Republic of Serbia, No. 78/11, extended the deadline by June 30, 2012.[34] However, the Guarantee Fund, in the form provided by the ZOOS, was not formed even in the extended period, nor afterwards. The Guarantee Fund as a special legal entity founded by the Republic of Serbia does not exist at all.

Transitional provisions of the ZOOS stipulate that until the commencement of the work of the Guarantee Fund, within the meaning of this Law, the activities from its scope of work are performed by the Association of Serbian Insurers, in accordance with the previously applicable regulation.[35] This earlier regulation is ZOIL.

ZOIL prescribes establishing of funds that will, among other things, be intended to compensate for damage caused by uninsured motor vehicles.[36] ZOIL called these funds a guarantee fund. Dealing with claims and payment of compensation for damages from the assets of that fund is a public authorization, which was entrusted to the Association of Serbian Insurers by law.[37] The guarantee fund in the sense of ZOIL could be defined as a separate property unit managed by the

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30 Šulejić P., *Garantni fond u novom Zakonu o obaveznom osiguranju u saobraćaju*, Pravni život, No. 10, 2004, p. 934

31 Article 73 of ZOOS

32 Article, 76 paragraph 1 item 1 and Article 91 paragraph 1 of the ZOOS

33 Article 111, paragraph 1 of the Law on Compulsory Traffic Insurance of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 51/09

34 Article 2 of the Law on Amendments to the Law on Compulsory Traffic Insurance, Official Gazette of the Republic of Serbia, No. 78/11

35 Article 111, paragraph 1 of the ZOOS

36 Article 99, paragraph 1 item 1 and Article 104, paragraph 1 of the ZOIL

37 Article 143, paragraph 1 item 5 of the ZOIL

Association of Serbian Insurers, which is intended (inter alia) for compensation for damages caused by uninsured motor vehicles.[38]

The laws of the Republic of Serbia provide for two guarantee funds with different time-defined scope of business, which compensate the damage by two different legal regimes.[39] One is regulated as a separate legal entity founded by the state and the other as a property unit managed by the Association of Serbian Insurers.

Entities, competent to act in the Republic of Serbia for claims for damages caused by uninsured vehicles, do not agree on the fact which law should be applied. The courts pass verdicts mostly by applying the provisions of the ZOOS, and not the provisions of ZOIL.[40] Although, in the judicial practice, there are also opposite cases.[41] The Governor of the National Bank of Serbia in the letter K.G. No. 2670/1/15 of July 13, 2015 states that the Guarantee Fund as a separate legal entity whose establishment anticipates the ZOOS has not yet been established, and therefore the provisions of the ZOIL are still applicable.[42] The Association of Serbian Insurers considers that the right to compensation for damage caused by an uninsured vehicle is realized in accordance with the provisions of ZOIL.[43]

The differences between the provisions of the two laws, for a damaged person from abroad, at some point could be significant.

International cooperation and protection of foreign citizens, in the nineties of the twentieth century when ZOIL had been passed, were not a priority of the Republic of Serbia. The provision of Article 107, paragraph 1 of this Law has limited the right of a foreign citizen to compensation for damages from the guarantee fund by

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38 ZOIL did not explicitly define the guarantee fund as a property unit managed by the Association of Insurers. However, from the provisions of Article 99, 100 and 143, paragraph 1 item 3, 4 and 5 and paragraph 3 of ZOIL it can be concluded that that the guarantee fund is a property unit managed by the Association of Insurers, intended (inter alia) for compensation for damage caused by an uninsured motor vehicles

39 Slavnić, J., *Nedostaci u načinu organizovanja garantnog fonda i propisanim merama nadzora u novom Zakonu o obaveznom osiguranju u saobraćaju,* Revija za pravo osiguranja, No. 3, 2010, p. 11

40 E.g. Judgments of the Appellate Court in Belgrade Gž. 5268/16 dated October 5, 2016 and Gž. 5926/16 dated November 17, 2016, judgment of the High Court in Belgrade, Gž. 13420/15 dated June 1, 2017, judgment of the Appellate Court in Novi Sad, 2761/17 dated September 14, 2017 and judgment of the High Court in Zrenjanin, Gž. 243/15 dated January 20, 2016 were made by applying the provisions of the ZOOS

41 E.g. The Appellate Court in Belgrade in judgment Gž. 6393/15 dated May 12, 2016 explained that the provisions of ZOIL should apply, and not the provisions of the ZOOS, due to the fact that the Guarantee Fund in the form anticipated by the ZOOS was not constituted

42 A letter of Governor of the National Bank of Serbia No. K.G. 2670/1/15 of July 13, 2015

43 A letter from the Association of Insurers of Serbia Gf-01062/14 dated January 29, 2015 sent to the National Bank of Serbia

reciprocity. A foreign citizen who has suffered damage in the territory of Serbia, under the said provision, is entitled to compensation from the Serbian guarantee fund only if the citizen of Serbia has the same right in the country of citizenship of the injured person. Professional authorities in the Republic of Serbia, at the time of adoption of the ZOIL, considered that the compensation of damages from the guarantee fund is "one special advantage", which "is primarily intended for domestic citizens, and only if there is reciprocity, for foreign citizens also who have suffered damage in our country." [44]

The Serbian legislator has introduced a provision in the ZOOS that excludes reciprocity as a condition for compensation of damage to a foreign citizen. Article 96 of the ZOOS prescribes that a person who is not a national citizen who suffers damage in the territory of Serbia due to the use of an uninsured means of transport has the right to compensation in accordance with that law.

A statutory provision that explicitly prescribes that a foreign national is entitled to compensation the Guarantee Fund, regardless of reciprocity, is favorable to injured foreign nationals. However, the transitional provisions of the ZOOS postponed the application of Article 96 of that law. The rule that the damage caused by an uninsured motor vehicle can be compensated irrespective of the citizenship status of the victim of a traffic accident, according to the Serbian law, will be applied after the Republic of Serbia becomes a full member of the World Trade Organization.[45] Serbia has postponed the application of the universal principle until its own admission to the international trade organization.

4. PRACTICE IN THE REPUBLIC OF SERBIA

Serbian regulations on the protection of victims of traffic accidents contain certain shortcomings. However, it cannot be said that the right of injured persons to compensation for damage from a traffic accident in Serbia is illusory, and that it is only possible in theory. The compensation for damage caused by uninsured motor vehicle in Serbia is effectively and efficiently realized.[46] Indemnification is often

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44 Jankovec, I., in: Šulejić, P., Jankovec, I., Ogrizović, D., Rajičić, B., *Zakon o osiguranju imovine i lica – Komentar*, Dunav preving, Beograd, 1996, p. 205

45 Article 117, item 5 of the ZOOS

46 According to the data of the Association of Serbian Insurers contained in the review of the number of registered, resolved and unresolved cases of the guarantee fund for 2015, 2016 and 2017: 686 claims for compensation for damage caused by uninsured motor vehicle were settled out of cort in 2015, and on that basis over 2 million euros were paid; In 2016, 815 requests for compensation for damage caused by uninsured motor vehicles were settled out of court, and over 2 million and 400 thousand euros were paid on this basis; In 2017, 739 requests for damages caused by uninsured motor vehicles were settled out of court, and over 2 million and 100 thousand euros were paid on that basis

obtained by domestic citizens, but also citizens of countries with whom Serbia has intensive traffic connections.[47]

The right to compensation for damage caused by an uninsured motor vehicle is relatively reserved for Serbian nationals in Serbian practice. Foreigners can exercise this right, but under one additional condition that does not apply to citizens of the Republic of Serbia. This condition is reciprocity.

Reciprocity in its content can be formal or material. Formal reciprocity has been established when domestic citizens in a foreign country are equal with the citizens of that country, and the citizens of that country are equal with our citizens. Material reciprocity, however, means giving the foreigner the rights that a national citizen enjoys in the country of that foreigner.[48]

The court practice in the Republic of Serbia considers that material reciprocity is necessary in order to compensate the damaged party from abroad for the compensation for damage caused by an uninsured motor vehicle. The judgment of the Commercial Court of Appeals Pž. 2917/17 dated June 28, 2017 has been passed concerning damage caused in Belgrade to a foreign legal entity registered in the State of Delaware (federal unit of the United States of America). The damage was caused by an uninsured motor vehicle in traffic. The damaged legal entity initiated a lawsuit to compensate for the damage from the assets of the guarantee fund of the Association of Serbian Insurers. The Commercial Court of Appeal, when passing the verdict, proceeded from the fact that there was no guarantee fund in the State of Delaware nor a similar institution. For this reason, he assessed that the laws of the said foreign state do not provide the Serbian citizen with the rights that the legal entity in the Serbia is seeking, and that the necessary condition of reciprocity is not met.[49]

Based on the above-mentioned case-law, it can be concluded that foreign citizens in Republic of Serbia have the right to compensation for damage from the guarantee fund, only if they come from the countries where the guarantee fund operates. If the law of the state of the injured person does not know the guarantee fund nor

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47 E.g. Association of Serbian Insurers from the assets of the guarantee fund paid compensation for damage caused by uninsured motor vehicle: to the damaged party A. B, a citizen of the Federal Republic of Germany, in the case Gf-01101/15; to the damaged party B. B., a citizen of the Republic of Croatia, in the case Gf-01279/14; to the damaged party G. P, a citizen of the Federal Republic of Austria in the case Gf-01244/14

48 Varadi, T., Bordaš, B., Knežević, G., Pavić, V., *Međunarodno privatno pravo*, Pravni fakultet Univerziteta u Beogradu, Javno preduzeće Službeni glasnik, Beograd, 2007, pp. 215 - 216

49 Commercial Court of Appeals, Judgment Pž. 2917/17 dated June 28, 2017

a similar legal institute, the damaged person will not be able to receive compensation from the guarantee fund at the Association of Serbian Insurers.

Migrants, who on their way to the central European Union countries pass through the territory of the Republic of Serbia, most often come from Asian and African countries that are affected by war, are unstable or very poor. A guarantee fund or a similar body, in such countries do not exist neither *de iure* nor *de facto*. Serbian citizens in such countries would not be able to receive compensation for damage because there is simply no guarantee fund there. Material reciprocity, as a condition necessary in Serbia for a foreign citizen to receive damages, is not fulfilled.

A claim for compensation of damage to the Association of Serbian Insurers was submitted by some of the persons injured in a traffic accident that occurred on February 24, 2015 in Serbia, near the town of Leskovac, when the Fiat Ducato van with 41 passengers skidded from the road. B.B. and M. O. from the Federal Republic of Nigeria and O. S., a citizen of the People's Republic of Bangladesh, sought compensation for damages from the guarantee fund. Association of Serbian Insurers rejected the claims of those injured parties. The reason why the damages were rejected was the lack of reciprocity between the Republic of Serbia and the countries which the specific injured persons come from.[50] The Association of Serbian Insurers in Serbian laws and practices of the courts of the Republic of Serbia had a reliable basis to reject claims for damages in these specific cases.

5. REGULATIONS OF OTHER COUNTRIES OF THE BALKAN ROUTE

The first European country on the Balkan migrants' route is Greece. Obligatory traffic insurance in the Republic of Greece is governed by Law 489/76, "Compulsory Insurance of Civil Liability arising from Motor Accidents", Government Gazette, No. A '331/1976, A' 253/1981, A' 118/1985, A' 227/1989, A' 98/1991, A' 150/1993, A' 186/1996, A' 87/97, A' 199/1999, A' 249/1999, A' 178/2000, A' 128/2001, A' 7/2003, A' 297/2005, A' 100/2007, A' 174/2008, A' 27/2009, A' 128/2010, A' 220/2012, A' 81/2013, A'107/2014, A' 194/2014, A' 13/2016. The provision of Article 16 of this Law establishes the Auxiliary Fund for the insurance of Liability arising from Motor Accidents (hereinafter: Auxiliary Fund) as a separate legal entity. Auxiliary Fund, among other things, is obliged to pay damages to the damaged person if a traffic accident is caused by a motor vehicle for which the

[50] Association of Serbian Insurers, Decision No. Gf-00734/16 dated November 1, 2016, Decision No. Gf-00027/18 dated 15 January 2016, and Decision No. Gf-00027/15 dated 7 February, 2018

obligation to conclude the insurance contract has not been met.[51] Greek law does not exclude the possibility that foreigners receive compensation from the Auxiliary Fund, nor does it make reciprocity as a precondition. Therefore, refugees and economic migrants from Asian and African countries could be compensated in case of injuries in Greece caused by an uninsured motor vehicle.

Mandatory insurance of motor vehicles in the Republic of Macedonia is governed by the Law on Compulsory Traffic Insurance, Official Gazette of the Republic of Macedonia. 88/2005, 70/2006, 81/2008, 47/2011, 135/2011. Article 58 of this Law obliges the Macedonian National Insurance Bureau to establish a guarantee fund. The primary purpose of this fund is compensation for damage caused by uninsured motor vehicles in the territory of the Republic of Macedonia. The conditions under which the right to compensation for damage from the guarantee fund can be exercised by the Macedonian National Insurance Bureau are stipulated in Article 60 of the Law on Compulsory Traffic Insurance of the Republic of Macedonia. The provision of paragraph 5 of this Article stipulates that a person who is not a citizen of the Republic of Macedonia may be compensated from the assets of the Macedonian guarantee fund only if in the country of his citizenship a citizen of Macedonia can exercise the same right. The right to compensation from the guarantee fund in Macedonia is conditioned by material reciprocity. Therefore, migrants from countries where the guarantee fund does not function, cannot receive compensation in the event of a traffic accident caused by an uninsured motor vehicle in Macedonia.

In Bulgaria Code on Insurance, State Gazette, No. 102/2015 is in force. This code contains about 650 articles. Among other things, it contains provisions on compulsory insurance in traffic and the guarantee fund. The Guarantee fund under Bulgarian law is a special legal entity.[52] It consists of two separate property units, the Compensation Fund and the Fund for Uninsured Motor Vehicles.[53] The Fund for Uninsured Motor Vehicles of the Guarantee Fund is in the scope of this paper, since it compensates the damage caused by uninsured motor vehicles in the territory of Bulgaria.[54] The Bulgarian legislator did not prescribe special conditions for the compensation of foreign nationals. Foreigners who suffer damage in the territory of Bulgaria due to the use of an uninsured motor vehicle, can receive

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51 Article 19, paragraph 1 item b of the Greek Law 489/76, "Compulsory Insurance of Civil Liability arising from Motor Accidents"

52 Article 518, paragraph 1 of the Code on Insurance of the Republic of Bulgaria

53 Article 521, paragraph 1 of the Code on Insurance of the Republic of Bulgaria

54 Article 557, paragraph 1 item 2 of the Code on Insurance of the Republic of Bulgaria

compensation from the Fund for Uninsured Motor Vehicles of the Guarantee Fund under the same conditions as Bulgarian citizens.

Compulsory insurance of motor vehicles in Hungary is governed by Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, Hungarian Gazette, No. 89/2009, 191/2009, 165/2011, 159/2013. The Association of Hungarian Insurance Companies under this Law has the authority to administer the Compensation Fund.[55] The Hungarian Compensation Fund is used to compensate the injured parties in cases where a traffic accident is caused by an uninsured motor vehicle.[56] A person who has been harmed in the territory of Hungary by a vehicle for which legal liability for liability insurance has not been fulfilled, shall be entitled to compensation for damage from the Compensation Fund.[57] This right governed by the Hungarian law is relatively reserved for the citizens of Hungary. The provision of Article 36, paragraph 7 of the Law LXII of 2009 on Insurance Against Civil Liability and Respect of the Use of Motor Vehicles of Hungary stipulates that the injured person, who is a resident of another country, is entitled to compensation from the Compensation Fund only if in the country of origin of the injured person Hungarian citizen may exercise the same right. Hungary allows foreigners to claim compensation from the Compensation Fund only on condition of material reciprocity. Refugees and economic migrants from Africa and Asia could not be compensated in this case if they were injured in a traffic accident caused by an uninsured motor vehicle in Hungary.

Law on Compulsory Traffic Insurance of the Republic of Croatia, Official Gazette, No. 151/2005, 36/2009, 75/2009, 76/2013, defines guarantee fund as the property of the Croatian Insurance Bureau intended, inter alia, to compensate for damages that are caused by uninsured means of transport in the territory of the Republic of Croatia.[58] Croatian law does not condition the right to compensation from the guarantee fund by reciprocity. Foreigners in Croatia who suffer damage due to the use of an uninsured motor vehicle, can receive compensation from the guarantee fund, even if they come from countries where this institute does not exist.

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55 Article 56, paragraph 1 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

56 Article 3, item 22 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

57 Article 35, paragraph 1 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

58 Article 44, paragraph 1 item 4 of the Law on Compulsory Traffic Insurance of the Republic of Croatia

The Republic of Slovenia has governed the mandatory motor vehicle insurance by the Law on Compulsory Insurance in Transport, Official Gazette of the Republic of Slovenia, No. 93/07 (official consolidated text), 40/2012, 33/2016, 43/2017. The Slovenian Insurance Association is liable to pay compensation to the damaged person from the guarantee fund in the event of a traffic accident caused by a vehicle for which the compulsory insurance contract has not been concluded.[59] Under the Slovenian law, the right to compensation for damages from the guarantee fund is not limited by reciprocity. Compensation in case of a traffic accident caused by an uninsured motor vehicle in the Republic of Slovenia, under the same conditions can be obtained by Slovenian and foreign citizens.

6. CONCLUSION

The migrant crisis has posed a series of questions to European countries and the Balkan countries through which the migrant route passes. Among other issues, the issue of compensation for damages to migrants in the event of a traffic accident caused by a motor vehicle for which the compulsory insurance contract had not been concluded, was also raised.

The Association of Serbian Insurers considers that persons who come from countries in which there is no guarantee fund or similar institute, do not have the right to indemnification from the guarantee fund at the Association of Serbian Insurers. Such an understanding cannot be criticized from the point of view of the positive law of the Republic of Serbia. The understanding of the Association of Serbian Insurers is based on the Serbian law and practice of the courts of the Republic of Serbia.

However, the law of the Republic of Serbia can be criticized. The purpose of the guarantee fund as a legal institute is to provide compensation for damage caused by a vehicle for which a compulsory insurance contract has not been concluded under the same conditions as if the vehicle was insured. The prescription of reciprocity as an additional requirement for compensation of a foreign person, which condition is not required for the compensation of damage caused by the insured vehicle, is not in accordance with the purpose of the guarantee fund.

A migrant is not responsible for the situation in the country he is leaving. The migrant himself cannot be charged for the fact that there is no guarantee fund or it does not function in the country of origin of the migrant. Therefore, it does not seem fair to say that due to the fact that there is no guarantee fund in the country

[59] Article 38, of the Law on Compulsory Traffic Insurance of the Republic of Slovenia

of origin of the injured person, the injured party will not be able to receive compensation.

The Serbian legislator clearly stated that the right to compensation for damages from the guarantee fund would be recognized to foreigners regardless of the existence of reciprocity. ZOOS prescribes that reciprocity will not be required when Serbia becomes a full member of the World Trade Organization. A refugee or an economic migrant, who is seriously injured in a car accident, is really not responsible for the fact that Serbia has not been admitted to membership of the World Trade Organization. For this reason, compensation for damage should not be denied to him.

European Union regulations do not provide for reciprocity as a condition for compensation of damages from the guarantee fund. Recognition of the right to compensation of damages from the guarantee fund, regardless of the citizenship of the injured party, is a standard that is desirable from the standpoint of European law. Recognition of rights to compensation to all foreigners, in the event when the damage has been caused on the Serbian territory by uninsured vehicles, would be in the interest of the European integration of the Republic of Serbia. The change made in this direction would contribute to the alignment of Serbian law with the acquis communautaire, but also to the duly fulfillment of the obligation that Serbia took over under Article 72 of the SAA. Announced amendments and supplements to the ZOOS are an opportunity to allow migrants from African and Asian countries to receive compensation from the assets of the guarantee fund in Serbia, and thus to further harmonize Serbian law with the law of the European Union. The desire for membership in the European Union, as the foreign policy priority of the Republic of Serbia, is an additional argument for allowing migrants, including economic migrats and refugees from Africa and Asia, to receive compensation for the damage caused by an uninsured motor vehicles in Serbia.

Countries in the neighborhood of the Republic of Serbia, or the country on the Balkan migrants' route, generally consider that the right to compensation from the assets of the guarantee fund should be available under equal conditions to foreigners and domestic citizens. Besides Serbia, only Macedonia and Hungary require reciprocity.

The valid Serbian legal solutions do not classify Serbia among the countries that take care of refugees and economic migrants. The announced changes to the Serbian law may be an opportunity to make Serbian law more equitable, to harmonize with the European Union law and to allow compensation for damage to migrants who have been injured in Serbia due to the use of an uninsured motor vehicle.

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Topic 2

EU law in context of enlarged Union

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EUROPEAN ADMINISTRATIVE STANDARDS AND PUBLIC ADMINISTRATION IN THE REPUBLIC OF CROATIA

ABSTRACT

After the introductory remarks which, among others, stipulate that the reform and modernization of public administration come from the state autonomy of the Republic of Croatia in the 90s of the previous century and the efforts to go in the path of the western democracies, the author exposes on public administration, local and regional self-government and legal entities with public authorities. Moreover, each of the stipulated segments of public administration is further analysed on the basis of legal structure, current situation and goals and measures for improvement planned by the strategic document of development of Croatian public administration between 2015 and 2020. The author considers new legal regulations on general administrative proceeding and administrative judiciary and subsequently explores the administrative standards of the European Union with key standard being the administrative cooperation among the member states. Croatia has to strengthen the administrative capabilities and develop the standards of European good administrative practice and thus accomplish the necessary Europeanisation of public administration.

Keywords: *Croatia, public administration, state administration, local self-government units, regional self-government, agency, European Union, European administrative standard*

1. INTRODUCTORY NOTES

Over the previous years, there have been many scientific – expert conferences in Croatia about the public administration, as well as numerous scientific and expert papers[1] and important program documentation. There are numerous complex

[1] Public administration was dealt with by the Croatian Academy of Sciences and Arts by holding of round tables with published books Reform of Croatian State Administration, Zagreb, 2006, Croatian State and Administration – Situations and Perspectives, Zagreb, 2008, New Croatian Local and Regional Self-government, Zagreb, 2010 and New Administrative – Territorial Organization of Croatia, Zagreb, 2015. There should also be mentioned the International Conference on Modernization of Croatian Administration that was held in Zagreb with presentations of about twenty foreign and national scientists and experts. Papers from that conference were published in the book Modernization of Croatian Administration, Zagreb, 2003

issues that need to be resolved, additionally because the public administration comprises the state administration entities (ministries, central government offices, state administrative organizations, state administration departments within the counties), local and regional self-government entities, and all the legal entities with public competencies (agencies, institutes, funds, bureaus, etc.…). There was also clearly expressed request for the public administration to be reformed and modernized, as a consequence of state independence of the Republic of Croatia in the 90s of the previous century[2] and the obtained possibilities to go in the path of the western civil states. According to the Constitution, Republic of Croatia is a democratic state (Article 2), "the ultimate values of the constitutional order are, amongst others, respecting of human rights, governance of law and democratic multi-party system (Article 3), there has been introduced the principle of the distribution of power (Article 4), principle of constitutionality and legality (Article 5), independent principle of legality in acting of administration and subordinated it to judicial control (Article 19), there has been guaranteed founding of political parties (Article 6), there have been guaranteed personal and political and freedoms and rights, as well as a vast array of economic, social and cultural rights (Part III), among which there is also a right to complaint (Article 18) and the right to entrepreneurial and market freedom (Article 49).[3] Such social environment requires public service that is up to its social role of executing of legal regulations and exercising of public interests.

However, due to organized armed aggression on Croatia, it could not go in the desired way for a long time after the independence "These are abnormal circumstances of different (external and internal) reasons, where the state authority risks to remain powerless if at supressing them – or removal of their consequences – there are forced to act in accordance with the legal norms foreseen for its functioning in regular undisturbed circumstances". Extraordinary situation in the country "had a strong influence on administration, which itself acted in extraordinary

[2] After the referendum of May 22, 1991, Croatian parliament in the session of June 25, 1991 made a Constitutional decision on sovereignty and independence of the Republic of Croatia, Official Gazette, No. 31/91 that stipulates that "by this Act Republic of Croatia initiates the procedure of separating from other Republics and SFRJ. Republic of Croatia initiates the procedure for international recognition". At the aforementioned session, the Parliament also brought the Declaration on sovereign and independent Republic of Croatia (Official Gazette, No. 3/91). After the expiration of a three – month period for the delay of application of the Constitutional decision of June 25, 1991, that was decided by the Brijuni Declaration, at the parliament session of October 8, 1991 the parliament reached a Decision by which "Republic of Croatia, as of October 8, 1991 breaks all state – legal connections on the basis of which it used to form the previous SFRJ together with other Republics and areas and it denies the legitimacy and legality to all the bodies of the former federation – SFRJ (Official Gazette, No. 53/91)

[3] Constitution of the Republic of Croatia (Consolidated text), Official Gazette, No. 5/14

circumstances… it did not start to adjust to the new requirements set before it by the 1990 Constitution but it continued to receive orders from the superiors and to act by them, as it had been done for decades. The only element that changed was the cause of such behaviour: it was now defending of public interests and extraordinary situation that threatened the integrity of the state".[4]

Certain changes of public administration were imposed by the full membership of Croatia in the European Union.[5] There are, namely, certain standards of public administration and thus the European Union administrative area where those standards are exercised. By inclusion into that area, Croatian public administration has the liability to act according to European administrative standards.

2. CROATIAN PUBLIC ADMINISTRATION – LEGAL ORGANIZATION AND PRACTICE

2.1. State Administration

2.1.1. Legal organization

According to Constitution, Article 117, Paragraph 1, organization and affairs of state administration and the ways they are performed are stipulated by the law. In accordance with that constitutional stipulation, state administration is legally structured by the Legal norms and primarily by the stipulations of the Act on the State Administration System (hereinafter: ASAS).[6] According to this Act, state administration entities are the ministries, central government offices, state administrative organizations and state administration and state administration offices within the counties. Ministries, central government offices and state administrative organizations are central entities of state administration and state administration offices within the counties are the first instance entities of state administration (Article 3). In order to perform some liabilities of state administration in the competence of central state administration entities, there can be founded regional entities within the county, city and municipality (Article 4).

Ministries are set up to perform the duties of state administration in one or more administrative areas. In the ministries that are set up for more administrative areas, there are usually set up administrative organizations within the ministries such as directorates, institutes and boards (Article 37). The ministry is represented and

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4 Omejec,J., *Legality of Croatian State in Croatian State and Administration*, Croatian Academy of Sciencies and Arts, Zagreb, 2008, page 83, 84 and 88

5 Repubic of Croatia became a full member of the European Union on July 1, 2013

6 Act on the State Administration System, Official Gazette, No. 150/11, 12/13, 93/16, 104/16

managed by the minister. They can have one or more state secretaries appointed by the Government after the proposal of the prime minister. Ministry can have one or more assistant ministers. Assistant minister is also appointed by the Government but after the proposal of the minister (Article 39 – 41).[7]

Central government offices are set up to perform the liabilities of state administration in one or more administrative areas of special significance for the more effective work of the Government. Central government office is managed by the state secretary (Article 44).[8] Within the central government office that performs primarily the administrative work, there are founded administrative organizations, as a rule as sectors, with a certain degree of independence (Article 48).

State administrative organizations are set up to perform the liabilities of state administration in one or more administrative areas, as a rule as state directorates, institutes and boards (Article 49). State administrative organizations are managed by the director. They are appointed by the government, after the proposal of the prime minister and with previous opinion of the competent minister (Article 49, 51).[9]

State administrative offices within the counties are set up to perform the liabilities of public administration in more administrative areas. Their internal structure is determined by the ordinance of the Government. They are managed by the head. They are appointed by the government on the basis of public tender (Article 53, 55 and 56). Office performs administrative and other business within the administrative area for which it is set up, and in particular:

- Directly implements the laws and other regulations and provides their implementation,
- Resolves administrative matters as a first instance, if it is not in competence of central state administrative entities by a separate act or legal entities with public authorities or trusted to local or regional self-government units,
- Implements administrative or inspection monitoring,
- Monitors the situation in its scope (Article 54).

Apart from the state administrative offices within the counties, state administration affairs are also performed within regional units of central state administration entities. It is so called **deconcentrated state administration.**[10]

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7 Affairs of the Ministries – see Article 38 of ASAS

8 Central State Offices affairs – see Article 44, Paragraph 2 of ASAS

9 State Administration Organization Affairs – see Article 50 of ASAS

10 Compare to Kuhlmann,S., Wollman, H., *Introduction to Comparative Public Administration: Administrative Systems and Reforms*, Edward Elgar, 2014, p. 132

In order to perform business of state administration from the competence of state administrative office within the local (regional) self-government, there can be set up branch offices within the cities and municipalities stipulated by the government after proposal of the head of the state administrative office. Branch office is managed by the head of branch office and there are responsible for their work to the head of the state administrative office within the county (Article 59).

Closely describes the responsibilities of the state administration entities. Those entities:

- Directly implement the laws and other regulations (resolve administrative matters, keep inquest registers, issue certificates and other documents) (Article 17),
- Implement administrative monitoring; especially monitor the legality of work and operations, resolving administrative matters, efficiency, cost effectiveness, purposefulness of work, internal structure and ability of officers and employees to perform the duties within the liability of state administration, the relationship of employees and officials with the citizens and clients (Article 20, 21),
- Perform inspection monitoring (Article 24 – 33),[11]
- Monitor the situation within their responsibility and on the basis of gathered data, notifications, reports, analyses, etc., implement certain measures and activities (Article 34).

Issuing of implementation regulations and making of draft bills of law and other regulations is within the competence of central state administration entities (Article 18, 35).

State administration affairs within the state administration are performed by government officials. They are accepted to government service on the basis of public tender, if the law does not stipulate otherwise. Auxiliary – technical affairs are performed by employees (Article 8).

The work of state administration is public. Public can be excluded only in exceptional cases foreseen by the law (Article 13).

Performing of work of state administration is harmonized and monitored by the government. While that, the government has the authority to:

- Terminate the regulations of state administration entities,

[11] Inspection work in the first instance is performed by the state administrative offices within the counties, and in second instance central state administration entities, if the special act does not determine otherwise. Central state administration entities can directly perform inspection within the competence of state administrative offices within the counties (Article 25 of ASAS)

- Analysed the situation within a certain state administration entity and stipulate the measures that are necessary for that entity to implement,
- Suspend the head of state administration entity,
- Start the procedure to determine the responsibility of officials and employees,
- Implement all other measures in accordance with the law and other regulations (Article 65).

As far as the other stipulations of ASAS are concerned, we herein mention only those that can be complained at the first instance against individual acts, and measures of state administration, and in case where the complaint is not permitted, there can be requested court protection (Article 16); at resolving of administrative affairs ex officio certificates on facts have to be obtained ex officio regarding the matters that are held in official registrars by the state administration entities (Article 82); state administration entities have to enable the citizens and legal entities to complain against their work and the head of the state administration entity has to issue a response to the complaint within 30 days from the day of complaint or objection (Article 84, Paragraph 1 and 4); state administration entities have to inform the public about their work through public media or in any other appropriate way and providing of information shall be withheld when the data is classified or if the information is protected by the act that determines the protection of personal data (Article 77); members of national minorities have the right to be represented in the central entities of state administration and state administrative offices within the counties in proportion to their number in total population of the Republic of Croatia or the county respectively (Article 9).

2.1.2. State – administration practice

State administration comprises 20 ministries, 5 state offices, 7 state administrative organizations and 20 state administrative offices within the counties. In order to perform work from the jurisdiction of central entities of state administration within the counties, cities and municipalities, there were set up 1,279 regional central entities of state administration and their branch offices. In order to perform work from jurisdiction of state administrative offices within the counties, there were 91 branch offices and 302 register offices set up in the cities and municipalities.[12]

On January 1, 2015 there was a total of 56,220 government officials and employees in state entities (44,910 government officials and 11,310 employees). Out

[12] Croatian Parliament, Strategy of Development of Public Administration from 2015 to 2020, p. 44

of total number of government officials, 15,981 or 35.58% had high, 6,484 or 14.44% higher and 22,445 or 49.98% high school education.

On January 1, 2015 public services had a total of 151,158 government officials and employees, 129,014 officials and 22,144 employees. 77,876 or 60.36% of officials had high, 19,958 or 15.47% had higher and 31,180 or 24.17% had high school education.[13]

According to the presented structure of state administration, apart from work of state administration from different administrative fields is performed by state administrative offices within the counties, and another part is performed by regional entities of numerous central state administration entities. Such structure of state administration is irrational, both from the aspect of costs and from the aspect of organization of work of state administration. Organization separation of regional entities of central state administration entity in the same area or within the same county disables them from acting harmonically, significantly increases material costs (each ministry performs "their" accounting, computer, additional – technical and other works), which increases the number of government officials and employees. Therefore, it is not surprising to see that almost a half of all government officials is employees in regional entities. It is, therefore, proposed that within the same entity – state administrative office within the county – there is official record and primary resolving of administrative matters that are not very specific (such as, for example, tax and customs administrative matters).

Considering the current issue of relationship between central entities of the state and local self-government and the opinion of administrative – legal science related to it that decentralization of state has no alternative (more on that at 2.2.2), the attention is drawn to the fact that there is a trend of centralization of performing of inspection work in administrative practice, because the inspection work that was primarily at first instance performed at state administrative offices within the counties are taken over by the central state administration entities. This jeopardizes the legal safety because the works from level I and II are performed at the same entity of state administration.[14]

Significant positive results of reform of public administration, which means state administration as well are as follows: strengthened utilization of information and communication technology in public administration (e-administration), especially with the system e-Citizens which has been available since June 2014; there was upgraded openness and transparency of public administration by application of

[13] Strategy as in footnote 13, p. 30-31

[14] Strategy as in footnote 13, p. 45

Act on the Right of Access to Information from 2003; there was set up a system of internal financial control of public administration by the Act on Internal Financial Control System in Public Sector[15]; there has been improvement of strategic planning in state administration entities; there has been set up a system of evaluation of legal regulations effectiveness; there has been upgraded the system of education and training of government officials; there have been taken measures for strengthening the ethics in state services.

Strategy of public administration development for the period between 2015 – 2020 that was accepted by the Croatian parliament on June 12, 2015, among other special goals of public administration system reform foresees the "rationalized administration system" and measures to "rationalize internal structure of public administration entities", "adjoining of regional entities of central state administration entity with the state administrative offices within the counties" and "transferring of certain inspection work in the first instance and the works of deciding in administrative affairs in the first instance from the central state administration entities to the state administrative offices within the counties".[16]

2.2. Local and regional self - government

2.2.1. Legal structure

Local and regional self-government is legally structured by the constitution, Act on Local and Regional Self – Government from 2001, with subsequent alterations and amendments (hereinafter: ALRSG),[17] as well as by other acts that structure the issues of this self – government. European Charter of Local Self-government was ratified by the decision by Croatian Parliament in 1997[18] and thus, in accordance with Article 141 of the Constitution, it became a part of internal legal order of the Republic of Croatia. By the Constitution, citizens are guaranteed the right to local and regional self-government. This right is exercised through local and regional representative bodies that consist of members elected in free and secret elections on the basis of direct, equal and general elective right. Citizens can also directly participate in local businesses through assemblies, referendums and other forms of direct decision-making in accordance with the law and statute (Article 133). The Capital of Zagreb can, by law, be given a position of the county, and major cities can get the authorities of a county. In the community, or a part of it,

15 Act on Internal Financial Control System in Public Sector, Official Gazette, No. 78/15

16 Strategy as in footnote 13, p. 53-54

17 Act on Local and Regional Self – Government, Official Gazette, No. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 150/11, 144/12, 19/13, 137/15

18 European Charter of Local Self-government, Official Gazette, International Treaties, No. 14/97

in accordance with the law, there can be founded forms of local self-government (Article 134). Local and regional self-government units have the right, within the law, to structure the internal order by their acts, as well as to structure the scope of their activities and to adjust them to the local needs and possibilities; they have the right to own revenues that they can autonomously distribute to perform the activities from their scope. Revenues must be in accordance with their authorities foreseen by the Constitution and law. Weaker local self-government units have to be supported by the state, in accordance with the law (Article 136, 138). Local and regional self-government units are independent in performing the work within their scope and they can only be monitored on the grounds of constitutionality and legality by the authorized state entities (Article 137).

According to ALRSG, local self-government units are cities and municipalities, and regional self-government units are counties. Municipalities, cities and counties are founded by the law (Article 3). The City of Zagreb, as the capital of the Republic of Croatia, is a separate and unique territorial and administrative unit, the structure of which is determined by the Act on the City of Zagreb (Article 2).

Municipality is founded, as a rule, for the area of more settlements that present a natural, economic and social unit and are related to common interests of the citizens.

City is a local self-government unit that is also the capital of the county, as well as any settlement with over 10,000 citizens, and presents an urban, historical, natural, economic and social unit. The city can comprise suburban settlements that create the economic and social unit with the city and are connected by daily migratory movement and needs of citizens. Exceptionally, the status of a city can be awarded to a settlement that does not meet the aforementioned criteria, if they are special reasons for that (historical, economic, geographical and transportational).

County is a regional self-government unit, the area of which presents a natural, historical, transportational, economic, social and self-government unit and it is set up for the purpose of performing works of regional interest (Article 4 – 6).

Municipality, city and county are legal entities (Article 9). Municipalities and cities perform the works of local significance that directly meet the requirements of the citizens, and that are not, by the Constitution or law, awarded to state entities and especially works that are related to physical planning and housing, communal economy, child care, social welfare, primary healthcare, upbringing and elementary education, culture, physical education and sport, protection of consumers, protection and promotion of natural environment, fire protection and civilian

protection, as well as transportation in the area and all other works in accordance with special act (Article 19).

ALRSG also recognizes the category of large cities. Those are the cities with over 35,000 citizens and that are economic, financial, cultural, health, transportational and scientific centre of the extended area. Apart from the works of municipalities and cities, large cities and capitals of counties also have the authority to perform works related to issuing of construction and location permits and other construction related documents and implementation of physical planning documentation, as well as maintenance of public roads. However, large cities and capitals of counties can, in their area, also perform works from the scope of the county (Article 19a, 21).

Counties perform works of regional significance, and especially works related to education, healthcare, physical planning, economic development and transportation infrastructure, public road maintenance, planning and networking of educational, health, social and cultural institutions, issuing of construction and location permits and other construction related acts, implementation of physical planning documentation for the county area outside the large city, as well as other works in accordance with the special act (Article 20).

Previously stipulated works awarded to local and regional self-government units by ALRSG, which can be extended by special acts, present their **self-government scope**. However, according to ALRSG, Article 23, the act also determines the works of state administration that are performed in the local and regional self-government unit. This is the, so called, **transferred scope** of self-government units because the works that are transferred to them still remain state administrative works. European Charter of Local Self-Government, which became an integral part of Croatian legal order after ratification, also recognizes the, so called, **optional self-government activity** of the local self-government units, according to which they can independently determine the works to perform in accomplishing the local interests, if it is not opposing the legal order.[19]

Representative bodies of local and regional self-government are municipal council, city council and county assembly. The number of their members depends on population, and they are elected for the period of four years. A member of the representative body performs the duty honourably and is not paid for it, but has the right to remuneration, in accordance with the decision of the representative body

[19] See Koprić, I., *Territorial Organization of Croatia: according towards the new structure*, in New Administrative - Territorial Organization of Croatia, Croatian Academy of Sciences and Arts, Zagreb, 2015, p. 24

(Article 27 – 31). Meetings of the representative body are public, except the special situations that are foreseen by the law and general act of the unit (Article 37).

Executive body in the municipality is the municipality mayor, in the city a city mayor and in the county a county prefect. They are elected, just like their deputy, at direct elections, in accordance with the special act (Article 39, 40). They are present at the meetings of the representative body and they submit a report on their work to that body, on a half-yearly basis (Article 35b, 37). They can, together with their deputy who was elected with them, be suspended by the referendum. The decision on their suspension is made if the suspension was chosen by the majority of voters who voted and if that majority presents at least 1/3 of total voters listed in the voters' registrar with the municipality, city or county (Article 40b, 40c). Municipality mayor, city mayor and county prefect represent the municipality, city or the county. They are responsible to the central state administration bodies for performing of works of state administration transferred to the scope of the municipality, city or the county (Article 42).

In order to perform works from the self-government scope of the local and regional self-government, as well as of works of state administration transferred to those units, there are founded administrative departments and services (administrative bodies). A single administrative department is founded in the municipalities and cities with up to 3,000 people, and in the municipalities and cities with population of more than 3000 there can be founded more than one administrative department. Administrative departments are managed by the heads who are, on the basis of public tender, appointed by the municipality mayor, city mayor or the county prefect (Article 53, 53a).

Apart from the stipulations on local and regional self-government, ALRSG also contains the stipulations on settlement self-government. Local community councils are a form of direct participation of citizens in decision making in local affairs of direct and daily influence to life and work of citizens. They are founded by the statute of the local self-government for a settlement or a part of a larger settlement or mutually connected smaller settlements, or the city that in relation to the other parts forms a separate divided unit. Bodies of the local community council are assembly of the local community council, members of which are elected at direct elections, by secret voting, and the president of the assembly of the local community council. Assembly of the local community council is elected by the citizens who have the right to vote, and the member can be a citizen with the right to vote and with residence in the area of the local community for which the members are elected (Article 57, 61).

Local and regional self-government units have their assets that comprise all movables and immovable and property rights belonging to them (Article 67). They have the revenues within their scope which they autonomously dispose of and that is determined in Article 68 of ALRSG (such as municipality, city or county tax, surtax, fees, contributions and duties, revenues from assets of units and property rights as well as others). They have their budget, which is proposed by the only authorized proposal maker, municipality mayor, city mayor or the county prefect (Article 67 – 69). Material and financial operation of the municipality, city and the county is monitored by the representative body, and the legality of their operations is controlled by the Ministry of Finance or other institution determined by the law (Article 71, 72).

Against the individual acts of municipal and city administrative bodies that resolve administrative matters, there can be filed a complaint to the administrative body of the county, or there can be started an administrative dispute. Against some individual acts in administrative affairs that are decided in the first instance by the administrative bodies of the council and large cities, there can be filed a complaint to the competent ministry, if the special law does not prescribe otherwise, or there can be started an administrative dispute (Article 76). However, against the individual acts of the representative body or the municipality mayor, city mayor or the county prefect that resolve the administrative matters, there cannot be filed a complaint, but there can only be started an administrative dispute (Article 77a).

Monitoring of legality of operations of the representative body of the local and regional self-government unit is performed by the central state administration entity competent for the local and regional self-government. It has the right to, in case of determined irregularity, by their own decision, declare a session of the representative body or a part of it illegal and to make the acts from such a session void. In the cases determined by the law, the government shall, at proposal of the aforementioned central state administration entity, dissolve the representative entity. If the budget is not brought within the legal time frame, or there is no decision on temporary financing, the government shall, at the same time, dissolve the representative entity and suspend the municipality mayor, city mayor or the county prefect and their deputy who was elected with them and the government shall appoint a commissioner to perform the works of the representative and executive body and call an early election. Against the aforementioned decisions of the central state authority entity, or the government, there can be started an administrative dispute (Article 78a, 85a – 85c).

The monitoring of legality of general acts of the representative body of the municipalities, cities and counties is performed by the state administrative offices within

the counties and competent central state authority bodies, each in their scope, in accordance with the special act (Article 79).

2.2.2. Local and regional self-government in practice

From the previous expose, we can see that according to Croatian legislation there is local, regional and local community self-government; self-government units are municipalities and cities (local), counties (regional), and one settlement or more related settlements or a part of a larger settlement or a city that form a separate divided unit (local community); city is every settlement with over 10,000 citizens (including the surrounding and suburban settlements) that presents urban, historical, natural, economic and social unit, and the capital of the county; status of the city can also be awarded to the settlement that does not meet the required criteria if there are special reasons (historical, economic, geographic, transportational); large cities are those with over 35,000 citizens and that are economic, financial, cultural, healthcare, transportational and scientific centres of the broader area; local and regional self-government units have their self-government scope, transferred scope and by the European Charter of Local Self-Government, optional self-government scope.

According to this summarized and closer (previously in 2.1) presented legal structure of local and regional self-government, there are 17 large cities in the Republic of Croatia and 8 cities with the authorities of larger cities (although they are below 35,000 citizens), because they are capitals of counties.[20] There are founded 576 local and regional self-government units, 555 of which local self-government unit (428 municipalities and 127 cities), 20 regional self-government units i.e. counties, and the City of Zagreb as the capital of the Republic of Croatia with the special status of the city and the county.

On December 31, 2014 there were 13,683 government officials and employees in the local and regional self-government units, 11,920 of which were government officials and 1,763 were employees.

Duties of the municipality mayors, city mayors, county prefects and their deputies are performed by 1,322 people, 428 being municipality mayors and 481 deputy municipality mayors, 127 city mayors and 211 deputy city mayors, 20 county prefects and 52 county prefect deputies, and the mayor of Zagreb and 2 of his deputies.[21]

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[20] In accordance with data of the Citizen Census from 2011

[21] Strategy, as in footnote 13, p. 47

There are great differences among the counties, both in their size and in the population. By area, the largest is Lika – Senj County (5,353 km^2), and the smallest is Međimurje County (729 km^2), so the ratio between the largest and the smallest county is 7.3 : 1. The largest in population is Split – Dalmatia County (455,242 citizens), and the smallest in population is Lika – Senj County (51,022 citizens) with the ratio being 8.9 : 1. According to the undivided opinion of the scientific and expert public, the existing local self-government system is not sustainable. Local units are excessively fragmented; due to poor financial abilities, many are lagging behind. Performing of self-government duties awarded to them often depends on the assistance of the central state. Works on education, healthcare and social welfare that are guaranteed by the Constitution to be self-government affairs are performed in only 33 cities, while the remaining units (94 cities and 428 municipalities) do not perform those duties. But even those are duties from the self-government scope only theoretically, due to practice of "decision-making, orders-giving, regulation and financing by the state bodies that defer from the standard of that scope".[22]

When it comes to regional self-government, scientific public expresses the understanding of the need of setting up new balanced regional structure, instead of the current inconsistently formed counties with five regions as geographic, historical and social – economic units.

The scientific literature indicates to necessity of decentralization where the law awards the local and regional self-government bodies with certain affairs from the state administration that they can independently decide on, with the liability of adhering to regulations and with the right of being monitored by the central state bodies that are, as a rule, limited to monitoring of legality of acting of local bodies, and not the regularity of their decisions.[23]

Many regional units of central state administration bodies and legal entities with public authority, as well as state administration offices and their branch offices disable the local units to perform their local work in an integral way. Integrated local administration is performed by cooperation and joining of organizations and people and as such, it assumes the quality providing of public services and local development.[24]

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22 Koprić, *op.cit.* note 20, p. 28

23 Smerdel, B., *Constitutional Structure of European Croatia*, Narodne Novine Plc., Zagreb, June 2013, p. 486

24 On model of multi-level governance see Bevir, M., *Key Concepts is Governance*, Sage Publications, 2009, p. 134–137

It has to be mentioned that the European Commission in June 2014 expressed their opinion that fragmented responsibility of public administration at regional and local level and complex distribution of competencies among the ministries and agencies at the central level make it difficult to reach operational decisions and extend the administrative procedures. Therefore, it was recommended by them to remove the stipulated issues within a short period of time.

In spite of certain efforts[25], decentralization and new administrative – territorial organization have not been accomplished until today because the key political figures and their political parties, in spite of the all abovementioned, want to keep the current state.

Nevertheless, there might be some hope because the Strategy of Development of Public Administration for the period from 2015 to 2020, among special goals and measures of the reform of providing of public services sets the target of "Goal 17. Rationalized system of local and regional self-government", and: "Measure 17.1 Define the Model of Functional and Fiscal Decentralization"; "Measure 17.2 Determine the Optimum Territorial Structure of the Republic of Croatia".[26]

2.3. Legal entities with public authorities

Legal entities that have public authorities are an important segment of public administration. These are organizations of different names that, due to their significant characteristics, can mostly be referred to as agencies or agency – type organizations, disregarding of their official name. Agencies can, namely, be defined as entities that are structurally separated from the state administration system to perform public works at the national level, that employ government officials and are financed primarily from the state budget, and they are subordinate to procedure of public control of legal nature.[27] Founding of them is related to liberalization and privatization of public services and with entrepreneurial and market freedom. They are based on the idea of regulatory state which, as such, holds the norms of market behaviour or in certain sectors of public services. They often have the authority to resolve individual cases (so called adjudication), implementation of

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[25] On February 23, 2012, Government of the Republic of Croatia founded the National Committee for Implementation of Decentralization and Reform of Local and Regional Self-Government. President of the Republic, Ivo Josipović, in cooperation with his expert team, made in 2014 a text of constitutional changes that also include regional restructuring, but those efforts remained ineffective

[26] Strategy, as in footnote 13, p. 57-58

[27] See Koprić, I., (referring to foreign authors), *Development and Problems of Agency Model with Special Reflection to Independent Regulators, within Agencies in Croatia*, Institute of Public Administration, Zagreb, 2013, p. 13

monitoring, implementation of sanctions, etc. Their advantages are lower possibility of political and other influences, protecting of general interest and better legal protection of the beneficiaries (consumers), preventing of forming of monopoly, specialization and expertise.

Founding of agencies in certain sector areas was imposed by the European Acquis Communautaire (e.g. protection of market competition, protection in electronic communication, safety protection in airline and railway transportation). We can, therefore, say that founding of agencies was a consequence of Europeanization of Croatian public administration. In that context, more attention should be paid to independent regulatory agencies and similar types of agencies.

Significant characteristics of Croatian independent regulatory agencies are:

- They are founded by a special act (e.g. Act on Croatian Agency for Financial Services Monitoring) or the act that structures a certain activity (e.g. Agency for Medicinal Products and Medical Devices was founded by the Medicinal Products Act),
- They have legal nature and are founded as legal entities with public authorities,
- They are founded on the national level with the purpose of providing of functioning of the market where certain public services are provided according to stipulated rules, or standards (e.g. financial services, electronic communication services); safety of trading of goods and services in a certain area for the protection of safety of people (e.g. transportation, medicinal products); providing of certain standard of quality of services for the beneficiaries (e.g. high education, healthcare and social welfare),
- They have independence (autonomy) in organization (statute determines their organization and acting), personal (freedom of employment and setting of salaries), financial (ensured source of financing, budget, own funds), political (not allowing political and other influences).

Monitoring of agencies is performed by legal supervision (legality of work and application of relevant legal regulations), financial (utilization of financial resources), monitoring of efficiency (accomplishing results), and political monitoring (submitting of report on operations, public manners of operations).[28]

According to data from 2012 and 2013, there were "about 75" organizations of agency type. Independent regulatory agencies had 749 employees, with most of

[28] See more by Musa, A., *Good Management in Croatian Regulation Agencies: according to legal framework, within Agencies in Croatia*, Institute of Public Administration, Zagreb, 2013, p. 117–131

them in Croatian Post and Electronic Communication Agency (140), and the least in the Croatian Railway Safety Agency (4).[29] The deficiencies of Croatian legal entities with public authorities are irrational system, non-existence of unique legal structure that results in non-harmonization of regulations, non-justification of founding and costs, insufficient cooperation with the competent ministries, deficiencies in employment and public procurement systems.

Therefore, it should be supported that the strategy of public administration development for the period from 2015 to 2020 within the rationalization of administrative system (Goal 14), foresees structuring of system by trusting of a part of a state administration affairs to legal entities with public authorities (Measure 14.4), and legal structure and rationalization of system of legal entities with public authorities (Measure 14.5).[30]

3. CROATIAN GENERAL ADMINISTRATIVE PROCEDURE AND ADMINISTRATIVE JUDICATURE

3.1. General administrative procedure

Regulations on general administrative procedure have very high significance for the entire public administration system. New Croatian General Administrative Procedure Act (hereinafter: GAPA)[31] was brought in 2009 and has been applied since January 1, 2010. It is the law that follows the constitutional structure of the Republic of Croatia after the independence and tries to accept the requirements of relevant international conventions, European Union Acquis Communautaire and general public administration standards.

In this paper we do not deal with general administrative proceedings into depth, but we point out some of the significant stipulations of the existing GAPA, and they are as follows:

- According to GAPA, "public-legal entities" act and resolve matters in legal affairs. This is a new term that comprises the state authority entities and other state entities, local and regional self-government bodies, legal entities with public authorities (Article 1).
- Administrative matter is defined as "any matter where the public-legal entity in the administrative proceeding decides on rights, liabilities or legal interest of a private or a legal entity or other parties, by direct application of laws, other

[29] *Ibid.* p. 115, 125-126

[30] Strategy as in footnote 13, page 53, 55

[31] Croatian General Administrative Procedure Act, Official Gazette, No.47/09

regulations and general acts that structure a certain administrative area. Administrative affair is also considered to be any affair that is legally stipulated as an administrative affair" (Article 2).

- GAPA is also applied, in an appropriate way, in the proceedings of protection of rights or legal interests of parties in affairs in which the legal entities who perform public services decide on their rights, liabilities or public interests, if there is no court practice or any other legal protection stipulated by the law (Article 3, Paragraph 3).
- Public-legal entity has to enable the parties to, if exercising of some of their rights requires more administrative or other proceedings, submit all requests in a single administrative location in public-legal entity, and they shall, without delay, according to formal duty, be submitted to the competent public-legal entities. In the aforementioned location, all parties and other interested entities can obtain the requested forms, notifications, advice and other assistance from the area of public-legal entity (Article 22). In that way, there was accepted the requirement of the European Parliament Directive from 2006 on services in common market, where all the member states have to provide in public authority locations a single location for contact and coordination where the clients can perform all formalities regarding the proceeding.[32]
- In the public-legal entity, the person who acts is an official whose duty is managing of the proceeding or resolving of administrative matters, in accordance with the regulations on structure of public-legal entities. The head of the public-legal entity issues a decision only if there is no person authorized for resolving of administrative matters within the entity (Article 23, Paragraph 1 and 3).
- An official in a public-legal entity can directly resolve the administrative matter without implementation of the examination procedure, in the cases foreseen by the law, if the proceeding does not comprise parties with opposite interests. GAPA lists the cases when an official can directly resolve an administrative matter in the proceeding that was initiated ex officio, or at request of a client (Article 48 – 50).
- Clients with the opposite interest can reach an agreement in total, or on some disputable issues, and the official has the liability to try and reach the settlement during the entire proceeding. It is not permitted to reach the settlement opposed to regulations, public interest or rights of third persons (Article 57).

[32] See Article 6, Paragraph 1, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market within the Official Journal of the European Union as of December 27, 2006

- In the stipulation that foresees electronic communication, GAPA determines that public-legal entities and clients and other persons in the proceeding can communicate electronically. Public-legal entity is obliged, without delay, to confirm electronically to the sender their receipt of the writ, or if the writ cannot be read due to technical reasons, the sender has to be notified about that (Article 75). Electronic delivery, which can be performed at any time, is performed at request of a client or with a clear consent of a client when it is prescribed by the law (Article 95).
- GAPA foresees assumption of acceptance of the client's request, or in the case of missing the deadlines it is considered that the request of the client is approved (so called fictional administrative act), when it is prescribed by the law and if the proceeding was initiated after the valid request of the client, and the public-legal body has the authority to directly resolve the administrative matter. In that case, the client has the right to request from the public-legal entity to issue decision of acceptance of the request. Public-legal entity is obliged to issue such a decision within 8 days from the day of request of the client (Article 102). With such positive fiction, GAPA went further with so called complex decisions, i.e. decisions in reaching of which there are more public-legal entities in a way that one entity cannot resolve the matter without the consent, confirmation, approval or opinion of another entity. Article 21, Paragraph 1 and 2 stipulate that public-legal entity has to issue the act on consent, confirmation, approval or opinion or reject to issue such an act within 30 days from the delivery of a valid request for issuing. When the public-legal entity does not decide on the request for issuing consent, confirmation, approval or opinion, it will be considered that the act was issued in favour of the client, if not prescribed otherwise.
- Second instance body shall resolve the administrative matter on the basis of complaint, by analysing the facts determined in the first instance proceeding. However, when the facts have not be fully determined or have been wrongly determined, second instance entity has the liability to complete the proceeding themselves or through the first instance body (Article 115, Paragraph 3). When the second instance body decides on complaint that the decision was not reached timely, and determines that the reasons for not reaching first instance decision were not justified, they resolve the administrative matter themselves or order the first instance body to issue the requested decision within 15 days (Article 119, Paragraph 3).
- Important news is the stipulation on administrative agreements in Article 150 – 154 of GAPA. They prescribe conditions for entering of and subject of administrative agreements, reasons for voiding them, alteration of administrative

agreements due to altered circumstances, termination of administrative agreement and the complaint to the administrative agreement.

- Public-legal entity is obliged to notify the interested person at their request on conditions, way and procedure to exercise or protect their right or legal interest in a certain administrative matter (Article 155). Person who considers that their right had been violated by illegal act of an official or any other person in the public-legal entity, has the right to file a complaint (Article 156). Protecting of rights of beneficiaries of public services who believes that their rights or public interests have been violated by an act of public services provider, comes down to the right of filing a complaint to the competent monitoring entity, and if they are not satisfied with the measures taken, they can start an administrative dispute (Article 157, 158).

It should be noted that the respectful ministry, at proposal of an expert taskforce,[33] proposes certain alterations and amendments of GAPA. Attention is drawn, in particular, by the following newly-proposed solutions:

- The principle of protection of legitimate expectations of clients is added to the principles of general administrative proceeding: "In the proceedings that decide on rights or liabilities of clients, public-legal entities have to provide protection of their legitimate expectations".
- There are determined cases of exemption of the expert witnesses and minutes keepers.
- It is determined that the deadline for reaching of decision starts from the day of starting of proceeding at request of a client or ex officio.
- There is foreseen the maximum deadline for filing a complaint and the documents to the second instance body: "If the first instance body does not reject the complaint or does not replace the disputed decision with a new one, they shall, without delay, and the latest within 8 days, submit the complaint with the documentation to the second instance body".
- There shall be limited returning of the proceeding for the retrial by new stipulations: "If the proceeding before the public administration entities was not completed within the two-year period from the day of starting of proceeding, the client has the right to start the administrative dispute".

[33] Members of the expert taskforce are: Professor Dario Đerđa, PhD, Professor Boris Ljubanović, PhD, Associate Professor Marko Šikić, PhD, Associate Professor Frane Staničić, PhD, Assistant Professor Bosiljka Britvić Vetma, PhD, and Assistant Professor Lana Ofak, PhD

- Stipulate that regular legal remedy (whether the complaint or objection) can be used against the decision that does not accept the proposal of the client to cancel or make the decision void.

3.2. Administrative judicature

Reform efforts of the Republic of Croatia within the public administration system also comprised the new stipulations on administrative judicature, contained within the new Administrative Disputes Act from 2010 (hereinafter: ADA),[34] which is applied from January 1, 2012.

The most significant new stipulations of ADA are:

- The goal of the Act, according to the new stipulation from Article 2 is to "provide judicial protection of rights and legal interests of physical and legal entities and other clients that are violated by individual decisions and acts of public-legal entities". Public-legal entities are the entities of "state administration and other state entities, local and regional self-government units, legal entities with public authorities and legal entities performing public services…"
- Subject of the administrative dispute has been significantly extended to comprise the assessment of legality: a) individual decisions of public-legal entity, b) proceeding of public-legal entity, c) breaching of determined deadlines for decision issuing and d) entering, terminating and exercising of an administrative agreement (Article 3, Paragraph 1).
- The law formulates the principles of an administrative disputes as follows: principle of legality, principle of client's statement, principle of oral discussion, principle of efficiency and principle of assistance to uneducated client (Article 5 – 9). The court can relinquish these principles only in cases stipulated by the law.
- Administrative disputes are resolved at two instances – administrative courts (in Osijek, Split, Rijeka and Zagreb) and High Administrative Court of the Republic of Croatia.

High Administrative Court decides on: a) complaints against verdicts of administrative courts and decisions of administrative courts that can be complained against, b) legality of general acts and c) conflict of interest between the administrative courts (Article 12).

Administrative Court decides in the council of three judges, and as an individual judge in cases described the law. High Administrative Court decides in the council

[34] Administrative Disputes Act, Official Gazette, No. 20/10, 143/12, 152/14, 94/16

of three judges, and on legality of general acts in the council of five judges (Article 14).

- Parties in a dispute are a claimant, a respondent and an interested party. Claimant is a physical or legal entity and can also be a person with no legal entity or a group of people if their rights or legal interests have been violated, but they can also be state entities authorized by the law and public-legal entity that participated or should have participated in decision-making, proceeding or reaching an administrative agreement. Respondent is a public-legal entity (Article 17 and 18).
- The complaint does not delay effectiveness, except when determined by the law. The court can decide for the complaint to have delay effectiveness if by exercising an individual decision or an administrative agreement there would be incurred damage to the claimant that is hard to be remedied, if the law does not stipulate that the complaint does not have delay effectiveness of an individual decision, and the delay is not against the public interest (Article 26).
- The Court resolves the administrative dispute on the basis of public hearing held, and without the hearing only in the cases determined by the Law (Article 36, e.g. if the respondent admitted to the complaint as a whole).
- The Court recognizes the institute of so called exemplary dispute (Article 48). Namely, if in ten or more first instance administrative disputes the subject of the complaint had the same legal and factual nature, the Court can decide which dispute is going to be resolved as an exemplary dispute, and terminate the dispute in others. After the effectiveness of the verdict in the exemplary dispute, the Court continues the terminated disputes with application of evidence from the exemplary dispute.
- The Court has the authority to draw evidence and determine facts and is not bound with the proposals of the parties or with the facts that were determined in the previous administrative proceeding. The Court draws the evidence on the basis of principles of evidence providing in the law proceeding (Article 33).
- The Court relevantly decides on the subject of dispute. By accepting the claim, the Court reaches the so called reformation decision.
- Parties in the administrative dispute can, due to violation of law, propose to State Attorney of the Republic of Croatia to submit a request for extraordinary questioning of legality of final decision of the administrative court or High Administrative Court and this request shall be decided upon by the Supreme Court of the Republic of Croatia (Article 78).

- The Act brings new stipulations regarding the settling of costs of the administrative dispute (Article 79), exercising of court decisions (Article 80 – 83), evaluation of legality of general acts given by the High Administrative Court at a public session (Article 83 – 88), and resolving of administrative dispute by the settlement of parties (Article 89).

Regarding the fulfilment of decision and verdict, fulfilment of a decision by which the court resolved the matter has to be ensured by the respondent, while the decision is fulfilled by the court that reached the decision. If the respondent does not ensure fulfilment of decision in a certain period, the claimant can require the court to exercise the fulfilment of the decision. Fulfilment is exercised according to rules for fulfilment in the general administrative proceeding.

The proceeding of assessment of legality of a general act is started by the High Administrative Court, at request of a private or a legal entity, or a group of people related with the common interest but the request is submitted within 30 days from the day of decision. However, that proceeding can be started by the High Administrative Court ex officio or at request of the court. High Administrative Court decides at public assembly on legality of a general act, with the possibility to have so called advisory hearing prior to it. If they stipulate that the general act is not in accordance with the law or statute of the public-legal entity, the court shall reach a decision to terminate the general act or some stipulations of it.

4. CROATIAN PUBLIC ADMINISTRATION AND EUROPEAN ADMINISTRATIVE SPACE

The idea on creating of European Administrative Space was encouraged by the principle of a single meaning and application of the legislation of European Union (hereinafter: Union). According to that principle, the legislation of the Union has to be equally valid in its entire area or in the area of all the member states has to be applied in the same way, which is the basic precondition for reaching the goals and tasks of the Union. Accomplishing of this requirement, assumes among others, suitable public administration system of the member states. Union, however, has no authority to create the model of structuring of public administration of the member states and to require the member states to apply it. It should also be mentioned that even acquis communautaire of the Union does not contain expressed rules on organization of public administration of the member states. Or, in another words, there is no final European solution on how to reach the modern and successful public administration. The principle of administrative autonomy of the member states was accepted by the stipulation of Article 291, Paragraph 1 of the Treaty on the Functioning of the European Union that says: "Member states

make all the measures of the national legislation necessary for implementation of the legally binding acts of the Union". This is the case of "implementation deficit" because the Union does not have the authority to organize public administration of the member states, although those public administrations apply the legislature of the Union with the requirement that this application should be harmonized and efficient. The importance of this issue, as pointed out by Maartje Verhoeven, should not be underestimated, since the application of the rights of the Union is primarily happening within the national administrative decisions, very few of which end up with court proceedings. The effectiveness of the legislature of the Union in practice greatly depends on its application by the national administrative bodies.[35] The aforementioned "implementation deficit" is attempted to be removed or at least mitigated by the European Administrative Space as an assembly of the administrative standards of the Union, with the key standard being the administrative cooperation of the member states. According to stipulation of Article 197 of the Treaty on the Functioning of the European Union that has the name "administrative cooperation", efficient implementation of the law of the Union by the member states, which is important for the right functioning of the Union, is considered the issue of common interest. The Union can support the efforts of the member state vested into improvement of their administrative capability to implement the legislation of the Union. Such activity can include alleviating of exchange of information and government officials as well as supporting the program of their training. No member state is bound to use this support. European Parliament and Council deciding by the ordinances in accordance with the regular legal proceeding, for that purpose determine the necessary measures, while excluding any harmonization of the laws and other regulations of the member states. These stipulations have the possibility of strengthening the administrative capacity of the national public administration, i.e. improvement of their ability to implement the laws of the Union.

According to Article 291, Paragraph 2 and 3 of the Treaty on the Functioning of the European Union, when there are necessary unique conditions for implementation of legally binding acts of the Union, these acts award the implementation authority to the Commission or the Council in special, valid cases and cases from Article 24 and 26 of the Treaty on the European Union.[36] For those purposes, European Parliament and Council through the Ordinances, in accordance with regular legislation procedure, determine the rules and general principles in advance, in

[35] Verhoeven, M., *The Constanzo Obligation, The Obligation of National Administrative Authorities in the Case of Incompatibility between National Lawand European Law*, 2011, p. 47

[36] The mentioned articles refer to common foreign safety policy

order for the mechanisms for the member states to function in monitoring of the implementation authorities awarded to the Commission.

The aforementioned administrative cooperation makes public administration of the member states become functionally and not structurally or hierarchically part of the European administration. Regarding public administration, there is accomplished "Europeanization as an effect", and not "Europeanization as homogeneity".

That, certainly, refers to Croatian public administration as well. In spite of generally good results, it has to strengthen its abilities and upgrade the standard of good European administration and in that way, fully, functionally join the European Administrative Space.

Apart from the mentioned administrative cooperation, there are other European administrative standards. An important administrative standard is so called administrative capacity of the Union.[37] Administrative capacities of the Union comprise the ability of public administration of a certain state to participate in shaping and implementation of the European public policy, to implement the European acquis communautaire and the policy of administrative staff.[38]

There is special importance of administrative standards contained in stipulation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that guarantees the right to a fair trial and stipulation of Article 41 of the Charter of Fundamental Rights of the Union that foresees the right to good administration.

Standards of good administration come down to, primarily, the principles of European public administration. These are the following principles:

a) Rule of Law means proceeding by the law or legislature with understanding certain requirements regarding the contents of the Constitution. It is important for functioning of the administration because it excludes arbitrary decision making and requires thorough functioning of legality, division of power, right and fair administrative proceeding, judicial monitoring of administration, etc.

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37 They were determined by the Commission in their opinion from 1997

38 For more on administrative capacities of the Union see Koprić, I., *European Administrative Space – Fulfilment of European Standards in the Member States and Candidates, within European Administrative Space*, Institute of Public Administration, Zagreb, 2012, p. 167–171

b) Legality means that the activities of administration have to be on the basis and in accordance with the law, valid regulations; it requires the legality of administrative acting and the administration being comprised by the law.

c) Proportionality means that every limitation of freedom or right has to be proportional to the nature of the need for limitation in any specific case.

d) Legitimate expectations mean that legal consequences should be certain for those to whom the law shall apply. They have to be in accordance with the legitimate expectations of the parties in any specific case when the law is applied directly to them.

e) Reliability and predictability. Reliability means absence of arbitrarity in acting of public administration which is accomplished by obeying of the fundamental principle of the legal state (Rechtsstaat) – acting by the law and in accordance with the law. Predictability means that it can be estimated in advance what the decision of the administrative body is going to be. Predictable, safe and clear administrative environment is especially appreciated by foreign and domestic investors. In order to apply these principles, it is necessary to have a fast administrative procedure and professional functioning of administrative officials, which is accomplished by a suitable system of employment and promotion and specific material rewarding.

f) Openness and transparency. Openness means that there have to be conditions for monitoring of public administration from the outside and transparency means that administration itself has to be "transparent" for possible control. Public interest is thusly protected because there is decreased possibility reaching bad decisions, bribe and corruption and the interest of the citizens is protected because there is an open possibility to deny the administrative decisions.

g) Responsibility. Responsibility means: firstly, that administration must make their decisions responsibly and be able to clarify them, and secondly, that administration must be responsible for their decisions and for the ethical nature of their work. This is the issue of responsibility regarding some specific decisions and acting of administrative officials. The supervision of the work of administration can be internal (so called internal controls) and external (by the prosecution, court, ombudsman and parliament).

h) Efficiency and efficacy. These are not synonyms. Efficiency, namely, means a good ratio between the utilized funds and accomplished results, and efficacy means the ability of public administration to accomplish the goals and find solution for the issues of public interest. Principle of efficiency

is accomplished by increasingly larger practice of contracted, concession signing and delegating of public services to private companies (roads, ports, telephones, waste, etc.), and by some public services entering the market and thus competing with the private sector.

There are, however, some other principles that are accepted in any democratic public administration, and they refer to the public officials and the quality of regulations and actions.

The principles that refer to public officials especially are the following:

a) Impartiality. This principle has two aspects. The first is that religious and point of view of the holder of the public authority, their social connections, personal and family interests cannot influence the contents of administrative decisions and regulations in a sense to be bias. The other aspect of impartiality is the independence of holder of public authority towards the superiors. They have the right to decline the order of the superior which is clearly illegal or doing it would commit a crime.

b) Loyalty. This principle requires: firstly, that the proposal maker has to offer the superior officials, whenever possible, multiple solutions and secondly, that the orders for the subordinate officials must be clear and unambiguous, with exact clear mandate (authority) and means to be used.

c) Material indifference. This principle is manifested as absence of corruption by the administrative officials and absence of cumulating of public services and private activities that lead to conflict of public and private interests.

d) Discretion and reservedness. This is the principle that requires public administration official to refrain from commenting of their professional work and stating of facts from the private area of the beneficiary of public services.

More intensive inclusion of Croatian public administration into the European Administrative Space is one of the goals (Goal 15) placed by the Strategy of Development of Public Administration from 2015 to 2020. They also state the measures for accomplishing of that goal: improving of capacity of state administration bodies to take part in processes of decision-making and shaping of public policies of the European Union (Measure 15.1); improving of application of European administrative principles and standards in every day's work of government officials (Measure 15.2).[39]

[39] Strategy, as in footnote 13, p. 56

5. CONCLUSION

Croatian public administration comprises the state administration bodies, local and regional self-government bodies and legal entities with public authorities. Legal structure of the system of state administration enabled the existing, very broad structure of state administration which, apart from central bodies of state administration (ministries, central state offices and state administrative organizations) also make the state administrative offices within the counties, as well as numerous regional units of central state administration bodies and their branch offices (so called deconcentrated state administration). Such administrative structure is irrational, both in respect of costs and in respect of organization of performing of administrative works. Fragmentedness of local central state administration bodies in the same settlements or in the area of the same counties prevents them for being harmonized, significantly increases material costs and the number of employed government officials and employees. Therefore, the strategic document of development of public administration from 2015 to 2020 foresees the rationalization of administrative system, among other things by joining the regional units of central state administration bodies with the state administrative offices within the counties.

Legal regulations that determine local and regional self-government enable, in practice, even further fragmentation of local self-government units (municipalities and cities). Most of these units do not perform the work that are Constitutionally guaranteed self-government works (so called self-government scope), due to financial difficulties, and moreover there are those that they assess they should do because they are of local interest (so called optional self-government scope). With all that, a large network of local central state administration units and legal entities with public authorities, with state administration offices and their branch offices disable the so called integrated local administration. In spite of requirements of scientific and expert public and certain efforts of political factors, decentralization of state administration affairs and new administrative – territorial organization have not been accomplished yet.

Legal entities with public authorities are organizations of different names that, due to their significant characteristics, can mostly be called agencies, or agency – type organizations. Their founding is connected with liberalization and privatization of public services, as well as with entrepreneurial and market freedom and with Europeanization of Croatian public administration. They are based on the idea of regulatory state which, as such, holds the right of setting norms of behaviour in the market and certain sectors of public services. The deficiencies of Croatian private entities with public authorities are irrational system, non-existence of unique

legal structure and thus insufficient harmonization of regulations, unjustness of founding and costs, insufficient cooperation with the respective ministries, deficiencies within the employment system and public procurement. Therefore, it is a positive thing that the aforementioned strategic document on development of public administration until 2020 stipulates, within rationalization of administration, the measure of legal structure and rationalization of system of legal entities with public authorities.

For the entire system of public administration, there is a great significance of regulations that structure the general administrative procedure and administrative judicature. New legal stipulations on general administrative proceeding that are effective from January 1, 2010 and new legal regulations on administrative judicature that are effective from January 1, 2012 have laid the cornerstone for modernization of administrative proceeding and administrative judicature as an integral part of reform efforts of the Republic of Croatia within the public administration system.

In spite of the generally good results, Croatian public administration has to strengthen their capacities and upgrade the European administrative standards and thusly fully include themselves in the European Administrative Space.

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THE PUBLIC'S RIGHT OF ACCESS TO INFORMATION ON CLIMATE CHANGE AND TRANSPOSITION OF THE ENVIRONMENTAL *ACQUIS* INTO SERBIAN LEGISLATION

ABSTRACT

This paper analyzes the results of application and protection of the right of access to information on climate change achieved thus far. The paper aims to point out the basis of the legal nature of information on climate change in international law and environmental acquis. It determines if the legal framework regulating the right of access to environmental information in Serbia can be applied to access to information on climate change. The final section suggests possible means to overcome the shortcomings found in domestic and comparative law.

Keywords: *Access to Information on Climate Change, Paris Agreement on Climate Change, Environmental Acquis and Climate Change*

1. INTORODUCTION

The report of the World Commission on Environment and Development (Brundtland Commission) named "*Our Common Future*" pointed out that the economic growth that does not comply with the Earth's regenerative capacities can endanger human life and health and the environment.[1] The Brundtland Commission defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The Brundtland Commission recommendations were adopted at the United Nations Conference in June 1992 in Rio de Janeiro. Another document was adopted at the same conference – the United Nations Framework Convention on Climate Change.[2] In mid-2001, Serbia has become a member of United Nations Frame-

[1] Report of the World Commission on Environment and Development: Our Common Future, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Cooperation: Environment

[2] Drenovak-Ivanovic, M., Djordjevic, S., *Practicum on the Right to Legal Protection in Environmental Matters in Administrative Procedure and Administrative Dispute*, the Ministry of Energy, Development

work Convention on Climate Change. Although the Convention does not specify the obligations of the Parties that are directly related to the introduction of quotas to reduce emissions of greenhouse gases, for the first time it determines a common goal of Convention Parties – emission stabilization and stopping their rise. By joining the Convention, the Parties have committed to form national registries of greenhouse gas emissions. In order to achieve cooperation between the Parties in the implementation of measures on mitigating the effects of climate change, the Convention emphasizes the need for the Parties to establish a system that would allow information exchange.

The next stage in evolution of the right to protection from the effects of climate change started with signing the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[3] The Kyoto Protocol related further course of the fight against climate change to reduction of carbon dioxide and other greenhouse gas emissions and limiting the rise in global temperature leading to climate change. Its adoption was a first attempt at establishing the legal basis for the continuous reduction of emissions of greenhouse gases. It was adopted at COP3 meeting in December 1997 and entered into force in February 2005. Although it was signed, the USA never ratified the Kyoto Protocol, while Canada withdrew a statement on acceptance of the Protocol. Serbia has ratified the Kyoto Protocol in 2007.[4]

The following legally binding document that defines the obligations of the Member States of the United Nations Framework Convention on Climate Change for the period after 2020 was adopted in December 2015 at the UN Conference on Climate Change in Paris. The basis for the adoption of the Paris Agreement on Climate Change consists of the results of scientific analyses which suggest that the activities initiated by the Kyoto protocol, which was repealed on 31 December 2012, should be pursued, and supported by the new instruments of technical, financial and legal protection from the effects of climate change.[5]

By signing the Paris Agreement on Climate Change, the Parties commit to limiting the rise in global average temperature "well below 2° C" above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5° C.[6] This is a long-term goal, time-bounded by the fact that global maximum emissions of

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and Environmental Protection / OSCE Mission in Serbia in 2013, pp. 15-20

3 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997

4 Law on Ratification of Kyoto Protocol to the United Nations Framework Convention on Climate Change, „Official Gazette of the RS", no. 88/2007

5 *Paris Agreement*, Dec. 1/CP.21, Annex, UN Doc. FCCC/CP/2015/10/Add.1

6 *Paris Agreement on climate change* (2015), Art. 2(a)

greenhouse gases should be reached "as soon as possible", so that in the second half of the XXI century a balance is reached between anthropogenic emissions by sources and removals by sinks.[7] As a special contribution to mitigating the effects of climate change, the Paris Agreement imposes the obligation of Parties to "improve educational programmes on climate change … and to encourage public participation and access to information" (Art. 12). Before the Paris Agreement, international law has been powerless to address the challenge of mitigating and adapting to climate change and the results of this Agreement should make a change.[8]

Ever since the Stockholm Declaration the Human Environment (1972), a considerble number of declarations and conventions were adopted under the auspices of the United Nations that define, in general or in detail, an obligation to apply the right of public access to environmental information. The need for "fuller knowledge and developing awareness about the basic characteristics of the environment", as one of the principles of the Stockholm Declaration, the adoption of the Rio Declaration (1992) becomes a right of each individual "... to have an easy ... access to information relating to the environment and held by public authorities, including the information on hazardous materials and activities in the community".[9] The content of the right of access to environmental information and the access itself are further regulated by the Convention on Access to Environmental Information, Public Participation in Environmental Decision-making and Access to Justice in Environmental Matters (2009).[10] Natural or legal person applying for access to environmental information needs a legal standing to institute proceedings in which to challenge the decision, act or omission of a public authority which acted on the request. Although the right of access to information on measures for mitigating climate change, adaptation to climate change and the damage as a result of climate change, is guaranteed both by conventions on climate change and environmental conventions, its application raises many questions. This paper firstly analyzes the legal framework for access to information on

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7 *Paris Agreement on climate change* (2015), Art. 4(1). Jeanette Schade, Wolfgang Obergassel, "Human Rights and the Clean Development Mechanism" (2014) 27 *Cambridge Review of International Affairs* 717

8 Carlarne, C., "*Climate Change Policies an Ocean Apart: United States and European Union Climate Change Policies Compared"* in 14 Penn State Environmental Law Review, 2006, pp. 435-482; Waxman, H., *"An Overview of the Clean Air Act Amendments of 1990',* in 21 Environmental Law 1721, 1991; Bogojevic, S., *"Litigating the NAP: Legal Challenges for the Emissions Trading Scheme of the European Union"*, in Carbon and Climate Law Review, 2010

9 The Rio Declaration on Environment and Development (1992), Principle 10

10 Law on Ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice on issues related to the environment (Aarhus, 25 June 1998) „Official Gazette of the RS- International Documents" no. 38/2009

various aspects of climate change in a positive and comparative law, and further it deals with questions raised in the administrative and judicial practice. This paper aims to determine whether the right of access to information on climate change applies both in the process of deciding upon individual measures and in the process of adopting strategic documents on mitigating climate change and adaptation to climate change. The final section provides scenarios for evolution of the legal framework regulating procedural rights in the process of access to information on climate change.

2. THE CONCEPT AND THE LEGAL NATURE OF INFORMATION ON CLIMATE CHANGE

The law amendments which constitute a legal framework for the application of horizontal environmental law in Serbia established guarantees for the implementation of the right of access to environmental information. The European Commission Report on Serbia's progress in 2014 does not identify progress in the process of harmonization of horizontal environmental legislation and it states a "need to increase capacity for effective public participation and public debate in environmental decision-making, especially at the local level".[11] The European Commission Report on Serbia's progress in 2016 identifies progress in the transposition and implementation of horizontal environmental *acquis*[12], while the Call for negotiations on environment and climate change, extended in January 2017, points out that in the area of horizontal legislation there is „a high degree of compliance", while in the process of environmental impact assessment it is still necessary to strengthen informing of the public concerned about alternatives, coordinated action plans, programs and measures for mitigating the effects of climate change.[13] The question that remains open is whether the results apply equally to all environmental information and whether the right of access to information on climate change is in compliance with the standards of the environmental *acquis*.

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[11] *The European Commission Report on Serbia's progress in 2014*, SVD (2014) 302, Brussels, 8. November 2014, the report follows the Commission Communication on the Enlargement Strategy and key challenges for the period 2014-2015 COM (2014) 700 p. 99. A similar assessment was presented in the *European Commission Report on Serbia's progress in 2015*, SVD (2015), Brussels, 10 November 2015. The report follows the Commission Communication on EU Enlargement Strategy COM (2015) 611, p. 78

[12] *The European Commission Report on Serbia's progress in 2016*, Brussels, 9 November 2016, report follows the Commission Communication on EU Enlargement Strategy COM (2014) 700 p. 87

[13] *Screening report Serbia, Chapter 27,* MD 114/16, 8 June 2016

The comparative literature contains a number of definitions of the concept of climate change.[14] The report of the International Panel on Climate Change for 2014 indicates that the anthropogenic factors are "extremely likely the dominant cause of climate change".[15] The local policy documents define climate change as "change directly or indirectly conditioned by human activities, causing changes in the composition of the global atmosphere, and which are superimposed on the natural climate fluctuations, observed during the comparable time periods".[16] This further means that the definition of information on climate change should start from the activities of the participants in the process of adoption of general and individual decisions on matters of importance for environmental protection which have an environmental impact and directly or indirectly contribute to climate change. We distinguish information on measures to adapt to climate change and measures to mitigate the effects of climate change. Information on measures to adapt to climate change is that relating to the procedures for adapting the nature and the people to the existing or expected climatic challenges and their effects that lead to damage or impair the value of the environment.[17] Information on measures to mitigate the effects of climate change applies only to measures on reducing emissions of greenhouse gases.[18]

The question arises whether the information on climate change is a part of the environmental information or, taking into account the concept and the legal nature of information on climate change, it should be defined in the narrow or broader sense? The Law on Amendments to the Law on Environmental Protection, adopted in February 2016, provides the first legal definition of environmental information, which transmits guarantees of access to environmental information determined by the Aarhus convention (1998).[19] It defines the environmental information in a broader sense.

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14 Rajamani,L.,*"Differentiation in the Emerging Climate Regime",* in 14 Theoretical Inquiries in Law 151, 2013

15 IPCC, *Climate change — 2014: Impacts, Adaptation and Vulnerability: Summary for Policymakers*, Cambridge University Press 2014, 4

16 *Water Management Strategy*, 2016, p. 213

17 IPCC, *Climate change — 2014: Impacts, Adaptation and Vulnerability: Summary for Policymakers*, Cambridge University Press 2014, 5

18 IPCC, *Climate Change — 2014: Mitigation of Climate Change*, Cambridge University Press 2014, 4-5. Mayer, B., *"Climate Change Reparations and the Law and Practice of State Responsibility"*, in Asian Journal of International Law, 2016

19 The Law on Environmental Protection „ Official Gazette of the RS", no. 135/2004, 36/2009, 36/2009 – other law 72/2009 – other law 43/2011 – Decision of the Constitutional Court I 14/2016, Art. 3 par. 1 point. 33a

In theory, (non-) existence of environmental risk is the criteria used for separating special administrative procedures with the public participation in environmental matters, which include the inclusion of the public in the decision-making process, from the administrative procedures in a given administrative matter relating to the environmental protection. In this sense, the environmental administrative matter is, in principle, an uncertain situation where the competent authority decides on conducting activities, taking into account the risk that they may have on human health and the environment.[20] We regard that the same criteria could be used to separate the concept of information on climate change, as a narrow term, from the concept of environmental information. While the concept of environmental information includes environmental information, regardless of whether the information is about the state of the environment or relating to activities that (may) have a negative impact on the environment, the concept of information on climate change would apply to the information relating to activities that (may) contribute to climate change. Starting from the theoretical and legal framework, the information on climate change is any information in written, visual, aural, electronic or any other material form, available to a public authority or kept in the name of public authority, about: 1) the state of the environmental elements, such as air and atmosphere, water, soil, land, natural landscape, and areas including marshy and coastal, river and lake areas, biodiversity and its components, geological diversity and heritage, genetically modified organisms, as well as interplay between these factors; 2) factors such as the matter, energy, radiation or waste, emissions, discharges and other forms of transmission in the environment which (may) affect environmental factors and contribute to climate change, 3) measures (including administrative measures), such as: public policy, strategy, legislation, plans, programs, agreements on climate matters and the activities undertaken to mitigate the effects of climate change and adapt to climate change; 4) reports on the implementation of the stated measures and regulations in the field of climate change; 5) the cost-benefit analyses, economic analyses and assumptions used in the context of these measures and activities; 6) the state of human health and safety, including the threat to the food chain and, if necessary, on the conditions of human life, to the extent they are or may be affected by climate change.

Singling out information on climate change has considerable consequences for the application of exceptions to the right to access information of public importance. According to the Law on Free Access to Information of Public Importance, the justified interest of the public to know exists in terms of all the information public authority bodies dispose of. However, the public authority may prove that in a specific case the protection of other legally protected interest overrides the importance

[20] Drenovak Ivanovic, M., *Access to Justice in Environmental Administrative Matters*, Belgrade 2014, p. 56

of protection of public's right to know.[21] Pursuant to Article 8 of the Law on Free Access to Information of Public Importance, the right of access to information can be limited exceptionally if it is necessary in a democratic society for the purpose of preventing a serious violation of an overriding interest based on the Constitution and the Law. Art. 4 of the same law stipulates that there is a justified interest of the public to know whenever it comes to information regarding a threat to, or protection of public health and the environment, which is in accordance with the practice of the Commissioner for Information of Public Importance stating that access to environmental information cannot be denied. Until the Law on Environmental Protection was amended in 2016, the Law on Environmental Protection determined a large number of exceptions to the right of access to environmental information. Those amendments affected Art. 78 p. 2 which now stipulates that the access to environmental information is achieved in accordance with the law that regulates the access to information of public importance. With this, the provisions on deadlines for providing the environmental information, which were significantly longer (30 days) compared to the same prescribed by the Law on Free Access to Information of Public Importance (48 hours) and the provisions on the costs of access to environmental information ceased to apply. Still, bearing in mind the need to revise the adopted amendments and the possibility of introducing certain exceptions to the right of access to environmental information (e.g., in order to protect the environment to which such information relates to, such as the location of rare species of wildlife) one should be aware that even in this case the right of access to information on climate change should be regulated without exception, given the fact that subject information is substantially related to emissions into the environment, for which the Aarhus Convention does not allow exceptions.[22]

3. THE RIGHT OF ACCESS TO INFORMATION ON CLIMATE CHANGE AND THE OBLIGATIONS OF PUBLIC AUTHORITIES

3.1. Active Public Information on Climate Change

The right of access to information on climate change implies that public authorities have an obligation of both active and passive public information. Active public information represents an obligation of public authorities to inform the public about the state of the environment and to provide information on climate change, regardless of whether the request for access to certain information had been sub-

[21] Roesler, S., *"Responding to Climate-Related Harms: A Role for the Courts?",* Craig, R. K., Miller, A. R. (eds.), Contemporary Issues in Climate Change Law and Policy: Essays inspired by the IPPC, Environmental Law Institute Washington, 2016, Chapter 9

[22] See art. 4 of the Aarhus Convention

mitted.[23] The European Court of Justice in the case of *East Sussex*[24] expressed their stand, for the first time, on the obligations of public authorities that derive from the right of the public to be actively informed. In this case it is pointed out that the public authorities have an obligation to keep, store and update public registers and other types of records for whose establishment and maintenance public authorities are in charge. The public must be provided with the right to free access to these registers, which is a form of active information. Keeping and updating of such databases and registers may represent a certain cost for the public authority. However, the cost cannot be borne by the requester.[25]

Active public information about climate change and its effects to the environment has a particular importance in the case of the right to health care. Thus, for example, in EU law, the Directive on Public Access to Environmental Information stipulates the obligation of active public information in case of an imminent threat to human health and the environment of all the information stored at or for the public authority, which may provide the public exposed to the threat to take measures on protection or mitigate possible damage. The public is to be informed about this "immediately and without delay".[26] An illustrative example is found in the Directive on Establishing Infrastructure for Spatial Information (INSPIRE), which stipulates the obligation of Member States to establish and manage networking the system allowing access to spatial data sets. These data have to be accessible via the Internet or other telecommunications equipment.[27]

The right of access to information on climate change relies to a large extent on access to information on water quality. It is indicated in Serbian Water Management Strategy (2016) that climate change has to be taken into account when making long-term plans in the field of water use. This particularly applies to including climate change as an element when determining the available amount of surface water,[28] the change of the underground water,[29] the preparation of the plans of flood protection,[30] and others.

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23 Williams, T., Preston, H., *"Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaptation"* in Climatic Change 3/2013, pp. 531-544

24 East Sussex County Council v. Information Commissioner Property Search Group Local Government Association, C−71/14 [2015] ECLI:EU:C:2015:656

25 *Ibid.*, para. 50

26 Directive 2003/4 / EC on Public Access to Environmental Information, OJ L 41, 14.2.2003, pp. 26-32 Art. 7 para. 4

27 Directive 2007/2 / EC on Establishing an Infrastructure for Spatial Information (INSPIRE), OJ L 108, 25 April 2007, pp. 1-14, Art 11

28 *Water Management Strategy* (2016), 140

29 *Ibid.*, 153

30 *Ibid.*, 186 and 213

The need for active public information about the quality of drinking water in case of potential danger to human health or the quality and quantity of drinking water is also prescribed by the Directive on Drinking Water. In such cases, "timely active public information" is required.[31] It is a standard that cannot be found in Serbian Water Act.[32] The Energy Development Strategy of the Republic of Serbia by 2025 with projections until 2030 states the impact of climate change on the availability to use water flow for electricity generation,[33] as well as the impact of active public information on the increased use of renewable power sources.[34]

3.2. Passive Public Information on Climate Change

The field of climate change and risks of the activities that may contribute or can be determined to contribute to the climate change is treated as the decision-making process involving the public. When it comes to the basics of conducting activities that may have a negative environmental impact, the public involvement is determined by the rules of the strategic environmental impact assessment, while the public involvement in decision-making in individual cases of proposed activities which have been found to have a negative environmental impact is regulated by the rules on integrated control and environmental activity management. Public involvement in decision-making on specific activities that may have a negative environmental impact is regulated by the legal rules on environmental impact assessment. Passive access to information on climate change is mainly connected to the procedures of public involvement in the implementation of the above assessments, i.e. issuing integrated permits.

The degree of public involvement in these procedures may have an impact on the passive access to information on climate change. Providing the public with opportunity to adequately participate in decision-making about activities which may have an impact on climate change underlines the significance of such activities and their potential negative impact, which may increase the degree of public interest in information on climate change.[35]

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31 Directive 98/83 / EC on the Quality of Water for Human Consumption, OJ L 330, 5.12.1998, pp. 32-54 Art. 8 para. 4

32 Water Act „*Official Gazette of the RS*", no. 30/10, 93/12 and 10/16

33 Energy Development Strategy of the Republic of Serbia until 2025 with projections to 2030 „*Official Gazette of the RS*", no. 124/12, 8

34 *Ibid.*, 24

35 The Energy Development Strategy of the Republic of Serbia by 2025 with projections until 2030 states that "although the Aarhus Convention was ratified, it is not fully implemented in the legal system, because the provisions on public participation at the early stages of decision-making were not adopted in certain projects and those that were are not always implemented adequately. Public participation in

Serbian law does not encounter the provisions that give special grounds for access to information on climate change. Thus, for example, the Law on Environmental Impact Assessment regulates the right of public concerned to access information on the environmental impact assessment study. The data in question contain, among other things, a list of main alternatives that the project holder considered.[36] However, the applicant is under no obligation to to present information on climate change. The same applies for data regarding the description of possible significant environmental impacts. The Law on Environmental Impact Assessment does not even prescribe the obligation of impact assessment of proposed projects on climate change or a description of the measures envisaged to prevent, mitigate or eliminate the effects of climate change. For the purpose of comparative analysis, in the part explaining passive public information on climate change we point to innovations in the Directive on Environmental Impact Assessment, introducing obligatory project impact assessments on climate change.

Another means of active public information is the disclosure of information on the results of policy measures reducing the effects of climate change. Those include information about the financial consequences of implementing a climate change policy to operators.[37] In comparative law, we find situations where balance sheets of oil companies suggested significantly higher costs of policy implementation in the field of climate change. One such example is the case which was launched into allegations of *Exxon Mobil Corporation* that the implementation of policy measures in the field of climate change significantly increases the cost of oil exploitation, which led the company to consider shutting down 20% of the plant. This led to a decline in the company's shares by 13% during 2016. Taking into account independent analyses which show that the implementation of polices in the field of climate change does not have such a financial impact, several civic associations started the initiative, thus triggering more proceedings regarding possible false in-

decision-making on individual projects is particularly important at the early stages of the project, when all options are open, and before making a final decision. It is important for the public to participate in decision-making on the disposal of 'public good'. In this segment, spatial and urban planning can determine decisions in the energy sector, so that at the earliest stages of documents it is necessary to achieve adequate public participation", p. 58. It is the process of deciding on activities that can contribute to climate change. Failure to include the public in the decision-making process at the earliest stage of deciding on activities that may have a negative impact on climate change, has a negative impact on both active and passive right to access information on climate change

36 Law on Environmental Impact Assessment „*Official Gazette of the RS*", no. 135/04 and 36/09, Art. 17 para. 1 point 4

37 Hojnik, J., *"Ecological modernization through servitization: EU regulatory support for sustainable product-service system"*, in RECIEL, 2018, pp. 1-14

formation about climate change.[38] Bearing in mind the comparative practice, the legal framework of active access to information on climate change should *de lege ferenda* contain the norms regulating the public's right of access to information on the impact of policies on climate change, but also obligations of operators, when preparing such information, to use reports on the impact of climate change policies produced by environmental protection agencies, as independent regulatory bodies.

3.2.1. Passive Public Information on Climate Change and Directive 2014/52/EU on Environmental Impact Assessment of Certain Public and Private Projects

The need for an analysis of environmental impact of certain public and private projects was marked as a pillar of impact assessment procedure regulated by Directive 2014/52/EU.[39] In this directive the project's impact on climate change is introduced as information that should be included in the study of the environmental impact assessment.

It is, firstly, the information on greenhouse gas emissions from power plants, and the information on the impact on the population and human health, biodiversity, soil, air and water, and the interplay between these elements, which have a particular importance in applying climate change adapting measures.[40] There is also the information describing possible significant environmental impacts of the project, resulting from the project's impact on the climate, and the impact of climate change on the proposed project.[41] Impact assessments of suggested activities to climate change are made on the basis of the available positions of science on the impact of human activities on climate change.[42]

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38 *People of the State of New York v. Exxon Mobil Corporation, Supreme Court of the State of New York, No. 451962/2016*, accessed 6 February 2017, [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=RjOFq8qu5DQSZfGVHWo4cw==&system=prod] Accessed 8 October 2017

39 Directive 2014/52 / EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment, *OJ L 124, 25 April 2014, pp. 1-18*. Preamble, points 7 and 13

40 Directive 2014/52 / EU, Annex IV, Art. 4. Verschuuren,J., *„Legal Aspects of Climate Changes Adaptation "*, in Hollo EJ., *et al.* (eds) Climate Change and the Law, Springer 2013, pp. 257-287

41 Directive 2004/52/EU, Annex IV, Art. 5(f)

42 Drenovak Ivanovic, M., *Environmental Law of the European Union - the principles and characteristics of specific administrative procedures*, Belgrade 2017, pp. 96-102. Cameron, J., Juli, A., *„The precautionary principle: a fundamental principle of law and policy for the protection of the global environment"* in BC Int'l & Comp. L. Rev. 14/1991, pp. 1-27; Sunstein, C. R., *Laws of fear: Beyond the precautionary principle*, Cambridge University Press 2005, pp. 35-64

4. THE RIGHT OF ACCESS TO INFORMATION ON CLIMATE CHANGE IN COMPARATIVE PRACTICE

In comparative practice there are many cases of requested access to information about the financial guarantees of countries for projects and activities that contribute to climate change. In the case *Friends of the Earth et al. v Spinelli et al.* the two NGOs and four cities applied for compensation arguing that the state agencies financed projects that contribute to climate change.[43]. In this case, access to information on projects contributing to climate change was also requested. Although the case ended in a settlement, this was the first case in the US where access to information on climate change was requested and pointed to the public's role in decision-making with potential impact on climate change.[44]

A similar request is found in practice of the Administrative Court of Berlin. In the case *Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v. Bundesrepublik Deutschland*[45] the Administrative Court considered whether the information on export incentive measures for projects that have a negative impact on climate change is in fact the information on climate change. Germany adopted the Law on Free Access to Information of Public Importance *Informationsfreiheitsgesetz* (*IFG*)[46] in 2005 and the Law on Access to Environmental Information *Umweltinformationgesetz* (*UIG*)[47], which contains and closely regulates accessing environmental information as a separate procedure.[48] *IFG* and *UIG* serve as a general and special law (*lex specialis derogat legi generali*).[49] To avoid conflict of laws, *UIG* prescribes minimum standards in the implementation and protection of the right to free access to environmental information. Only if, in a particular situation, *IFG* provides broader powers for access to environmental information in relation to the solution provided by *UIG*, it is possible to apply *IFG* as a general

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43 *Friends of the Earth et al. v Spinelli et al.*, US District Court of California 2009

44 Savaresi, A., *„EU and US Non-State Actors and Climate Governance"*, in Bakker, C., Francioni, F. (eds.), The EU, the US and Global Climate Governance, Routledge 2016, pp. 211-224

45 Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V., v. Bundesrepublik Deutschland, vertreten durch Bundesminister fur Wirtschaft und Arbeit (The Administrative Court of Berlin, 2006)

46 *Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz – IFG)*, BGB1, I S. 2722, dated 5 September 2005

47 *Gesetz über die Umweltvertäglichkeitsprüfung,* BGB1. I S. 1757, dated 25 June 2005 and BGB1. I S. 1794, dated 24 June 2005

48 Jastrow, S.D., Schlatmann, S., *Informationsfreiheitgesetz – IFG Kommentar*, Hüthig Jehle Rehm 2006, p. 219; Erbguth, W., Schlacke, S., *Umweltrecht*, Nomos 2008, pp. 118–120

49 Schrader, C., Schrader, C., *"UIG und IFG – Umweltinformationsgesetz im Vergleich"*, in Zeitschrift für Umweltrecht 2005, pp. 572–573

law.[50] However, the concept and the legal nature of information on climate change are not regulated either by *UIG* or *IFG*. Access to information in the case *Bundes fur Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v. Bundesrepublik Deutschland* was requested in accordance with the provisions of the *UIG*. The competent ministry rejected the request, arguing that the information on export incentives cannot be considered environmental information. The Administrative Court in Berlin overturned that decision, arguing that it is special environmental information since the activities in question may have a negative impact on the environmental elements, and hence on climate change.

In comparative law we find cases that indicate the importance of a general law on access to information of public importance and the law regulating the access to environmental information. While a general law provides the foundation of the legal regime relating to access to information of public importance, a special law explains the characteristics of environmental information and can serve as the basis for closer regulation of the right of access to information on climate change.[51] The question as to which law provides better legal protection for access to environmental information was also raised in the case *Keiller v. Information Commissioner*.[52] The framework for legal regulation of access to environmental information in the United Kingdom consists of the Act on Free Access to Information from 2000 (*FOIA*)[53] and the Environmental Information Regulation Act from 2004 (*EIR*).[54] The case was launched with regard to the request to one of the UK's universities for a remote access to information contained in the electronic correspondence including the documents on the alleged manipulation of the data on climate change by a University's Associate. The Commissioner for Information refused access to the requested information, referring to the *EIR*. Since the e-mail was deleted, the information was no longer in the possession of the University, and thus could not be granted access. On appeal to the decision of the Commissioner for Information, the Tribunal held that the e-mail is still located on a server or is in the possession of a person storing the data on behalf of the authorities. In accordance with the *FOIA*, such information is deemed information held by public authorities, and as such it should be granted access.[55]

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50 *UIG* Art. 3 (2), *IFG* section 1 (3)

51 Kaminskaite-Salters, G., *Constructing a Private Lawsuit under English Law*, Walters Kluwer 2010, pp. 89-90

52 *Keiller v. Information Commissioner* (EA/2011/0152), United Kingdom, 18 January 2012

53 *The Freedom Information Act (FOIA)*, 2000

54 *The Environmental Information Regulations (EIR)* 2004

55 More on the case see [https://www.informea.org/sites/default/files/court-decisions/COU-158374.pdf]. Accessed 7 October 2017; see Drenovak Ivanovic, M., *Access to Justice in Environmental Administrative Matters*, p. 86

Bearing in mind the previous analysis of the case and the legal nature of information on climate change and comparative practice, we believe that the legal framework for access to environmental information should contain provisions in accord with the nature of information on climate change.

5. CONCLUSION

Information on climate change is the information of public importance. In terms of legal nature, it is closely related to the concept of environmental information. However, information on climate change, such as the information on export incentive measures for projects that have a negative impact on climate change, information on financial guarantees of countries for projects and activities that contribute to climate change, information about the financial consequences of the implementation of a policy on climate change for operators, differ from the environmental information inasmuch they border on the information of public importance where it is possible to apply many exceptions to the right of access. This requires amendment of the legal framework in order to closely regulate the right of access to such information, as evidenced by the analysis in comparative practice.

The legal framework should set deadlines for access to information on climate change, longer than those for access to environmental information (48 hours, 15 days) taking into account the complexity of analyses indicating the effects of climate change. Minimum criteria should be determined by the standard "as soon as possible", while the deadline may vary depending on the type of information requested. The foregoing analyses suggest the outstanding issues in the implementation of exceptions to the right of access to environmental information. Frequent amendments of positive law governing this issue and uneven practice of the Commissioner for Information of Public Importance, as well as examples of comparative legal practice, emphasize the need for clear criteria against which to apply the exception to the right of access to information on climate change, with the exception of right of access to information on emissions into the environment, which cannot be limited.

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JUSTICE FOR CHILDREN IN JUSTICE SYSTEM OF BOSNIA AND HERZEGOVINA- REFLECTION ON EUROPEAN LAW IN AREA OF HUMAN RIGHTS

ABSTRACT

In recent years, authorities in Bosnia and Herzegovina with support of international organizations achieved very important goals in improving respect for children's rights in area of juduciary, police and social protection. Also, similar process is happening in countries in region, which is very important indicator of unification of policy makers to make their society better place for all citizens and vulnerable categories such as juvenile offenders, victims and witnesses. Bosnia and Herzegovina has complex state organization- two entities and one District, which means three different legislatives. Not only in justice for children system but also in all attempts on improving any other system, decision makers must be aware that they need to deal with three processes at same time. As every social change, these changes take time, motivation and resources. Policy makers in Bosnia and Herzegovina did recognize urgent need to make this area more structured and through working plans agreed with three Governments in Bosnia and Herzegovina, there is tendency that in the following period, system of juvenile justice will be improved, based on experiences from past and on vision and desire to make society of Bosnia and Herzegovina as society safe and healthy for all families. Using comparative analysis, description and methods of abstraction and concretization, this Paper will show justice system in Bosnia and Herzegovina with focus on justice for children, in reflection with area of human rights contained in European Law. System of child protection is extremely complexed and sensitive, and in process of creating surrounding best for them, Bosnia and Herzegovina's society must show the will, motivation and great energy in strengthening justice for children.

Keywords: *Human rights, Bosnia and Herzegovina, justice system, children, European area of justice*

1. INTRODUCTION

European Union is based on a strong commitment to promoting and protecting human rights, human dignity, freedom, democracy, equality, the rule of law, democracy and the rule of law worldwide. Human rights are at the very heart of EU relations with other countries and regions. Promoting human rights work can help to prevent and resolve conflicts and, ultimately, to alleviate poverty. European Union policy includes[1] working to promote the rights of women, children, minorities and displaced persons, opposing the death penalty, torture, human trafficking and discrimination, defending civil, political, economic, social and cultural rights and defending the universal and indivisible nature of human rights through full and active partnership with partner countries, international and regional organisations, and groups and associations at all levels of society. Considering tha fact that Bosnia and Herzegovina still is no part of European Union, it is much harder to achieve complete protection in area of human rights. Bearing in mind situation like this, we also can not ignore the fact that authorities in this country actively work on development of mechanisms which will focus on protection of its citizens on all aspects, within complex country structure.

2. CHILD PROTECTION - CONTEXT OF BOSNIA AND HERZEGOVINA

UN Guidelines for Alternative care of Children[2] aims to support implementation of UN Convetion on the Rights of a Child and all other documents which will provide best interest of a child accomplished. One of the main principles is preservation of a family and avoiding separation of a child from a family, because family surrounding is the best for child's mental and physical health. Only in case when that care is not adequate, system must find other alternative care solution which best fits to every individual child and protects his rights. Document emphasise the importance of having strong and well structured child protection policies and frameworks and constant work on prevention of separation of children from their parents. Special attention is focused on protection of vulnerable children (victims, abandoned, children living on street, refugees and children with disabilities) and avoiding discrimination of parents based on their poverty, religion, illness or other circumstances which can lead to abandonment of a child. One of principles is also alternative care which must be must propriate for every child and taking into

[1] European Union website, [www.europa.eu] Accessed 15. May 2018

[2] The Guidelines for the Alternative Care of Children were endorsed by the United Nations General Assembly on 20th November 2009, in connection with the 20th anniversary of the UN Convention on the Rights of the Child

account child's environment, health and social life and respecting his dignity and his/her voice in decision making. Also, alternative care should be temporary and if possible not to separate siblings. This Document and also other documents from area of protection of children stresses out that children under age of three should not be placed in institutions. Important issues such as "children without parental care", "alternative care" and "residential care" are detailed explained with focus on prevention the need for alternative care, strengthening biological families, preventing separation and promoting family reintegration. One of the important objectives of these Guidelines is to have a good network of care providers who are trained and motivated, timely acting in emergency situations and focus also on children who are already abroad.

2.1. Benefits from legislative framework

At the end of 2017, the National Assembly of the Republic of Srpska adopted a new Law on Child Protection that regulates the child protection system, carriers of the child protection system, rights and users from child protection, conditions and procedure for exercising rights, financing, supervision, records in child protection and other issues of importance for the functioning and realization of child protection. The child protection system in Republic of Srpska consists of organized activities and activities that provide support for the birth of children and harmonization of work and parenting, creating basic conditions for equalizing the level of meeting the developmental needs of children, helping the family with children in achieving its reproductive, protective, educational and economic functions, improving the material situation of families with children and the special protection of the third child in the family.[3] Also, special attention is focused on protection of children without parental care. Numerous experts in the Republic of Srpska professionally deal with the analysis and improvement of the living conditions of children growing up in institutions. As an integral part of the strategic commitments of the Government of the Republic of Srpska in the area of social protection of citizens, the Strategy for Improving Social Protection of Children Without Parental Care 2015-2020 was adopted. The Strategy foresees directions of action that, in accordance with the available possibilities, improve the activities of the holders of the social protection system in the Republic of Srpska. In addition, all actions taken in connection with the provision of social support to children without parental care are aimed at achieving the best interests of the child. The overall goal of the Strategy is to develop and improve systemic models of

[3] Law on Child Protection of Republic of Srpska, Official Gazzete of Republic of Srpska, number 114/17

management and action in the field of social protection of children who have the capacity to respond to the needs of children without parental care and to the needs of children at risk of separation from parents, in accordance with the best interests of the child. Aim of Strategy for improving the social protection of children without parental care 2015-2020 in Republic of Srpska is to achieve a better realization of the rights of children without parental care through the social protection system, and to develop and improve the system of social protection of children that would be able to respond to the needs of children without parental care. The Strategy foresees directions of action that, in accordance with the available possibilities, improve the activities of the holders of the social protection system in the Republic of Srpska. In addition, all actions taken in connection with the provision of social support to children without parental care are aimed at achieving the best interests of the child. The overall goal of the Strategy is to develop and improve systemic models of management and action in the field of social protection of children who have the capacity to respond to the needs of children without parental care and to the needs of children at risk of separation from parents, in accordance with the best interests of the child. The Strategy foresees directions of action that, in accordance with the available possibilities, improve the activities of the holders of the social protection system in the Republic of Srpska. The specific objectives are defined based on the recognition of six areas of action towards children without parental care in the social, family and child care system.

Specific goals of Strategy are focused on:

1. The area of preventive protection of children at risk of separation, which implies sensitization of experts, parents, children and young people for family life issues that lead to violation of parental roles, establishment of a systemic solution for the promotion of preventive activities, early detection of children who grow at an increased risk of loss of parental care, and empowerment of parental competence in the field of care and acting towards the child.

2. The field of guardianship, which implies the improvement of systemic arrangements for the implementation of guardianship in order to achieve a higher degree of custody of children without parental care.

3. The field of adoption, which implies improvement of systemic solutions and affirmation of adoption in practice, as the most efficient model for the care of children without parental care.

4. Foster care, which implies providing material, institutional and personnel requirements for the implementation of family accommodation based on raising

the quality of existing and establishing new models of family care services for children without parental care.

5. The scope of institutional care for children without parental care, which implies improvement of care in social care institutions that provide institutional accommodation through the extension of the scope, quality and diversity of social protection services.

6. The area of support for the independence of young people leaving organized forms of social protection for children without parental care, which includes organized forms of social protection for children without parental care.

Since 2013, the Republic of Srpska has been working intensively on promoting foster care. The Law on Social Protection[4] provides care in the foster family as a form of providing the beneficiaries with a family that ensures that they meet the basic needs of life, which takes care of the personality of the beneficiaries and helps them in exercising their rights and execution of obligations. The Regulation on Foster Care[5] prescribes the types and forms of care for the foster family, and depending on the needs and conditions of the beneficiaries, standard, specialized and urgent fostering is applied. The focus of these long-term activities is to develop the capacity of experts dealing with this area, improving competencies and training to assess the general suitability of foster families for the quality of performing a foster care role, and foster care tasks to meet the specific needs of beneficiaries for which foster care is applied as a safeguard measure. Also, Federation of Bosnia and Herzegovina recently adopted Law on foster care. In Bosnia and Herzegovina, foster care campaign is active in partnership of UNICEF and Governments. Helping families at risk and preventing the separation of children from families, primarily means their timely identification, and an individual approach in accordance with the individual needs of each family. Support can be provided by various institutions, above all, the key role have the centers for social work that provide continuous support and who are familiar with family circumstances and challenges through which families go through their life cycles.

2.2. Recommendations

In context of overall situation in area of child protection, Governments in Bosnia and Herzegovina must fosuc on:

[4] Law on Social Protection,, Official Gazette of the Republic of Srpska, No. 37/12, 90/16

[5] Regulation on Foster Care, Official Gazette of the Republic of Srpska, No. 27/14

- **Stregthening national Laws on Child Protection at all levels**- Child protection systems should provide support for harmonization of parenting, creating basic conditions for satisfaction of children needs, helping families to achieve its reproductive, protective, educational and economical role, improving financial situations of a families and special attention of a third child in a family. Laws on child Protection and also by-laws should include carriers of a system of child protection, rights and beneficiares, financing and supervision.

- **Finalizing transformation plan of Children's Homes in Bosnia and Herzegovina in aim to reduce number of children in institutions and to increase number of services for a child and a family-** Developing and adopting new services for families such as day care centers, counseling, resource centers and service called "family associate" which already exist in region and which showed excellent impact on strenghening biological families.

- **Support to biological families**- Best way to provide this kind of support is directly in family with help of experienced social workers and similar profesions, but while developing this "assistance directly at family home", families should be able to be supported in centers for social work or in day centers.

- **Strengthening of capacities of experts from centers for social work and foster parents**- To make possible that families get real support means that experts should be trained how to do that on best way. People who work in this area already have knowledge through their education, but extra education with this focus can benefit to both- professionals and families. In this sense, providing trainings for supervision is extremely important.

- **Support to youth who leave care systems**- After leaving care system, youth needs additional support in their way of entering into the world of adults. Governments should provide programs/centers which main focus would be that for certain time they assist to adult in job search, housing, counceling… Experiences from other countries showed that good example for this could be to provide/build apartments for this youth where they would do housework independently and be able to have a good start for life, and that is the basis for their progress.

- **To work more on relations between biological and foster families-** It is important that all partners in process where child must leave family (biological parents, social worker, foster parent), and especially social worker who is bond between biological and foster family realize that for the best interest of a child is to know its identity, to avoid secondary trauma and to be accaepted with its all individual characteristics. Through supervisions and trainings, experts could get more knowledge about how to choose right foster family and how to prepare a

child for new changes. Also, bearing in mind that in Bosnia and Herzegovina there is certain number of children with dissabilities and with chalenging behavior, training should be provided to foster parents also- with focus on specialized foster care which is urgent need in society of this country.

Governments should work and lobby for enabling financial resources for above mentioned activities.

2.3. Challenges

Looking at the overall situation in Bosnia and Herzegovina related with area of child protection, key challenges are following:

- Material status of families- poverty must never be a reason for separation of children from families. It is reality of society of Bosnia and Herzegovina that there is a lot of families in need, but governments should focus on helping those families to overcome obstacles in their family development. Money which system gives for alternative care should be focused on families in need. For example, if one month in alternative care costs 700 BAM per child, that money on montly level could help biological family to fight against life challenges and to keep child in family. Also, strategies for employment, made by Governments could provide that families whose parents do not have job (and that is very often), make salaries and keep their family together. This process is systematic measure and could be monitored by Government directly, with assistance of local community and Centers for Social Work who already know families at risk and can make a social map and follow the progress.

- Situation analysis[6] showed that in Bosnia and Herzegovina there is 1.640 children without parental care and that number of children with dissabilities is in higher procent in comparation with other children without parental care. This means that our society still needs to learn a lot about how to deal with specific needs of this vulnerable categories. Governments in Bosnia and Herzgovina put a lot of efforts to emphasize the importance of protection of children with disabilities, but this is a long process and needs step by step actions. Main action should be to educate and make awerness about disabilities in general, to help and support parents who have children with disability because often because of fear and not knowing what to do, parents decide to put a child in institution. Health and Social Welfare system should work closely in this area, and to enable support to families by making team of people consisted of doctors and

[6] Done by UNICEF Bosnia and Herzegovina during 2017

helping professionals who could work together with family. Those teams could go directly to family or to be part of daily center where families can go, with assistance of social worker in both cases because social worker is key bond between family and service provider. This intervention could be followed by Centers for Mental Health and Centers for Social Work and monitored by relevant ministries of health and social welfare in Bosnia and Herzegovina.

- Parent never stops being parent, even if he is absent or not live anymore. For child's identity and avoiding additional trauma, it is important that it knows all about its origin. Unfortunatelly, we can not influence on life, but we can work on providing best care for a child whose parents died. In those situations, kinship foster care showed as best for a child, because they already know eachother and already have specail bond. Social workers who make decisions about placements should support capacities of kinship parents and also if there are siblings, to put them together in kinship family. For a child best interest is not to change a lot of foster families, and kinship care, with good assesment of social worker and support provided, is most relevant for a child. This measure of giving extra importance to kinship care could be measured very well directly by centers for social work.

2.4. Issues

Two key child protection issues in Bosnia and Herzegovina are:

1) **Process of transformation of institutions where are placed children without parental care and children with dissabilities**. Recent data presented on IFCO 2017 World Conference, showed that 500 000 children in Europe are placed in institutions. Also, generally, UN Convetion on the Rights of the Children and UN Guidelines for the Alternative care of Children emphasise importance of this issue. Bosnia and Herzegovina is currently on the beginning of process of transformation and through exsiting projects, governments work effectively on making transformation plans in aim to reduce number of children in institutions, to develop alternative ways of care- especially foster care as closest model to family (this is incorporated in laws in Bosnia and Herzegovina). Most important goal of this process is to strengthen biological families and to prevent separation of children from families. On this way, family as a key cell of society will be preserved and children will avoid trauma and have the opportunity to grow in love and in warmth of their own home.

2) **Creation and strengthening legal frameworks for protection of children rights in all aspects**. Existing Laws on Child Protection in Bosnia and Her-

zegovina show that our society needs to overcome some gaps, and laws need to be adopted and some new ones created in order to protect best interest of a child. Also, there is obvious need for creation of by-laws which will cover areas of protection of children from all forms of violence. In Republic of Srpska, Federation of Bosnia and Herzegovina and District Brcko progress has been made in a way that existing laws are improved, new strategies and guidelines created and in some parts of country funds for implementation are provided. Those activities indicate progress which will continue also in future. Also, by making domestic laws and regulations, governments in Bosnia and Herzegovina should follow international recommendations and should accept generous help in this process offered by international organizations.

3. JUSTICE FOR CHILDREN

Bosnia and Herzegovina in recent years has taken important steps to initiate reforms in the area of children's rights. The reform of the justice for children system, under the umbrella of the wider criminal justice sector reform, demonstrates the commitment of line ministries and their institutions to bring the justice for children system in line with international and European child-rights principles. Key laws to enhance children's protection in the justice system have been adopted in each entity and District Brcko. Municipal Working Groups with the aim of encouraging multi-sector cooperation at the local level, encouraging the use of alternative measures and creating and implementing secondary and tertiary prevention programmes, have been established, and secondary prevention programmes for identifying at-risk children and addressing their needs have been piloted. Furthermore, child victims and witnesses have increased access to child-friendly justice systems, including child-friendly interviewing rooms at the police and courts and capacitated professionals, leading amongst others to an increase in the number of children receiving specialised witness support from 28 in 2013 to 539 children in 2016. However, progress has been patchy and uneven and much more remains to be done in establishing a holistic justice for children system. [7]Within the Project

[7] Data of UNICEF Bosnia and Herzegovina as a result of project "Justice for Children". Activities implemented under this joint project of UNICEF and relevant ministries in Bosnia and Herzegovina include support for the drafting and implementation of primary and secondary legislation, development of training programmes, development and enhancement of the capacity of professional staff, strengthening inter-sectoral cooperation, providing support to establishment of day care centres, implementing secondary and tertiary prevention measures, prevention of offending and re-offending, as well as a number of activities focusing on protection and reintegration rather than punitive measures. The aim is to ensure that children in conflict with the law receive better services and protection, and that experts recognise their needs. This includes taking a consistent and uniform approach, addressing socio-cultural causes of juvenile offending and mobilising the whole society (parents, citizens, edu-

"Justice for children" authorities in Bosnia and Herzegovina together with UNICEF Bosnia and Herzegovina achieved very important goals in improving respect for children's rights in area of juduciary, police and social protection. Also, similar process is happening in countries in region, which is very important indicator of unification of policy makers to make their society better place for all citizens and vulnerable categories such as juvenile offenders, victims and witnesses.

3.1. Solutions and progress

Reasons for unequal progress and possible solutions would be:

- Bosnia and Herzegovina has complex state organization- two entities and one district, which means three different legislative. Not only in justice for children system but also in all attempts on improving any other system, decision makers and partners mut be aware that they need to deal with three processes at same time. Republic of Srpska is centralized and it makes this process go much faster, Federation of Bosnia and Herzegovina is decentralized and before any actions, cantons must agree among themselves about joint progress, and District Brcko has its specific Government. Suggestion would be to primarily understand well functioning of all parts of Bosnia and Herzegovina, and then to make detailed plan for progress bearing in mind specifics of every part of Bosnia and Herzegovina. This also means, to lobby with highest level of authorities, to make them aware of necessity of impoverment of juvenile justice, and then to focus on other levels- which means that influence must go from top. Without respecting this, progress made so far can be stopped and precious time wasted and that definitelly is not at the best interest of children in Bosnia and Herzegovina.
- Significance of preventive work is not enough emphasized. Even though a lot of educations were conducted, this should be more then just education- it should be raising awareness. For example, if we organize education for workers in centers for social work, and we forget directors, then our education achieved just half of goals. Possible solution would be to include not only workers in centers, police, courts or prosecutors, but also their superiors, because only then they will be able to really make actions possible. Of course that it is important that every individual has its own motivation, but without understanding of their superios, those experts will not be able to give its maximum. Bearing in mind stress which is obvious in professions like this, good idea would be to organize

cational institutions, legislative authorities and NGOs) in combating juvenile offending. Also, other activities in the area of prevention and support for children in contact with the justice system were performed. Reforming the juvenile justice system is one of the conditions for ensuring compliance with the UN Convention on the Rights of the Child

supervision for all people working in this area, because burn-out syndrome is hidden danger.

- One of the reasons for unequal progress is also different implementation of Law on Protection and Treatment of Children and Juveniles in the Criminal Procedure Code. This is also a result of different system functioning in Bosnia and Herzegovina. One of the soulutions could be to connect policy makers from different parts of country, to share experiences and to follow practicies. Cooperation is conditio sine qua non for progress, not only between different entities, but also within systems (for exapmle: to connect social workers with prosecutors and judges, because they all work together in same goal on advancement of juvenile justice).

- Social workers across Bosnia and Herzegovina do not have same approach to questions of minors in conflict with law- this is mainly consequence of some obsolete modalities of social work methods, new and old generations of social workers. It is extremely important that social workers adapt new modalities and to write unique social anamnesis. Authorities at all levels in Bosnia and Herzegovina should make guidelines for social anamnesis and other relevant documents, in order to have detailed data about minor and its family, so judges could make proper decisions. Social workers usually know very well child and family, they are with them also during the process on the court, and also later in process of treatment and resocialization. This means that social worker is partner to a family and a crucial factor in support and strengthening its capacities.

- Child-friendly interviewing rooms exist only in few municipalities in Bosnia and Herzegovina. Focus in this subject and solution for following period should be to lobby more at local level, because municipalities are guided from different leaders, and plan to approach them should be individual. Also, it is important to lobby for more resources.

- Even law on questions about juvenile justice exists in Bosnia and Herzegovina for five years now, not all of what is written is implemented. For example- there are no institutions for realization of some measures proscribed by law. Suggestion and focus for following period should definitelly be to make/build daily centers where minors can go after desiosion by court is made and where they can get professional help during and after time spent there.

4. CHILDREN IN CONFLICT WITH LAW- TO PREVENT AND TO HELP

In institutions in Bosnia and Herzegovina regarding proceedings in justice that are directed towards children and juveniles who are in conflict with the law, problems of a practical nature are evident, due to the fragmentation of criminal legislation, which is regulated in this area and still at four legislative levels at the level of the Republic of Srpska, at the level of the Federation of BiH and at the level of the Brko District, if their provisions are almost identical and based on the same principles, and because of the fact that in the procedure towards them, if there are no special solutions, provisions of the laws applicable to adult perpetrators of criminal offenses. In addition, as parts of entity laws, and before the reform of criminal legislation in BiH in 2003, there were special provisions concerning juvenile perpetrators of criminal offenses, which even when the investigative procedure against adult perpetrators went beyond the jurisdiction of the prosecutor, they did not suffer much because preparatory proceedings against juveniles remained within the jurisdiction of a juvenile judge (Observatory for Human Rights in Bosnia and Herzegovina, 2014).

Children and minors in conflict with the law need and have the right to appropriate care, protection, and the opportunity for social reintegration - the rights that the criminal justice system for juveniles should be based on. Shifts have also been made in the increasing importance of mediation in the social protection system, especially in relation to minors in criminal proceedings. Centers for Social Work are in the public's focus because they are preoccupied with remedying the consequences of certain social problems, and less time is allocated for preventive activities. There is a positive tendency in terms of organizing a large number of scientific and professional meetings where experts exchange experiences and contribute to the improvement of the general social situation, pointing to the importance of observing this issue from the point of view of individuals, groups and society as a whole. Research should aim at relieving centers for social work, providing resources, professional staff, informing the public and improving the general social climate, because a healthy society and environment encourage children and young people to be aware, conscientious and responsible for their own actions (Mitrovic, Kupresanin , 2017).

The principal regional systems for the protection of human rights essentially rely on the rules set out in the regional conventions which created them. Nevertheless each convention in its preambular provisions links it to the Universal Declaration of Human Rights and, explicitly or otherwise, to the Charter of the United Nations. The European Convention' in its preamble provides that, through the

agreement to establish the treaty and its institutions, the "Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law" have resolved, "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration". (Wilner, 1996).

Guidelines for Action on Children in the Criminal Justice System[8] state the importance of a comprehensive and consistent national approach in the area of juvenile justice as recognized, with respect for the interdependence and indivisibility of all rights of the child. In the use of the Guidelines for Action at both the international and national levels consideration should be given to the respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child. The principles and provisions of the Convention on the Rights of the Child and the United Nations standards and norms in juvenile justice are fully reflected in national and local legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society. The European Convention on Human Rights (ECHR)[9] protects the human rights of people in countries that belong to the Council of Europe. The Convention consists of numbered 'articles' protecting basic human rights. The Convention secures the right to life, freedom from torture, freedom from slavery, the right to liberty, the right to a fair trial, the right not to be punished for something that wasn't against the law at the time, the right to respect for family and private life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly, the right to marry and start a family, the right not to be discriminated against in respect of these rights, the right to protection of property, the right to education, the right to participate in free elections and the abolition of the death penalty.

Children in conflict or contact with criminal justice or welfare agencies either as children in need of protection, children at risk, on arrest, during trial, in detention or as victims and witnesses, are often in a vulnerable position, unaware of their rights or unable to enforce them. How these children are treated by the system is

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8 Recommended by Economic and Social Council resolution 1997/30 of 21 July1997

9 The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundament freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe the convention entered into force on 3 September 1953

a critical factor in determining how they will be reintegrated into their families, schools and communitie (Penal Reform International, 2013).

5. CONSCLUSION

An assessment of juvenile justice in Bosnia and Herzegovina[10] pointed out that strategies on juvenile offenses should be based on a realistic risk assessment and expected constraints, a careful analysis of the most urgent changes in the system and a relevant assessment of the viability of possible approaches and measures to address priority problems. The priority should be to support the centers for social work in developing capacities that will enable them to fulfill their obligations in accordance with the law. Opening a large number of day centers can influence the elimination of existing shortcomings in secondary prevention programs, and legal solutions should be constantly monitored and analyzed.

System of child protection is extremely complexed and sensitive, and in process of making our world best for children, Bosnia and Herzegovina's society must show the will, motivation and great energy in accomplishing that goal. Child protection is large, sensitive and one of the most important areas of one society. Every country has its own mechanisms to provide social security of this part of population. Family is basis of all relations and actions, and often it happens that family needs to deal with different challenges in its development and life cycles. Some crises are temporary, but some of them are unfortunatelly permanent and they indicate offering support and help- material and non material. Most vulnerable categories of children are children without parental care, children with dissabilities, children visctims of violence and children in contact with law.

As every social change, these changes take time and need a lot of steps, motivation and resources. Authorities in Bosnia and Herzegovina did recognize urgent need to make this area more structured and through working plans agreed with three Governments in Bosnia and Herzegovina, in following period, system of juvenile justice will be improved, based on experiences from past and on vision and desire of us all to make society of Bosnia and Herzegovina as society safe and healthy for all families.

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ALIGNMENT OF THE SERBIAN CIVIL SERVICE LEGISLATION WITH THE EU ACCESSION REQUIREMENTS

ABSTRACT

The objective of the paper is to assess the degree of alignment of key aspects of the Serbian civil service legislation with the EU accession requirements. As Serbia aspires to become the EU member state, it is important that its civil service legislation is aligned the EU accession requirements, which should ensure civil service effectiveness during the negotiation process and subsequently within the EU system. Special attention in the paper is paid to the assessment of civil service professional development rules and practices, which include civil servants training, performance appraisal and promotion.

The authors argue that the Serbian civil service legislation which governs professional development is still not fully aligned with the EU accession standards. In spite of the fact that the normative-legal framework mainly reflects the EU requirements, its level of implementation and effectiveness is not satisfactory. The authors conclude that additional legal and socio-political changes need to take place in order to achieve progress in this area.

Keywords: *alignment of legislation, civil service, professional development, EU accession requirements*

1. INTRODUCTION

The accession to the European Union has been one of the key objectives of the Government of Serbia since the early years of the XXI century. The accession process of EU accession began in 2003, when Serbia was identified as a potential candidate for EU membership during the Thessaloniki European Council summit. Setting the priorities in the legal and institutional reform was continued through the adoption of a European partnership in 2008. Serbia was granted EU candi-

date status in 2013. In June 2013, the Council made a decision to open accession negotiations with Serbia, which was followed by the adoption of the negotiating framework. On 21 January 2014, the 1st Intergovernmental Conference took place, signaling the formal start of Serbia's accession negotiations to the EU.

The process and the prospects of Serbia's accession to the European Union serve as an important anchor for comprehensive legal and institutional reforms, which includes the area of civil service. In spite of the fact that the field of civil service falls outside of the scope of "acquis communautaire", the Commission pays special attention to this area in its progress reports, as part of political criteria which need to be met during the accession process. The Commission realizes that Serbia, just like other candidate states, needs professional civil service which will be able not only to handle the complex negotiation process, but also to enable Serbia to effectively function as a member state, once it joins the EU.

The objective of this paper is to assess the degree of alignment of certain aspects of the Serbian civil service legislation with the EU accession requirements. The EU requirements in the field of human resources management in the civil service are established by the SIGMA programme[1] and their document "Principles of Public Administration" adopted in 2014.[2] Special attention in the paper shall be paid to the requirements regarding professional development of civil servants, which include civil servants training, performance appraisal and vertical and horizontal mobility of civil servants.

Methodology of the paper is based on combining normative and socio-legal method. Normative method shall be used to examine SIGMA standards and normative framework of professional development of civil servants in Serbia. Analysis of normative legal texts should provided a good basis for understanding of what are the current regulations regarding professional development of civil servants in Serbia and to which degree they are aligned with the European standards. However, as institutions and norms represent just a part of the broader social background,

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1 Having recognised the importance of a well regulated and organised public administration for the fulfillment of the membership requirements in all sectoral areas, in 1992 EU cooperated with the Organisation for Economic Cooperation and Development (OECD) to establish the SIGMA programme (SIGMA - *Support for Improvement in Governance and Management*). The Programme aims at providing support to public administration reform activities in (potential) candidate states. SIGMA programme is mainly funded by the EU and represents one of the main instruments of the European Commission in promoting capacity development in public administration in Central and Eastern Europe, as well as a technical assistance service to the candidate states

2 SIGMA, *Principles of Public Administration*, OECD Publishing, Paris, 2014

they cannot be analyzed isolated from their social context.[3] Therefore, in order to provide a better understanding of the existing legislation, considerable attention shall be devoted to analysis of implementation of civil service rules in practice and respective social environments through the employment of socio-legal method.[4]

The structure of the paper shall comprise three key parts: 1) the first part which will analyse EU requirements in the area of human resources management in the civil service, reflected within the SIGMA Public Administration principles, 2) the central part, which shall examine the level of alignment of the Serbian civil service legal framework and its implementation with the SIGMA standards, and 3) the third, concluding part, which will provide recommendations for improvements in this area.

2. EUROPEAN "SOFT ACQUIS" IN THE AREA OF CIVIL SERVICE – SIGMA PRINCIPLES OF PUBLIC ADMINISTRATION

The EU has recognized the importance of professional civil service systems with adequate capacity ever since the completion of the Internal Market. While administrative and civil service systems were the exclusive domain of the EU member states up to the early 1990s, this has changed fundamentally with the completion of the Internal Market and Monetary Union. The quality of administrations has become a point of discussion between member states. The prospect of accession of a large group of CEE states, with (perceived) weak public administration systems, added incentive to politicians in EU states for engaging in discussions about administrative quality at European level.[5]

In the process of EU accession candidate countries have become obliged to comply with general European principles of public administration of the so-called "European Administrative Space", developed by SIGMA programme in the 1990s.[6] The idea of "European Administrative Space" was that, in spite of the differences of institutional configurations, a degree of convergence existed among member states at least at the level of general principles. These common public administra-

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3 Kokkini-Iatridou, D., *Some Methodological Aspects of Comparative Law*, Netherlands International Law Review, 1986, pp. 166–167

4 Cotterrell, R., *Why Must Legal Ideas Be Interpreted Sociologically?* Journal of Law and Society, Volume 25, Number 2, 1998, pp. 185–187

5 Verheijen, T.J.G., Rabrenovic A., *Civil Service Development in Central and Eastern Europe and the CIS: A Perfect Storm?*, van der Meer, F.M., Raadschelders, J.C.N., Toonen, Th.A.J. (eds.), Comparative Civil Service Systems in the 21st Century. Houndsmills: Palgrave Macmillan, pp. 15-37

6 SIGMA, *European Principles of Public Administration,* SIGMA papers No. 27, OECD publishing, 1999

tion principles included elements such as reliability, predictability, accountability and transparency, as well as technical and managerial competence, organisational capacity, financial sustainability and citizen participation. [7]

In 2014, SIGMA prepared a new document entitled "Principles of Public Administration", which sets out qualitative and quantitative indicators in six areas of public administration.[8] These areas include: strategic framework for public administration reform (PAR), policy development and co-ordination, public service and human resource management, accountability, service delivery and public financial management (PFM), including public procurement and external audit. The Principles succeeded the previous SIGMA "baseline assessment" system, which reviewed the quality of civil service and public management systems based on a set of qualitative indicators, related to six core functions that public management systems are expected to fulfill.[9]

It may be argued that the SIGMA Principles of Public Administration represent so-called "*soft acquis*", which constitute common standards of the EU Member States, and which influence the development of the national law indirectly.[10] Although they are not legally binding, these standards can have significant practical impacts on the countries seeking EU membership, as the European Commission uses them as benchmarks for assessing progress towards membership.

The Principles of Public Administration represent an example of a change of the EU approach to the accession requirements. Unlike in the early years of accession, when the Commission was insisting merely upon adoption of certain legislation and establishment of institutions (so-called "check-box" approach), there is a strong orientation towards assessing implementation of the legal framework and its effectiveness in practice. This appears to come from a wider understanding that an attempt to change the society and civil service in particular through laws has obvious limits in the 21st century.[11]

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7 *Ibid*, pp. 8-18

8 SIGMA, *Principles of Public Administration*, op. cit. note 2

9 First baseline assessment system included the following areas: policy management, civil service, internal financial control, public expenditure management, external financial control and procurement. SIGMA, *Structural Elements for Improving Horizontal Public Governance Systems in EU Candidate States: SIGMA Assessment Baselines*, 2009

10 Keune, M., *EU Enlargement and Social Standards – Exporting the European Social Model?*, JOrbie, J., Tortell L., (eds.), The European Union and the Social Dimension of Globalisation, How the EU Influences the World, Routhledge, 2009, p. 52

11 Nicolaidis, K, Kleinfield, R, *Rethinking Europe's 'rule of law' and Enlargement Agenda: The Fundamental Dilemma*, SIGMA paper No. 49, OECD publishing, 2012, p. 47

In order to be able to monitor the progress in achieving the benchmarks set in the Principles, SIGMA has also recently developed a document entitled "Methodological Framework", which provides a comprehensive monitoring framework for assessing the state of a public administration against each Principle set out in the Principles of Public Administration.[12] The Framework includes a set of indicators, which attempt to define preconditions for a good public administration (good laws, policies, structures and procedures) with the special emphasis on actual implementation of legislation and its effects and outcomes in practice.[13]

Each year SIGMA makes an assessment of the progress the candidate countries have made in meeting its public administration requirements.[14] These assessments are presented in the reports, which are forwarded to the Commission, which takes them as a basis for the preparation of its annual progress reports. The SIGMA and the Commission reports are published at the same time at the end of the calendar year. SIGMA made a baseline measurement report for all EU candidate states on the basis of the Principles of Public Administration in 2015 and subsequent monitoring reports for certain priority areas of public administration in 2016 and 2017.[15]

The key area of the Principles which sets out the requirements in the area of civil service development is the section on public service and human resource management. The section includes seven principles which cover the following areas: the scope of public service; institutional set up for HR management; recruitment and selection of senior and other civil service personnel; remuneration; professional development; measures for promoting integrity.[16] Each of the mentioned areas contain key principles and several sub-principles and assigned indicators to measure each of them.

As assessment of the overall framework for the civil service would require substantive and comprehensive analysis which falls outside of this paper, we shall focus the analysis to the area of professional development of civil servants, as one of the key elements of human resources management in the civil service. Professional development of civil servants is outlined within Principle 6 of the Principles of Public Administration. It includes three inter-related elements – training of civil

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12 SIGMA, *Methodological Framework for the Principles of Public Administration*, OECD publishing, Paris, 2017

13 *Ibid.*, 102

14 SIGMA reports are available at: [http://www.sigmaweb.org/publications/monitoring-reports.htm] Accessed 15 March 2018

15 *Ibid.*

16 SIGMA, *Principles of Public Administration*, *op. cit.* note 2, pp. 42-54

servants, performance appraisal and promotion and mobility. SIGMA main requirement regarding professional development is insurance of regular training, fair performance appraisal, and mobility and promotion based on objective and transparent criteria and merit. The following section of this paper shall analyse the elements of principle 6 in more detail, together with the level of alignment of Serbian legislation and practices with this principle.

3. ASSESSMENT OF THE ALIGNMENT OF SERBIAN LEGISLATION AND PRACTICES WITH THE SIGMA PRINCIPLES

3.1. Training of civil servants

Education and training of civil servants constitute an essential part of legality and professionalism.[17] Civil service training is a process of acquiring specific knowledge, abilities, skills, attitudes and/or behavior in order to improve results achieved by each civil servant at his workplace and hence the effectiveness of the whole civil service.[18]

SIGMA principles of Public Administration envisage four key requirements that need to be met in relation to civil servants training, which combine legal and practical requirements. The first one is that training is recognized as a right and duty of civil servants, established in law and applied in practice. The second is that there needs to exist a strategic training needs assessment and development of annual or bi-annual training plan(s), which should be conducted through transparent and inclusive processes, co-ordinated or supported by the central co-ordination unit for public service and/or public service training institution. The third one is a necessity of strategic annual or bi-annual training plans of civil servants (for different categories of civil servants, including senior managerial positions are adopted, implemented, monitored and evaluated. Finally, sufficient resources need to be allocated for training public servants.[19] These measures are additionally assessed through four indicators: a) recognition of training as a right and a duty of civil servants b) co-ordination of the civil service training policy c) development, implementation and monitoring of training plans and d) evaluation of training

[17] Visković, N., *Država i pravo,* Birotehnika, Zagreb, 1997, p. 72

[18] Milovanović, D., Ničić, J., Davinić, M., *„Stručno usavršavanje državnih službenika u Republici Srbiji" [Professional Development of Civil Servants in the Republic of Serbia],* Udruženje za javnu upravu, Službeni glasnik, Belgrade, 2012, p. 10

[19] SIGMA, *Principles of Public Administration*, *op. cit.* note 2, p. 53

courses, e) training expenditures in proportion to the annual salary budget (%) and f) participation of civil servants in training (%).[20]

With respect to legal requirements, Serbian civil service legislation appears to have a high degree of alignment with the PA principles requirements. Article 10, paragraph 2 of the Serbian Civil Service Law stipulates the right and duty of each civil servant to undergo professional development according to the needs of the civil service institution.[21] Professional training is implemented through general and specific training programs based on training needs analysis. According to the Decree on Professional Development there are four general training programmes: the training programme for newly employed civil servants; the general programme of continuous training for civil servants; the training programmes for managers; and the personal development training programme.[22]

The Human Resource Management Service, as a central Government service responsible for training delivery, also conducts an annual evaluation of outcomes through an online survey. The results of the evaluation show a high level of satisfaction among trainees. Results of the 2016 survey, for example, indicate that 77.5 % respondents consider they perform their job better thanks to the knowledge and skills acquired in training. [23] There is also a trend of the rise of the number of trainees since 2016.[24]

SIGMA has, however, on several occasions criticized unclear institutional division of training responsibilities between different institutional actors.[25] Namely, the Law on Ministries[26] and Civil Service Law divide responsibilities for training policy and its implementation between the Ministry of Public Administration and the Human Resources Management Service. The Ministry of Public Administration and Local Self Government is responsible for the programme adoption, while the

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20 SIGMA, *Methodological framework for the Principles of Public Administration, op. cit.* note 12, pp. 102-103

21 Civil Service Law, Official Gazette RS, Nos. 79/2005, 81/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014 and 94/2017

22 Article 13, Decree on Professional Development of Civil Servants, Official Gazette of RS, No. 25/2015

23 HRMS, *Evaluation of Training Programme for the period January-December 2016*, HRMS, January 2017 available at [http://www.suk.gov.rs/dotAsset/21485.pdf] Accessed on 16 March 2018

24 *Ibid.* In 2016, around 3 350 civil servants attended training courses. Aside from general training programmes, almost 8300 civil servants participated in a variety of other training programmes

25 SIGMA, *Monitoring report: The Principles of Public Administration, Serbia, 2017*, OECD publishing Paris, 2017, p. 83; SIGMA, *Baseline measurement report: The Principles of Public Administration, Serbia, 2015*, OECD publishing Paris, 2017, p. 54-55

26 Law on Ministries, Official Gazette of RS, Nos. 44/2014, 14/2015, 54/2015, 62/2017

Human Resource Management Service is responsible for the training delivery. In addition, the responsibility for professional development in the area of European integration (EI) issues lies with the Ministry of European Integration. SIGMA has also pointed out a low annual number of civil servants who attend trainings (only around 15 per cent of the total number of civil servants).[27]

These problems are expected to be overcome by the establishment of the National Academy for Professional Training in Public administration, which is currently in the process of institutionalisation. The Law on the National Academy for Professional Training in Public Administration[28] was adopted in October 2017 and its director was appointed in January 2018. The National Academy has been envisaged to be a central public institution entrusted with the training on horizontal issues for all public servants. In order to establish unique and harmonised system for professional development, it will be responsible for the development, preparation, implementation of general professional development programmes for public servants. The Academy should also become responsible for the processes of the preparation of specific professional development programmes, by providing professional assistance and coordination in the process of their development and implementation. It is expected that new institutional framework shall encourage professional and depoliticised operation of public administration and will have the capacity to train much higher number of civil servants.

3.2. Performance appraisal

Civil servants' performance appraisal is an essential element of human resources management system, aimed at continuous monitoring of work and professional development of civil servants.[29] The objective of performance appraisal is to develop a dialogue between a civil servant and his/her manager, encourage achievement of better results and provide conditions for fair desicion on a civil servant's promotion and professional development.[30] Contemporary appraisal model are

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27 SIGMA, *Monitoring report: The Principles of Public Administration, Serbia, 2017*, *op. cit*. note 24, p. 83

28 The Law on National Academy for Professional Training in Public administration, Official Gazette RS, No. 94/17

29 Demmke, C., *Performance Assessment in the Public Services of the EU Member States, Procedure for performance appraisal for emplozee interviews and target agreements*, European Institute of Public Administration, 2007; Demmke, C., Hammerschmid, G., Meyer R., *Measuring Individual and Organisational Performance in the Public Services of EU Members States*, European Institute of Public Administration, 2008

30 Stjepanović, N., *Upravno pravo FNRJ, opšti deo,* Savremena administracija, Belgrade, 1958, p. 397; Vukašinović, Radojičić, Z., *Pravna pitanja službeničkih odnosa*, Kriminalističko-policijska akademija, Belgrade, 2015, p. 59

based on agreeing and evaluating the work objectives, along with the evaluation of various, priory determined competences of civil servants.[31]

SIGMA principles of Public Administration envisage four key requirements that need to be met in relation to performance appraisal. These requirements are as follows: 1) the principles of performance appraisal are established in law to ensure the coherence of the whole public service; 2) the detailed provisions are established in secondary legislation; 3) the performance appraisal of public servants is carried out regularly; 4) the public servants have the right to appeal unfair performance appraisal decisions.[32] These requirements are assessed individually and further reviewed based on three indicators: 1) professionalism of performance assessments, 2) linkage between performance appraisals and measures designed to enhance professional achievement and 3) right of civil servants to appeal against performance appraisal decisions.[33]

The legislation must meet four basic criteria for a performance assessment system: performance is assessed against individual objectives aligned with the function and level of responsibility of position; civil servants have to be informed about the objectives on which they will be evaluated; the results should be accorded in the written form; and interviews between civil servants and their managers should be compulsory.[34]

Serbian performance appraisal rules are thoroughly regulated by the existing civil service legislation, which is generally in line with the SIGMA Principles of Public Administration. The principles of performance appraisal are established in the Civil Service Law, while detailed provisions are established by the Decree on Appraisal of Civil Servants.[35] Performance appraisal is carried out regularly, on annual basis, by the end of February for the past calendar year.[36] Performance is assessed against individual objectives, which are determined at the beginning of the calendar year, during the conversation between a civil servant and his/her manager. Performance appraisal is also based on assessment of competencies, such as independence, creativity, quality of cooperation etc., which are the same for all

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31 Rabrenović, A, Matijević, M., "*Comparative analysis of basic elements of civil servants appraisal systems in European countries"* in Topical issues of modern legislation – Compendium of papers presented at the meeting of law practicioners held on 12-16 June 2011 in Budva, Budva Days of Law Practicioners, Federation of Associations of Lawyers of Serbia and Republic of Srpska, Belgrade, 2011, pp. 515-528

32 SIGMA, *Principles of Public Administration*, *op. cit.* note 2, p. 53

33 SIGMA, *Methodological framework for the Principles of Public Administration, op. cit.* note 12, pp. 103-105

34 *Ibid*, p. 103

35 Decree on Performance Appraisal, Official Gazette of RS, Nos. 11/2006 and 109/2009

36 Article 3 of the Decree on Performance Appraisal

civil servants.[37] The results of performance appraisal have to be acknowledged in writing in a special performance appraisal form and interviews between civil servants and their managers are compulsory.[38]

In spite of the solid legal framework, however, performance appraisal has proved to be ineffective in practice, due to a consistent problem with the inflation of the highest marks. Since the introduction of the system in 2006, about 85% of all civil servants have been constantly given the two highest marks - "stands out" and "exceptional".[39] The appraisals conducted in 2016 for performance in 2015 resulted in almost 90% of civil servants obtaining the highest two grades.[40] For this reason, the indicator value on professionalism of performance assessment assigned by SIGMA during the 2017 appraisal has not been high.[41] The established situation clearly indicates that the current appraisal method is not reliable and effective.

The reasons for ineffectiveness of performance appraisal rules are multiple. The appraisal is often considered as a merely bureaucratic procedure and unnecessary "burden" for managers.[42] Another key issue is a difficulty with defining the work objectives, as one of the key appraisal criteria. At the beginning of the year a civil servant and his/her manager make an agreement on the work objectives for the following year, which is line with good European practice. The work objectives, however, are not easily defined, due to absence of performance management framework within the institution, to which they could be linked. The objectives, instead, are usually copied from the job descriptions, which outline general duties and responsibilities of civil servants.[43] An additionally complicating factor is that the job descriptions were initially poorly done, so often one cannot perceive what an employee is supposed to do. This leads to a generalised definition of objectives, which are not sufficiently measurable. In addition, the current grading does not appear suitable for civil service needs. Both managers and civil servants associate five-point scale with the school marks. This provides the inertia that the grade 3, "good" is not considered as the mark of a standard and expected performance, and therefore many managers avoid it. Employees who work standardly well, in ac-

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37 Articles 12-17 of the Decree on Performance Appraisal

38 Articles 24-30 of the Decree on Performance Appraisal

39 SIGMA, *Monitoring report: The Principles of Public Administration, Serbia, 2017*, *op. cit.* note 24, p. 82

40 *Ibid.*

41 *Ibid.,* p. 83

42 Bajic, D., Jovetic, O., Panovski, A., Tadic, K., *Analiza upravljanja ljudskim resursima u državnoj upravi Republike Srbije" [Analysis of Huam Resource Management in the Civil Service of Republic of Serbia]*, report prepared within the project of support to reforms in Serbia, UK GGF fund, April 2016, p. 44

43 *Ibid.*

cordance with the expectations for that job, are appraised by managers by grade 4 - "stands out" instead by grade 3 - "good". The further objection is that managers as appraisers, who have the main role in performance appraisal, do not have sufficient information on the civil servants' work and are thus unable to objectively assess it, which often results in a bad working environment and adversely affects the morale of the entire organisation.[44] In order to remedy this situation, managers then resort to awarding high level grades to majority of their subordinates, which subsequently leads to inflation of grades.

From the aspect of the legal security of civil servants and the protection of their rights, the rules of the appraisal procedure are of particular importance. The civil servants have the right to appeal unfair performance appraisal decisions. In 2016, 201 appeals of performance ratings were submitted to the Government Appeals Board (1.3% of the total number appraised in that year).[45]

Finally, one of the weaknesses of the current performance appraisal system is inefficient link between performance appraisals and other human resource management functions, such as promotion, mobility and training of civil servants. Performance appraisal is still not effectively linked to training of civil servants. Although the strategic policy documents[46] and Civil Service Law do provide a clear link between performance appraisal and remuneration and promotion, the connection between these systems still does not operate effectively, as will be discussed in more depth within the next section.

3.3. Promotion and mobility

Promotion and mobility are viewed as legal and social instruments which directly influence motivation and productiveness and quality of operation of the civil service.[47] For this reason, it is very important to determine objective and fair promotion criteria and encourage vertical and horizontal mobility.

Principles of Public Administration outline two key requirements with regard to mobility and promotion of civil servants: 1) the mobility of civil servants (second-

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44 *Ibid*.

45 In the period from 2013 to 2014, The Government Appeals Board registered a total of 112 appeals (4%) of performance appraisal. SIGMA, *Monitoring report: The Principles of Public Administration, Serbia, 2017*, *op. cit*. note 24, p. 82

46 Serbian Ministry of Public Administration and Local Self-Government, *The Public Administration Reform Strategy in the Republic of Serbia for 2014-2016,* Official Gazette of RS 020-656/2014, Belgrade, 2014; *The Strategy for Professional Development of Civil Servants in the Republic of Serbia,* Official Gazette of RS No. 56/2011, 51/2013

47 Pusic, E., *Nauka o upravi ,* XII edition, Školska knjiga, Zagreb, 2002, p. 223

ment, temporary or mandatory transfer) should be encouraged, established in legislation, based on objective and transparent criteria, and applied in practice; 2) the functional promotion of public servants (on-the-job, horizontal and vertical promotion) should be established in the legislation, based on the merit principle and objective and transparent criteria, and applied in practice.[48] The assessment of these requirements is coupled with the review of four indicators: a) clarity of criteria for and encouragement of mobility b) adequacy of legislative framework for merit-based vertical promotion c) absence of political interference in vertical promotions and 4) right of civil servants to appeal mobility decisions.[49]

Mobility of civil servants is established in the Serbian civil service legislation, but without objective and transparent criteria. The mobility is allowed through the mechanism of takeover, which implies the agreement between the managers of the authorities that a civil servant will be relocated to another position in another administration body.[50] As internal competition is not mandatory, mobility is not really based on transparent criteria, and hence is not in line with the SIGMA standards. Civil servants, however, do have the right to appeal mobility decisions.[51]

In practice, mobility of civil servants is not very common. Remaining in the current position is considered the most desirable in the current organisational culture, as there is a "fear" of changing a job (unless it is promotion which implies higher salary) and change of the organisational unit, especially of changing the authority in which the civil servant works.[52] Promotion and transfer often depend on other factors, such as: political and financial conditions, reorganization of the powers and jobs of the authorities, the current staffing solutions, etc.[53]

The conditions for promotion of Serbian civil servants to a higher position are clearly stipulated by the Civil Service Law. Civil servants can be promoted to a higher rank or to a pay step within the same rank. The promotion to a higher rank is possible without an internal competition, based solely on performance appraisal results. Civil servant can be promoted to a higher rank if he/she has been appraised as "exceptional" at least two times in a row or "stands out" four times in a row.[54] In addition, it is necessary that the desired position is vacant according to the in-

48 SIGMA, *Principles of Public Administration*, *op. cit.* note 2, p. 53

49 SIGMA, *Methodological framework for the Principles of Public Administration, op. cit.* note 12, pp. 104-105

50 Article 49a of the Civil Service Law

51 Article 142 of the Civil Service Law

52 Bajic *et al, op. cit.* note 41, pp. 53-54

53 *Ibid.*

54 Article 88 of the Civil Service Law

ternal organisation and job classification and that a civil servant meets the criteria required for that position (degree and years of experience). The promotion within the same rank is also based on performance appraisal results and is carried out in accordance with the Law on Salaries of Civil Servants and State Employees.[55]

The promotion system in practice is still, however, not based on merit. This is the consequence of a lack of a mandatory internal competition and dysfunctional operation of performance appraisal system. As mentioned in the previous section, most of civil servants are appraised with the highest performance appraisal marks, which leaves a lot of discretion to a manager to decide who to promote to a higher rank. This provides a wide leeway for political interference in the promotion system.

Furthermore, in a situation of fiscal consolidation, the system of vertical and horizontal promotion of civil servants is limited. Although some civil servants were promoted in 2016, promotions were generally not possible due to budget restrictions and the improper application of performance appraisal.[56] As most civil servants are entitled to horizontal advancement (salary steps) there is an unsustainable fiscal pressure on the pay roll.

4. CONCLUDING REMARKS

As discussed within the previous sections, Serbia has made an important progress in alignment of its civil service legislation with the EU requirements, outlined within the SIGMA Principles of Public Administration. Over the past years, a lot of efforts have been invested in order to establish civil service legislation and practice based on contemporary standards. Civil service law and supporting secondary legislation provide a solid framework for key elements of human resources management, such as training, performance appraisal and promotion and mobility of civil servants. One of the key drivers for reform was undoubtedly the objective to meet the European Union accession requirements.

In spite of all invested efforts, there are still significant challenges for the establishment of a merit based civil service system, in line with the SIGMA requirements. Key elements of professional development of civil servants, such as performance appraisal and promotion are still often based on arbitrary decisions. This may be attributed to a complex political environment, which does not provide a solid ground for the implementation and internalization of existing rules in practice.

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[55] Article 16 of the Law on Salaries of Civil Servants and Employees, Official Gazette of RS, Nos. 62/2006, 63/2006, 115/2006, 101/2007, 99/2010, 108/2013 and 99/2014

[56] SIGMA, *Monitoring report: The Principles of Public Administration, Serbia, 2017*, *op. cit.* note 24, p. 82

When making recommendations to improve the current civil service legislation to reflect European standards, it is important to take into account broader societal environment within which the system operates. Otherwise, there is a risk that the existing achievements in building the civil service system in accordance with the EU standards could be compromised. In this regard, the experience of the new EU member states, such as Slovakia, Poland, Czech Republic and partly Estonia and Hungary, should be taken into account. Namely, shortly after joining the EU, under political pressure and in the absence of EU conditionality, these countries almost entirely abandoned the civil service legislation and abolished the central institutional civil service management structure.[57] In order to avoid this scenario, it is necessary to make a careful assessment of whether stricter legal rules would make a positive effect in practice and would be sustainable in the short or long run. The priority should be given, instead, to strengthening of the current system, which would also to some extent be able to absorb external pressures. Furthermore, it would be important to ensure that the central institutions responsible for the human resources management in the civil service get recognized as useful partners of civil servants and attempt to attract broader inside and outside support for their future development. The capacity of the newly established Training Academy and its ability to demonstrate its contribution to professional development of civil servants will be very important in this respect.

The future reform efforts need to be focused on strengthening the current elements of professional development and creation of strong linkages between them. In order to improve effectiveness of performance appraisal system, the system of quotas, which would limit the number of civil servants who can obtain the highest marks, should be considered. Furthermore, in order to strengthen the process of setting individual work objectives, it would be necessary to develop organizational performance management framework, which would set out clear organizational objectives. In this way, a civil servant would be able to recognize his/her influence and role in achieving of the institutional and overall Government's objectives. A stronger relationship should also be made between between performance appraisal and training, by using performance appraisal results as a key source of training needs assessment. Finally, it is very important to invest efforts in strengthening the fairness and effectiveness of the promotion system. To the extent that the promotion process is perceived as too slow, too inflexible, or based on factors other than merit, the most-talented and ambitious civil servants will most likely find alternative employment. This, however, necessitates a change of political and

[57] World Bank, *EU-8 Administrative Capacity in the New Member States: the Limits of Innovation?*, The World Bank, Washington DC, 2006; Meyer-Sahling, J., *Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years After EU Accession*, SIGMA Papers, No. 44, OECD Publishing, 2009

social culture and a recognition of a different societal actors (media, civil society and political parties) that a professional civil service is an important precondition for social and economic development of a country. Such changes, however, do take a lot of efforts and time. Therefore, one of the greatest challenges for Serbia in its path to the EU and in the future, is not only to fully align its civil service legislation with the EU requirements, but even more so to create an environment in which performance and talent are fully recognized and appreciated.

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4TH INDUSTRIAL REVOLUTION AND CHALLENGES FOR EUROPEAN LAW (WITH SPECIAL ATTENTION TO THE CONCEPT OF DIGITAL SINGLE MARKET)[1]

ABSTRACT

Digital Technologies alter our everyday life and the world around us. Individuals and businessmen are confronted with significantly differentiated conditions in every area of social-economic relations in contrast with the state that existed a few years ago. These altered conditions are in the case of the European Union's Member States multiplied by this status and by the related facts, especially by the necessity to conform the domestic politics to the EU's politics in many areas.

Frontal offensive towards the creation of the digital single market was announced by the European Commission in May 2015 by releasing its 16 initiatives within three basic pillars. The year 2017 was characterized by various legislative activities motivated by the creation of optimal legislative conditions in the EU. Slovak Presidency of the Council of the EU was also significantly defined by the Digital Single Market Agenda, since the presidency's program explicitly states the new key aim of the EU to ensure the free flow of data as the 5th freedom within the EU's internal market.

[1] This paper was written within the project APVV-14-0598 Electronisation of business with emphasis on the legal and technical aspects

The Article analyses the most significant legislative changes introduced in 2017 which impact will be observable in the beginning of 2018 and in the following years.

Keywords: *Digital market, EU , Digital Single Market Agenda, EU internal market*

1. INTRODUCTION

Professor Klaus Schwab, founder and executive chairman of the World Economic Forum, has been at the center of global affairs for over four decades. He is convinced that we are at the beginning of a revolution that is fundamentally changing the way we live, work and relate to one another.[2]

Previous industrial revolutions deliberated humankind from animal power, made mass production possible and brought digital capabilities to billions of people. This Fourth Industrial Revolution is fundamentally different. It is characterized by a range of new technologies that are fusing the physical, digital and biological worlds, impacting all disciplines, economies and industries, and even challenging ideas about what it means to be human.[3]

New dimensions in business and acceleration of business activities are accompanied by the development of new technologies, especially, by the development of computer technologies.[4] The importance of computer technologies in the business sphere at present go along with the enormous virtual potential for conducting business, it means, the internet network.

As regards the technological development, the branch of commercial law is in the forefront among other branches of law which can be viewed from different perspectives. On one hand, these modern age inventions are considered as objects of conducting business activities; on the other hand, these conquests of science and technology are deemed to be instruments to facilitate processes in conducting business activities. Further considerations must be of accentuated European dimension, since the European Union declared the strategy of single digital market in the previous months that should be created until 2020 and serve as the virtual platform to the existing physical single market. The general intent drifts forward to prepare the European economy for the new period in commercial and economic relations that is determined by the development in the sphere of information technologies.

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2 For details: [https://www.weforum.org/about/the-fourth-industrial-revolution-by-klaus-schwab] Accessed 21 January 2018

3 *Ibid*.

4 Suchoža, J., Husár J., *et al.*, *Obchodné právo,* Bratislava, Iura Edition, 2009, p. 11

This paper discusses some of the legislative changes in the European Union legal framework presented, discussed and implemented during the last months. Three different issues are discussed and incorporated into the separated parts of the paper: eIDAS Regulation, law of Cookies and issue of the Cybersecurity which all seem to be very different. But if we look closer and more into details all of the discussed topics are fundamental elements of the agenda of Digital Single Market.

2. EIDAS REGULATION AS CRUCIAL ELEMENT OF THE DIGITAL SINGLE MARKET CONCEPT

Only several forms of verification of declared virtual identity with the real identity were known in the recent period. These were exemplified by electronic signature or guaranteed electronic signature. Having adopted the Regulation of the European Parliament and Council (EU) no. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("Regulation eIDAS"), the options of electronic identification of both natural persons and legal persons have been broadened and, we can say, improved.

The objective of this Regulation is to enhance the electronic transaction based on signature and promote trust in electronic transactions. The eIDAS Regulation is the first concrete measure of the European Commission taken towards the strategy of single digital market which should become real in the European Union until 2020. The mentioned regulation aims to harmonize the requirements for mutual recognition of electronic identification in respective Member States. As noted in the abstract of this paper, its aim is to simplify not only the electronic commerce but also all other cross-border transactions and to enhance trust in electronic transactions in the internal market by providing a common foundation for secure electronic interaction between the citizens, businesses and public authorities and this way increase the effectiveness of public and private online services, electronic business and electronic commerce in the European Union. New regulation has been labelled as revolutionary with significant impact, especially, on the sphere of private-law proceedings and submission of documents in processes of authoritative application of law.[5]

The eIDAS Regulation stipulates the requirements for providing trust services for electronic transactions in the internal market which include services provided in the sphere of electronic signature and defines several new types of trust services.

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5 Polčák, R., Nařízení eIDAS [http://ict-law.blogspot.sk/2014/09/narizeni-eidas.html] Accessed 21 January 2018

This regulation defines conditions under which the Member States can recognize means for electronic identification of natural persons and legal entities issued by the Member States. Moreover, this regulation also provides for the requirements for trust services, namely, services for issuance, verification and validation of electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and services for issuance, verification and validation of certificates for website authentication and requirements under which the Member States provide certificates and recognize electronic signature creation devices and recognize the electronic identification means of natural persons and legal entities which are included in the notified electronic identification scheme of another Member State.

With the adoption of this regulation, the directive on electronic signature was repealed, and, as a result, the legislation on electronic signature in several Member States was repealed. The Slovak republic was no exception. According to the European Commission, the legislation in the Member States of the EU was not compatible, which significantly hindered the cross-border transactions. Under point 3 of this Regulation, the Directive 1999/93/EC addressed electronic signatures without delivering a comprehensive cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions. Further, the Regulation also viewed as problematic those cases when the citizens of the European Union could not use their electronic identification to authenticate themselves in another Member State, because the national electronic identification schemes in their country were not recognized in other Member States. This barrier prevented the service providers from enjoying the full benefits of the internal market. According to the drafters of the Regulation, mutually recognized electronic identification means will facilitate cross-border provision of numerous services in the internal market and enable businesses to operate on a cross-border basis without facing many obstacles in interactions with public authorities. Based on this, the Act on e-Government was adopted representing the fundamental legal regulation of identification and authentication of persons in the Slovak republic. Its aim was to provide for general legal regulation of the electronic form of governance of public authorities including the related legal concepts, and thus enable the implementation of electronic services of public authorities in a uniform manner, without intervening into every special legal regulation governing the concrete cases of governance.[6]

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[6] See Explanatory report to the Act on electronic form of governance of public authorities as amended (Act on e-Government) available at [http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=4500] Accessed 21 January 2018

The eIDAS Regulation was implemented by the Act no. 272/2016 Z.z. (Collection of Acts) on trust services for electronic transactions in the internal market (Act on trust services). We can say that it aimed to amend the eIDAS Regulation and adjust it to our legal conditions and environment. This Act repealed the Act no. 215/2002 Z.z. (Collection of Acts) on electronic signature and brought about changes connected with harmonization of procedure in providing trust services and securing supervision. Moreover, it also regulated the competences of the National Security Authority and the liability for infringement of duties. According to the explanatory report to the Act on trust services, this Act amended the eIDAS Regulation in those areas which were entrusted to the exclusive competence of the Member State so that the proposed legislation together with the eIDAS Regulation formed a compact, transparent and applicable legal regulation.[7]

Under the eIDAS Regulation, emphasis should be placed on the requirements for use of electronic signatures and on the documents that bear the electronic seal. The first requirement for the validity of the electronic signature to be fulfilled is that it must be issued by the acting person. The form of the carrier, whether the signatory signs on the paper or, for example, on the tablet, is not relevant. The second requirement concerns the implementation of the content of the legal act. It means that it is important to secure that the content of the signed document and the digital signature is implemented and contained (locked) in one file without any subsequent possibility to alter its content. Finally, the third requirement inevitable for the validity of the signature is the identification of the person who carried out the legal act, which can be done, for example, by providing the name and surname at the signature. Various specialized software tools are available on the market for electronic signatures which can guarantee the Contractual parties that electronic signatures are secure and comply with the valid legislation. Under the regulation, the signatory would have the option to entrust the qualified electronic signature creation devises to a third person on the condition that appropriate mechanisms and procedures are introduced that would secure the signatory can have sole control over the use of his data for the issuance of electronic signature, and when using the devise, all requirements for qualified electronic signatures be fulfilled. The above mentioned is also connected with the protection of personal data under the new General Data Protection Regulation (also "*GDPR*") which enters into effect in the entire European Union in May 2018.

[7] See Explanatory report to the Act on trust services for electronic transactions in the internal market available at [https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=426794] Accessed 21 January 2018

The eIDAS Regulation defines several types of electronic signatures which are classified based on the level of security assurance. It distinguishes electronic signature, advanced electronic signature, advanced electronic signature based on a qualified certificate and qualified electronic signature. Viewed from the eIDAS Regulation, the qualified electronic signature provides the highest level of security assurance, and this electronic signature is issued by the signatory with data for the creation of electronic signature (private key) which are located in the qualified electronic signature creation devices (QSCD) for which the qualified certificate containing data for the validation of electronic signature (public key) was issued, identity of this person (signatory) and the person responsible for the issuance of this certificate (qualified trust service provider for issuance and authentication of certificates). The definition of the qualified electronic signature, in its essence, corresponds to the definition of guaranteed electronic signature which was used in our conditions based on the repealed Act on electronic signature. The procedure of technical implementation of this type of signature remains intact. This procedure is, however, supplemented by another option when the qualified trust service providers administering data for the issuance of qualified electronic signature in the name of the provider may disseminate data for the issuance of qualified electronic signature only for back-up purposes. The eIDAS Regulation also contains definitions of various types of electronic signatures which for the purposes of this paper will not be further analyzed.[8]

As regards the electronic signature and legal acts implemented by virtually secured electronic signature, the practical application has drawn major attention to various methods of electronic signing. In relation to mutual recognition of electronic signatures, the eIDAS Regulation stipulates that such acts require high level of security assurance, although electronic signatures of lower level of security assurance can also be accepted. The legal effect of the legal act bearing electronic signature which fails to comply with the requirements for the qualified electronic signature, though, is questionable. Under the Regulation, such electronic signature cannot be denied its legal effect despite that it fails to comply with the requirements of qualified electronic signature, and it provides for the national legislation to resolve on the legal effect of such signatures. Under the Regulation, the qualified electronic signature has the equivalent legal effect of a handwritten signature. This must also be guaranteed in national legislation. Moreover, its importance must also be highlighted in connection with court proceedings considering, for example, the validity of electronic contract or the validity of electronic signature. The consid-

[8] Treščáková, D., *Virtuálna identita a elektronické schránky – vzájomné súvislosti*, in Studia Iuridica Cassoviensia (Law Journal of Law Faculty, can be reached here: [http://sic.pravo.upjs.sk/]) Vol. 5, No. 1, 2017, pp. 113-120

eration of electronic signature is essential with regards to evaluation of electronic evidence submitted in court proceedings.

The eIDAS Regulation complies with the above given and underpins the importance of the electronic documents in the further development of cross-border electronic transactions in the internal market. This Regulation should provide for a principle under which the electronic document should not be denied its legal effect by reason that it is in the electronic form and it is important to secure, through this Regulation as well, that the electronic transaction is not to be rejected just because the electronic document is issued in electronic form. As noted earlier, electronic business is actually proper (traditional) business activity which is conducted in the virtual world in the electronic environment by making use of electronic means. Electronic documents and the electronic business must be conducted in compliance with legal regulations and it may not contradict the national and European legislation. This is connected with the trust in electronic transactions and services. Full-scope use of electronic services requires the online services be trustworthy and ease-to-use. To this end, the EU trust mark should be introduced for identifying qualified trust services provided by qualified trust service providers. This EU trust mark for qualified trust services would clearly differentiate between qualified trust services and other trust services and eventually lead to transparency on the market. Using the EU trust mark on the part of qualified trust services providers should be on a voluntary basis and would not require any additional requirements apart from those enshrined in this Regulation.

3. LAW OF COOKIES

Legislative changes can also be identified with regard to the protection of privacy in the digital environment. Current legislation regarding the protection of privacy in electronic communications is contained in the Directive 2002/58/EC on privacy and electronic communications[9]. However, due to the implementation problems associated with this Directive, a new regulation[10] has been proposed, focusing on various issues. One of the most significant aims of the new proposal is to alter the current regulation of cookies.

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9 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). *OJ L 201, 31.7.2002,* p. 37–47

10 Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications). *COM/2017/010 final - 2017/03 (COD)*

In general, we can describe cookies as small text files placed in the end-user's terminal equipment by a website´s server for storing and transmitting desired information back to the website's server[11]. GDPR recognizes cookies as online identifiers that „*may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them*"[12]. It is our view, that the use of cookies that are uniquely assigned to a device and can therefore identify an individual, fall within the scope of the term 'personal data' and are protected by the relevant provisions of GDPR.

The Proposal together with GDPR proposes various changes to the existing legislation. Firstly, with regard to the need to obtain consent. In the current practice websites usually inform their end-users about the use of cookies and do not require them to provide explicit consent for their use through an active action. Therefore, only implicit consent is provided. However, the new regulation is clearer in this regard, as it stipulates the need to obtain the explicit consent of the end-user with the use of cookies. Furthermore, the controller will have to be able to demonstrate that such consent has been provided.

Secondly, to make the provision of consent more user-friendly, the Proposal stipulates a new process for providing consent consisting of expressing user's consent through appropriate settings of a browser or other application and not separately for every website. A set of privacy settings should be available to users that range "*from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, reject third party cookies' or 'only accept first party cookies')*"[13]. Moreover, browsers will also be obligated to inform users about cookies and their privacy settings options in and after installation, which is currently absenting in most browsers. These, of course, are not the only changes contained in the Proposal, but from our point of view, the most relevant for the ordinary end-user.

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11 See [https://europa.eu/youreurope/business/cookies/index_en.htm] Accessed 21 January 2018

12 Recital 30 of the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications). *COM/2017/010 final - 2017/03 (COD)*

13 Recital 23 of the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications). *COM/2017/010 final - 2017/03 (COD)*

4. CYBERSECURITY AS ONE OF THE PILLAR OF THE DIGITAL SINGLE MARKET

2017 was the year, in which sophistication and complexity of attacks or other malicious actions in cyberspace continue to increase. The top threats in the last year's cyberthreat landscape is malware, web based attacks, phishing, ransomware etc.[14] These threats can have a huge impact on the functioning of the organizations' and states´ basic services. As example we can mention ransomware WannaCry, which affected organizations and states across the European Union, including hospitals (e.g. UK, Slovakia), postal services (e.g. FedEx), passenger and freight transport (e.g. Deutsche Bahn). Another example is ransomware NotPetya that disrupted a transport companies (e.g. TNT, Maersk), but also Ukrainian nuclear plant.

The European Union reflects these threats when it states that the main aim of the second pillar of Digital Single Market Strategy is to enable secure environment for information society services. In other words, it is important to ensure the security of networks and information systems that create an environment for implementation and operation of the information society services. Article 4(2) of The Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (hereby "NIS Directive") defines security of network and information systems as "the ability of network and information systems to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of stored or transmitted or processed data or the related services offered by, or accessible via, those network and information systems"[15].

To protect the Europe's networks and information systems, it is needed to tackle cybersecurity challenges on a daily basis. In other words, events need to be addressed, which have an actual adverse effect on the security of network and information systems. These events are defined as (security) incident[16]. All procedures supporting the detection, analysis and containment of an incident and the response thereto can be defined as (security) incident handling[17].

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14 Marinos, L., Belmonte A, Rekleitis E., T*hreat Landscape Report 2017: 15 Top Cyber-Threats and Trends,* Heraklion: European Union Agency for Network and Information Security Publishing. ISBN 978-92-9204-250-9

15 Article 4(2) of NIS Directive

16 Article 4(7) of NIS Directive

17 Article 4(8) of NIS Directive

4.1. Legal framework for the incident handling

The last years was significant from the perspective of cybersecurity. In year 2016, a basic European legal framework has been adopted to clarify the rules for incident handling.

The basic legal document for the incident handling is also above mentioned NIS Directive. This directive was adopted by the European Parliament on 6 July 2016 and entered into force in August 2016. Member states had 21 months to transpose this directive into their national laws. The deadline for member states transposing this directive into domestic legislation is 9 May 2018. For example, in the Netherlands a mandatory breach reporting law for critical sectors was adopted in 2017 and went into force on 1 January 2018. In Slovakia, Cyber security Act was adopted in January 2018 and went into force on 1 April 2018.

For the area of personal data incident handling it is important Regulation 2016/679 on protection of natural persons with regard to the processing of personal data and on free movement of such data, and repealing Directive 95/46/EC. This regulation was adopted by the European Parliament on 27 April 2016 and entered into force in 25 May 2018.

The incident handling is also part of other legal documents. Example is Directive 2015/2366 on payment services in the internal market (hereby "PSIM Directive"). This directive was adopted by the European Parliament on 25 November 2015 and entered into force in December 2016. Member states had to adopt and publish the measures necessary to comply with this directive by 13 January 2018.

In the following section we deal with one of the important aspect of incident handling - notification of (security) incident.

4.2. Notification of (security) incident

Notification of (security) incident is part of (security) incident handling. Within this chapter, we focus on notification of (security) incident from the point of view of three legal acts, namely the NIS Directive, the GDPR and the PSIM Directive. Notification of (security) incident can be classified as mandatory notification (Article 14 of GDPR, Articles 33,34 of NIS Directive, Article 96 of PSIM Directive) and voluntary notification (Article 20 of NIS Directive). Voluntary notification means that "entities which have not been identified as operators of essential services and are not digital service providers may notify, on a voluntary basis, incidents

having a significant impact on the continuity of the services which they provide[18]. The following text will be addressed mandatory notification.

In the notification of (security) incident, answer several issues need to be:

- Who notifies the (security) incident?
- Whom is the (security) incident notified?
- What kinds of (security) incidents shall be notified?
- What is the time period for notify the (security) incident?

The first and the second issue are linked to entities who are required to notify the (security) incident (hereby "breached entity") and the persons to whom the (security) incident is notified (hereby "notified entity"). According to the NIS Directive the breached entities are operators of essential services and digital service providers (e.g. provider of e-shops). They report (security) incidents to competent authority or Computer security incident response team (hereby "CSIRT").

In case of personal data incidents (e.g. personal data breach), breached entities are the controller and the processor. They notify (security) incidents to supervisory authorities. When (security) incident (the personal data breach) is likely to result in a high risk to the rights and freedoms of natural persons, they notify this type of (security) incident to the data subject.

An intersection of these two sets exists: operators of essential services and digital service providers, the controller, the processor. Therefore, there will be situations where the entity will have to notify an incident to multiple entities. For example, digital service providers are an Internet Service Provider (ISP), and an attack on its infrastructure is underway. The result might be data leakage, including personal data. In this case, the ISP notifies the incident to the CSIRT team, the supervisory authorities, and will need to consider reporting to the data subject.

In the case of the payment services, breached entity is payment service providers (e.g. credit institutions, electronic money institutions, payment institutions). They notify competent authority of the (security) incidents in their home member state. If (security) incident has or may have an impact on the financial interests of its payment service users, the payment service provider shall inform its payment service users. Specific element of payment services is hierarchical notification of (security) incidents, because competent authority of the home member state shall inform the European banking authority (EBA) and the European Central

[18] Article 20(1) of NIS Directive

Bank (ECB). In some cases, ECB shall notify the members of the European System of Central Banks on issues relevant to the payment system.

The third issue is type of the (security) incident, which needs to be notified., the operators of essential services notify of incidents having a significant impact on the continuity of the essential services they provide[19]. In order to determine the significance of the impact of the (security) incident, the following parameters shall be taken into account[20]:

a) the number of users affected by the (security) incident
b) the duration of the (security) incident
c) the geographical spread with regard to the area affected by the (security) incident.

On the other hand, that digital service providers (e.g. provider of e-shop) notify of any (security) incident having a substantial impact on the provision of a service[21]. In order to determine whether the impact of an incident is substantial, same parameters like significance of the impact shall be taken into account. Moreover, two parameters shall be taken into account[22]:

a) the extent of the disruption of the functioning of the service
b) the extent of the impact on economic and societal activities.

The GDPR focuses on specific type of the (security) incident – a personal data breach. It means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed[23]. It's a different point of view on a security incident. While The NIS Directive divides types of (security) incident according to their impact, the GDPR does not consider impact but it behavior itself.

The PSIM Directive states the major operational and security incidents, but it doesn't define the terms. Usage of words operational and security leads to conclusion that this directive does not apply onto to notification of security incidents, but also incidents related standard operations of payment systems, where it may not necessarily be a security breach, for example incidents that might occur while replacing hardware parts, or switching to different internet service provider (ISP).

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19 Article 14(3) of the NIS Directive
20 Article 14(4) of the NIS Directive
21 Article 16(3) of the NIS Directive
22 Article 16(4) of the NIS Directive
23 Article 4(12) of the GDPR

The last issue is period for notification of the (security) incident. The security incidents shall be notified without undue delay. In case of personal data incidents, not later than 72 hours after the controller or the processor having become aware of the (security) incident. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

Only GDPR states the maximum threshold for notification without undue delay. Other legal documents leave it for consideration by notified entity. Time of notification is determined by several factors, whether it be technical, legal, or organizational. It should be considered depending on type and impact of the incident. In the future, when concrete statistical data will be available, it should be possible to set a real estimated time needed for notification of an incident. However here as well, one will have to consider the specifics of notified entities.

Aforementioned notes are summarized in **Table 1.**

Legal framework	Breached entity	Notified entity	Type of (security) incident	Period for notification
NIS Directive	Operators of essential services Digital service providers	competent authority, CSIRT	Incident - significance of the impact Incident - substantial impact	without undue delay
GDPR	controller and the processor	supervisory authorities, data subject	personal data breach	without undue delay (max. 72 hours)
PSIM Directive	payment service providers	competent authority, payment service users, EBA, ECB, European System of Central Banks	major operational and security incidents	without undue delay

5. CONCLUSION

The Digital Single Market denotes the strategy of the European Commission to ensure access to online activities for individuals and businesses under conditions of fair competition, consumer and data protection removing geoblocking and copyright issues.

On 10 May 2017, the Commission published a mid-term review of the Digital Single Market Strategy.[24] It presents and evaluates the progress in implementing the Strategy since 2015[25] and highlights where further actions are needed.[26] The mid-term review is accompanied by the European Digital Progress report which gives an in-depth assessment of how the EU and Member States are progressing in their digital development and identifies potential steps to help improve national performance in digital.

In this paper only three legislative tools of the Digital Single Market are discussed. Authors are aware that also other aspects and their legal regulation should be also discussed but due to the limited space, abovementioned issues were chosen to be analyzed and presented in the paper. Last year was according to the legislative plans of the European law very important. The Joint Declaration on EU legislative priorities highlighted a political responsibility for the EU institutions to finalize key legislation under the Digital Single Market by the end of 2017. Legislation in the last year was concentrated on the internet connectivity for all, a better online marketplace for consumers and businesses, building an innovation-friendly environment though effective enforcement, the protection of privacy and personal data in the internet, improvement the conditions to create and distribute content in the digital age.

There are several policy actions under way within the Digital Single Market Strategy, which need increased efforts in order to seize the opportunities and address the challenges of digitization. Further legislative and political attention will be dedicated to the digital skills and opportunities for all, startups and digitization of industry and service sectors, digital innovation for modernizing public services, necessary investments in digital technologies and infrastructures. The last mentioned area is connected with the actions in the sphere of a European Open Science Cloud, high performance computing and European data infrastructure. Also actions concerning artificial intelligence must be discussed and prepared. Artificial intelligence can bring major benefits to our society and will be a key driver for future economic and productivity growth. Equipping devices and ser-

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24 Mid-Term Review of the Digital Single Market Strategy: [https://ec.europa.eu/digital-single-market/en/news/digital-single-market-mid-term-review] Accessed 21 January 2018

25 The Digital Single Market Strategy was adopted on the 6 May 2015 and includes 16 specific initiatives which have been delivered by the Commission by January 2017. Full text of Digital Single Market Strategy: [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX-%3A52015DC0192] Accessed 21 January 2018

26 [https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market] Accessed 21 January 2018

vices with some form of intelligent behavior can make them more responsive and autonomous.

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CURRENT AFFAIRS IN PASSENGERS RIGHTS PROTECTION IN THE EUROPEAN UNION

ABSTRACT

Developed passenger transport includes new issues related to liability issues as well as issues of passenger rights protection. The protection of passengers rights is carried out in accordance with the provisions of international treaties, European and national legislation. Carriers are liable for passengers (in case of death, injury) and their luggage (loss, damage) and in some cases for delay so passengers may be entitled to compensation. The protection of passengers rights is imperative in the creation of transport law regulations as set out by the Commission in the 2001 White Paper – 'European transport policy for 2010: time to decide'.

The European Union has recognized the need for wider protection of passengers rights and has adopted a series of regulations and directives aimed at protecting the interests of passengers and strengthening their rights in all modes of transport (road, rail, air, maritime and inland waterways). Application of EU passenger rights legislation should be uniformed. In order to increase the number and frequency of passenger transport, appropriate regulations are needed. European rules pay special attention to better organization, accessibility and transportation for disabled persons and persons with reduced mobility. The rights of passengers in multimodal transport should be also appropriately regulated.

Despite the great efforts and the existence of these rules, there are still some open questions, legal gaps, problems in implementation and application of rules as well as problems regarding exercising passenger rights. In this paper, we will look at existing problems, obstacles to more efficient application of the Regulations and make recommendations for further action and amending legislation in order to increase the protection of the passengers rights.

***Keywords*:** *passenger rights protection, application of the Regulations, harmonization of rules, European Union, transport law*

1. INTRODUCTION

Transport of persons by land, air, sea or inland waterways is a complex and demanding task for every carrier.[1] Modern passenger requires punctuality, regularity, comfort, speed, economy, and above all safety while traveling. In order to meet the high demands of their passengers, withstand the competition, comply with the development of modern technology, carriers must constantly adapt to new circumstances. No less important are the more frequent changes of legislation that emphasizes the obligation to protect the passengers, and with which they must adjust their business. The main carrier's obligations under the contract of carriage of passengers are: the carriage of passengers and the preservation of their physical integrity. Since the passenger is a weaker party to the transport contract, all passengers should be granted a minimum level of protection. Carriers are liable for passengers (in case of death, injury) and their luggage (loss, damage) and in some cases for delay so passengers may be entitled to compensation.

Transport policy plays an important role in strengthening the economic and social development of the European Union. The protection of passengers rights is imperative in the creation of transport law regulations as set out by the Commission in the 2001 White Paper – 'European transport policy for 2010: time to decide'.[2] In latest EU documents, there is increased accent on the protection of passenger rights in all modes of transport. The EU legislation on passenger rights seeks to provide passengers with a minimum and harmonized level of protection for all modes of transport in order to facilitate mobility and encourage the use of public transport.[3] The protection of passengers rights is carried out in accordance with the provisions of international treaties,[4] European and national legislation. The

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1 Statistical data are also reported about developed passenger traffic: „In 2015, total passenger transport activities in the EU-28 by any motorized means of transport are estimated to amount to 6 602 billion pkm or on average around 12 962 km per person. This figure includes intra-EU air and sea transport but not transport activities between the EU and the rest of the world. Passenger cars accounted for 71.5% of this total, powered two-wheelers for 1.9%, buses & coaches for 8.2%, railways for 6.7% and tram and metro for 1.6%. Intra-EU air and intra-EU maritime transport contributed for 9.8% and 0.3% respectively." European Commission, *Statistical pocketbook 2017, 2.3 Performance of passenger transport (pkm),*
[https://ec.europa.eu/transport/facts-fundings/statistics/pocketbook-2017_en] Accessed 24 March 2018

2 COM (2001) 370 final

3 Vasilj, A., Činčurak, Erceg, B., *Prometno pravo i osiguranje*, Sveučilište Josipa Jurja Strossmayera, Pravni fakultet Osijek, 2016, p. 175

4 The international treaties contain an individual right to compensation for damage. "In case of disagreement between passenger and carrier the issue needs to be assessed in court in the light of the individual circumstances. By contrast, the EU passenger rights regulations do not take into account individual damage, but provide for a more direct and collective protection of passengers to alleviate trouble

European Union has recognized the need for wider protection of passengers rights in all modes of transport (road, rail, air, maritime and inland waterways) especially of disabled persons and persons with reduced mobility. Conditions and criteria are set for possible compensation, re-routing or ticket reimbursement, as well as assistance (meals, accommodation). In the protection of passenger rights there are some new issues that need to be regulated such as passenger rights in multimodal transport.

Delays, flight cancellations, luggage damage, or even lost luggage are commonly caused in transport, and there are often damages to the physical integrity of the passengers. Then numerous questions arise: I have the right to compensation? Who can I ask it from? What is the procedure? Do I have any further rights? It is not our intention to analyse in detail the provisions of all relevant international treaties, European and national legislation, relating to the liability of the carrier for damage on the passenger and its luggage as well as the rights of the passengers as there is extensive literature[5] about it. However, the most important rules will be briefly listed for a better understanding of the paper. In this paper we will look at the deficiency of the existing legislation, the application of existing rules, obstacles to more efficient application of the Regulations, problems in practice and make proposals to amend regulations or solving problems.

2. PASSENGER RIGHTS IN THE EUROPEAN UNION

EU passenger rights are adapted for all modes of transport. "There are some differences that relate to national exemptions or the amount and basis of compensation. But in essence, the rights that apply to all types of transport are comparable. They are based on three key principles: non-discrimination; accurate, timely and

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and inconvenience, where the standardised and immediate types of redress are defined by objective, measurable criteria, such as the duration of the delay, the ticket price or the distance of the journey." Communication from the Commission to the European Parliament and the Council, A European vision for Passengers: Communication on Passenger Rights in all transport modes, COM (2011) 898 final, p. 12

5 E. g. see Bolanča, D., *Prometno pravo Republike Hrvatske*, Sveučilište u Splitu, Pravni fakultet, Split, 2016; Primorac, Ž., Barun, M., *Zaštita prava putnika u kopnenom prijevozu*, Sveučilište u Splitu, Pravni fakultet, Split, 2016; Vasilj, A., Činčurak, Erceg, B., *Prometno pravo i osiguranje*, Sveučilište Josipa Jurja Strossmayera, Pravni fakultet Osijek, 2016; Činčurak, B., *Odgovornost prijevoznika za* štete *na tjelesnom integritetu putnika i prtljazi prema odredbama hrvatskog Pomorskog zakonika iz 2013. godine*, Poredbeno pomorsko pravo, Vol. 54, No. 169, 2015, pp. 409–442; Vasilj, A., *Jačanje pravnog položaja putnika - potreba usklađivanja nacionalnih propisa s međunarodnim konvencijama i propisima Europske unije*, Pravni vjesnik, Vol. 27, No. 1, 2011, pp. 25-55; Radionov, N., *et al., Europsko prometno pravo*, Zagreb, Sveučilište u Zagrebu, Pravni fakultet, 2011; Pavić, D., *Pomorsko imovinsko pravo*, Split, Književni krug, 2006; Grabovac, I., *Suvremeno hrvatsko pomorsko pravo i Pomorski zakonik*, Književni krug, Split, 2005

accessible information; immediate and proportionate assistance. These principles are the foundation for ten basic rights that form the core of EU passenger rights policy."[6] These ten rights are: right to non-discrimination in access to transport, right to mobility - access and assistance for disabled passengers and passengers with reduced mobility, right to information,[7] choice to cancel trips due to disruption, right to the fulfilment of the transport contract in case of disruption - rerouting or rebooking,[8] assistance in event of long delay, right to compensation under certain circumstances, carrier liability towards passengers and their luggage, easy complaint handling, and effective enforcement rights.[9] In continuation of the paper we will display current affairs in passengers rights protection in all modes of transport.

2.1. Passenger rights in road transport (bus and coach)

The rights of passengers in road transport are regulated by the Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.[10] Passengers who travel by bus and coach as part of a package trip enjoy additional rights under Directive (EU) No 2015/2302.[11] The Regulation (EU) No 181/2011 according to Article 2(1), applies to passengers travelling with regular services for non-specified categories of passengers where the boarding or the alighting point of the passengers is situated in the territory of a Member State and where the scheduled distance of the service is 250 km[12]

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6 European Commission, *Transport infographics: 10 passenger rights however you travel*, [https://ec.europa.eu/transport/facts-fundings/infographics/zero-to-ten_en] Accessed 15 March 2018

7 Passenger rights to information cover: general information on issues like rights and obligations while travelling, on accessibility of services for disabled passengers and passengers with reduced mobility and on carrier quality standards and performance; specific information on the journey throughout the trip (before purchase, before and during the journey as well as in case of disruption)

8 The right to choose between reimbursement or rerouting is unconditional in all modes and it intervenes in all events, even in case of extraordinary circumstances

9 Communication from the Commission to the European Parliament and the Council, A European vision for Passengers: Communication on Passenger Rights in all transport modes, COM (2011) 898 final, p. 3-4

10 [2011] OJ L 55. It became applicable on 1 March 2013

11 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326

12 Passengers travelling irrespective of the scheduled distance of the service also have same core rights: non-discriminatory transport conditions; access to transport for people with disabilities or reduced mobility at no additional cost; minimum rules on the travel information provided to all passengers before and during their journey including information on their rights; a complaint handling mecha-

or more. It regulates the compensation and assistance in the event of accidents (death or personal injury to passengers and loss of or damage to luggage (Article 7), immediate practical needs of passengers following the accident (Article 8)), rights of disabled persons and persons with reduced mobility[13], passenger rights in the event of cancellation or delay (continuation or re-routing to the final destination, reimbursement of the ticket price, information, assistance), enforcement,[14] complaints.

The Report on the application of Regulation (EU) No 181/201[15] of 2016, states that the Commission has not identified any deliberate or serious breaches of the Regulation and considers that there is no justification for amending it. However the Commission had find some problem regarding its application: passengers and operators are not sufficiently aware of their rights and obligations, enforcement is lagging behind in some Member States, difficulty in interpreting certain provisions. As a result, the Commission took some measures to address these issues. It remains to be seen how this will affect the protection of the rights of passengers in the future.

Surveys carried out in several Member States show that passengers using this mode of transport tend to be vulnerable, as they are often on low incomes or live in geographically isolated areas.[16] Therefore we consider that the consistent application of the Regulation (EU) No 181/2011 is extremely important in order to protect this group of people. When we are talking about passengers rights when traveling bus and coach, it should be noted here that the EU has not harmonized rules on

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nism that carriers must make available to all passengers; and independent national enforcement bodies in each Member State, which have the mandate to enforce the Regulation and, where appropriate, to impose penalties

13 In this place we must look at Article 12 which prescribes that Member States shall designate bus and coach terminals where assistance for disabled persons and persons with reduced mobility shall be provided. In practice, such provision has been implemented in an inappropriate manner. According to Report on the application of Regulation (EU) No 181/2011 "The approach taken by Member States varies: some of the larger and more highly populated Member States have designated only one or a very small number of terminals, which does not correspond to either the size of the country or the volume of passengers carried by buses and coaches." (Report from the Commission to the European Parliament and the Council Report on the application of Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, COM (2016) 619 final, p. 8)

14 The Regulation requires Member States to designate national enforcement bodies (NEBs), which are responsible for enforcing the Regulation and laying down effective, proportionate and dissuasive penalties in their national law, in order to sanction operators that breach the Regulation

15 Report, *op. cit.* note 13. from the Commission to the European Parliament and the Council, Report on the application of Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, COM (2016) 619 final

16 *Ibid*., p. 3

liability for damages for death and personal injury and for damage to luggage, and that there are different solutions in national legislation of the Member States. This does not contribute to the unification of the rules therefore we stress that the existing legislation should be changed.

2.2. Passenger rights in railway transport

Protection of passengers rights in rail transport is regulated by Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations[17]. The Regulation is part of the so-called 'third railway package'[18] that aims to improve the quality of rail transport. The Regulation applies to all rail journeys and services throughout the Community provided by one or more railway undertakings licensed in accordance with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings (Article 2(1)).

The Regulation (EC) No 1371/2007 establishes rules regarding: the information to be provided by railway undertakings; the conclusion of transport contracts, the issuing of tickets and the implementation of a Computerised Information and Reservation System for Rail Transport; the liability of railway undertakings and their insurance obligations for passengers and their luggage; the obligations of railway undertakings to passengers in cases of delay; the protection of, and assistance to, disabled persons and persons with reduced mobility travelling by rail; the definition and monitoring of service quality standards; the management of risks to the personal security of passengers[19] and the handling of complaints, and general rules on enforcement.

The liability of the railway undertakings according to the Regulation (EC) No 1371/2007 is regulated by reference to the application of the provisions of Uniform rules concerning the Contract for International Carriage of Passengers and

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17 [2007] OJ L 315. It entered into force on 3 December 2009

18 Commission of the European Communities, Communication from the Commission - Further integration of the European rail system: third railway package, COM (2004) 140 final

19 In contrast to the Regulations covering other transport modes, Regulation (EC) No 1371/2007 defines that adequate measures to ensure passengers' personal security must be taken. According to Article 26 "In agreement with public authorities, railway undertakings, infrastructure managers and station managers shall take adequate measures in their respective fields of responsibility and adapt them to the level of security defined by the public authorities to ensure passengers' personal security in railway stations and on trains and to manage risks. They shall cooperate and exchange information on best practices concerning the prevention of acts, which are likely to deteriorate the level of security."

Luggage by Rail (CIV)[20] where the CIV contains the provisions on the liability of railway undertakings in respect of passengers and their luggage, liability for delays, missed connections and cancellations. Regulation independently defines the responsibility for additional rights that are not regulated by CIV. In cases of delays the Regulation provides for certain conditions and additional rights - reimbursement and re-routing (Article 16), compensation of the ticket price (Article 17), assistance (meals, refreshments, accommodation (Article 18)).

Commission in its Report on the application of Regulation (EC) No 1371/2007 on rail passengers' rights and obligations[21] concludes that: the overall application and enforcement of the Regulation is satisfactory. Despite the overall positive picture certain Member States and railway undertakings need to take additional efforts to improve application and enforcement. Regulation allows Member States to exempt the majority of their railway services from most of its provisions, so the Commission considers the extensive use of exemptions as a serious obstacle to the fulfilment of the Regulation's objectives. Besides, in 2013, the Court of Justice of the European Union ruled in Case C 509/11 Ö*BB-Personenverkehr AG*[22] that the current Article 17 of the Regulation does not allow for railway undertakings to be exempted from compensating passengers for delays caused by *force majeure* which distinguishes rail from other transport modes. For these reasons, the Commission published in 2017 Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations[23] that seeks to amend Regulation (EC) No 1371/2007. The Commission's proposal updates the existing rules on rail passenger rights in five key areas: 1. uniform application of the rules; 2. information and non-discrimination (improved provision of information about passenger rights, discrimination on the basis of nationality or residence is prohibited); 3. better rights for persons with disabilities or reduced mobility; 4. enforcement, complaint-handling procedures and sanctioning; 5. proportionality and legal fairness (a *force majeure* clause will exempt rail companies from having

[20] Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999

[21] Report from the Commission to the European Parliament and the Council: Report on the application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, COM (2013) 587 final

[22] Case C-509/11 ÖBB-*Personenverkehr AG* [2013]

[23] COM (2017) 548 final - 2017/0237 (COD)

to pay compensation in the event of delays caused by natural catastrophes).[24] The proposal aims to ensure similar levels of passenger protection across the EU by reducing national exemptions.

The EU regulations on the rights of passengers in rail transport implement the solutions of international conventions. This leads to a high degree of unification and better legal protection in compensation claims. However, taking into account the above mentioned, we agree that amendments to Regulation aimed at better protection of passengers should be supported.

2.3. Passenger rights in maritime and inland waterways navigation

Protection of passengers rights in maritime and inland waterways transport is also regulated with a few regulations. Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents[25] lays down harmonised rules on liability and insurance for shipping companies carrying passengers by sea. It covers liability of the carrier in respect of passengers, their luggage and their vehicles, as well as mobility equipment Regulation (EC) No 392/2009 incorporates the provisions of the Athens Convention on the carriage of passengers and their luggage by sea 1974, as amended by the Protocol of 2002 and International Maritime Organisation (IMO) Reservation and Guidelines for Implementation of the Athens Convention, adopted by the Legal Committee of the IMO on 19 October 2006 into European law. It covers the scope of the Athens Convention, but is extended to carriage of passengers by sea within a single Member State on board ships[26] of Classes A and B under Article 4 of Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships. However, it does not apply to inland waterways services.

At present there is no international treaty that regulates inland waterway transport of passengers. So the national legislation will be applied, which will lead to non-harmonized solutions. "The absence of an international agreement regulating the carriage of passengers and their luggage by inland waterways is unacceptable.

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24 European Commission, *European Commission modernises European rail passenger rights*, [https://ec.europa.eu/transport/themes/passengers/news/2017-09-28-european-commission-modernises-european-rail-passenger-rights_en] Accessed 12 March 2018

25 [2009] OJ L 131. It became applicable on 18 December 2012

26 Where: the ship is flying the flag of or is registered in a Member State; the contract of carriage has been made in a Member State; or the place of departure or destination, according to the contract of carriage, is in a Member State. According to Article 2 of the Regulation No 392/2009 Member States may apply this Regulation to all domestic seagoing voyages

Although the number of passengers transporting by inland waters is relatively small, an international treaty should be made. Such treaty will contribute to the harmonization of this matter."[27] Once again we point out that this arrangement of inland waterways navigation is unsatisfactory. In the Member States usually a single regulation govern maritime law and navigation of inland waterways, which in our opinion is not good solution. Therefore we propose, in such cases, to separate regulations governing the liability of the carrier for damage to inland waterways navigation from those relating to maritime law, in order to facilitate the search of relevant regulations as well as legal certainty. In any case, this liability for the passenger and its luggage should be regulated at the European level, since the arrangement under the international treaty has failed.

Moreover, Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004[28] provides additional protection to passengers.[29] This Regulation, pursuant to Article 2(1), applies in respect of passengers travelling: a) on passenger services where the port of embarkation is situated in the territory of a Member State; b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier; c) on a cruise where the port of embarkation is situated in the territory of a Member State, with defined exceptions. The Regulation follows solutions from the regulations governing the carriage of passengers in bus, coach and rail transport: obligations of carriers and terminal operators in the event of interrupted travel[30] (information in the event of cancelled or delayed departures (Article 16), assistance in the event of cancelled or delayed departures (Article 17), re-routing and reimbursement in the

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27 Činčurak Erceg, B., *Legal framework of European inland waterways and Croatian legislation on inland waterways navigation – problems of non-harmonized rules*, European Scientific Journal, Vol. 14, special edition, 2018, p. 52-53

28 [2010] OJ L 334. It became applicable on 18 December 2012

29 Passengers who travel by ship as part of a package trip enjoy additional rights under the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, [2015] OJ L 326

30 The Regulation does not regulate cases of denied boarding on the ship (except for disabled persons and persons with reduced mobility), because it was found during consultation with representatives of the industry of the carriage of passengers by sea and inland waterways that almost no cases of denied boarding have been recorded, especially due to the higher number of reservations than the ship's capacity (overbooking). Bulum, B., *Prava putnika u pomorskom prijevozu prema Uredbi Europske unije broj 1177/2010*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 4, 2012, pp. 1087

event of cancelled or delayed departures (Article 18), compensation of the ticket price in the event of delay in arrival (Article 19), etc. This Regulation also pays special attention to rights of disabled persons and persons with reduced mobility.

According to the Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004,[31] the Commission has not detected any deliberate, severe or systematic non-compliance with the Regulation. The Commission identified the following obstacles to more efficient application of the Regulation: passengers and operators are not sufficiently aware of their rights and obligations, enforcement is lagging behind in some Member States, difficulty in interpreting certain provisions[32] and thus had taken some measures to address these issues. We support all further efforts to increase the protection of passengers rights of and in these modes of transport.

2.4. Passenger rights in air transport

Today, air transport is one of the busiest and statistically safest ways to travel. Transport of passengers in air traffic is largely of an international character. Globally, The European Union is leading the way with its passenger rights policy. However, mostly in the rest of the world it has been left to individual states to look after air passengers who are often not aware of their rights (if there are any).

In case of denied boarding and of cancellation or long delay of flights, passengers until recently had no institutionalized protection. Solving their travel problems at one of the airports in the EU have been dealt on *ad hoc* basis, depending on the discretion of the air carrier and without the possibility of appeal or complaint to any of the institutions besides the air carrier that caused such an incident.[33]

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91,[34] establishes minimum rights for passengers when: a) they are denied boarding against their will; b) their flight is cancelled; c) their flight is delayed (Article 1(1)). The Regulation according to

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31 COM (2016) 274 final

32 *Ibid*. p. 9

33 Radionov, N., Kocijan, I., *Prava putnika u slučaju uskraćenog ukrcaja, otkazanog leta ili dužeg kašnjenja leta (II. dio)*, Hrvatska pravna revija, Vol. 9, No. 10, 2009, p. 28

34 [2004] OJ L 46. It became applicable on 17 February 2005

Article 3(1) applies to: a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies; b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.[35] Similar as other regulations on passenger rights it consist provisions regarding: denied boarding (Article 4), cancellation of a flight (Article 5), delay (Article 6), right to compensation (Article 7), right to reimbursement or re-routing[36] (Article 8), right to care (Article 9), placing passengers in higher or lower class (Article 10), persons with reduced mobility or special needs[37] (Article 11), obligation to inform passengers of their rights (Article 14), etc.

While ensuring a high level of passenger protection, Regulation 261/2004 is at the same time a constant source of many discussions, doubts, disputes and arguments that create legal uncertainty that undermines the rights of passengers in air transport and leads to numerous disputes between air carriers and passengers. We can say that the Court of Justice of the European Union had their hands full when it comes to air transport.[38] Numerous opinions and judgments (such as Case *The Queen, on the application of IATA and European Low Fares Airline Association v Department for Transport*,[39] Case *Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA.*,[40] Joined cases *Sturgeon v Condor Flugdienst GmbH and Stefan*

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35 On the condition that passengers: (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation, present themselves for check-in as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated, not later than 45 minutes before the published departure time; or b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason. (Article 3(2))

36 About re-routing see more in Serrat Bech., J. M., *Re-Routing under the Air Passenger's Rights Regulation*, Air and Space Law, Vol. 36, No. 6, 2011, pp. 441-451

37 In order to establish rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, to protect them against discrimination and to ensure that they receive assistance, the Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air [2006] OJ L 204 was adopted

38 „Some 15 rulings have been adopted by the CJEU in this area, which have had a major impact on the interpretation of Regulation 261/2004 by national enforcement bodies (NEBs) and national courts. The rulings apply directly and are therefore legally binding on airlines." Truxal, S., *Air Carrier Liability and Air Passenger Rights: A Game of Tug of War*, Journal of International and Comparative Law, Vol. 4, No. 1, 2017, p. 111

39 Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-00403

40 Case C-549/07 *Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA.* [2008] ECR I-11061

Böck and Cornelia Lepuschitz v Air France SA,[41] Case *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija,*[42] Joined Cases *Emeka Nelson and Others v Deutsche Lufthansa AG* and *TUI Travel plc and Others v Civil Aviation Authority;*[43] Case *Denise McDonagh v Ryanair Ltd.*[44] etc.) have largely expanded the understanding of some of the rights that actually led to the extension of passenger rights, and some have even complicated[45] the application of the Regulation 261/2004.

In 2007 the Commission issued a Communication[46] where the main shortcomings related to the application of the Regulation 261/2004 were identified with a set of remedial measures, and again in 2011 Communication on the application of Regulation 261/2004[47] that showed how the provisions of the Regulation were being interpreted in various ways, due to grey zones and gaps in the current text[48], and that the enforcement varied between Member States. Consequently, in 2013 the Commission tabled its Impact Assessment and a proposal for the revision of the Regulation No 261/2004.[49] The Proposal aims to: ensure effective and consistent enforcement of passenger rights (clarify key principles, ensure effective and consistent sanctioning as well as effective handling of individual claims and

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41 Joined cases C-402/07 and C-432/07 C*hristopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* (C-402/07) and *Stefan Böck and Cornelia Lepuschitz v Air France SA* (C-432/07) [2009] ECR I-10923

42 Case C-294/10 *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* [2011] ECR I-03983

43 Joined Cases C-581/10 and C-629/10 *Emeka Nelson and Others v Deutsche Lufthansa AG* and *TUI Travel plc and Others v Civil Aviation Authority* [2012]

44 Case C-12/11 *Denise McDonagh v Ryanair Ltd.* [2013]

45 Air passengers as well as the national enforcement bodies do not always know how to apply these rulings outside the specific context of the case law. „This has led to divergent interpretations of the rules and hence divergences of application/enforcement of the Regulation across Member States." European Commission, *Roadmap Interpretative Guidelines on Regulation N°261/2004 on Air Passenger Rights*, 2016, p. 2

46 Communication from the Commission to the European Parliament and the Council pursuant to Article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM (2007) 168 final

47 Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM (2011) 174 final

48 *Op. cit.* note 45, p. 1

49 Proposal for a regulation of the European Parliament and of the council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) 130 final - 2013/0072 (COD)

complaints), better take into account the financial capacities of the air carriers, ensure better enforcement of passenger rights with regard to mishandled baggage and to adapt liability limits in accordance to general price inflation. "Member States have not yet reached a common view on the proposal. This is mainly due to (i) divergences of views as regards the balance between passengers' and airlines' interests and (ii) the ongoing dispute over the Gibraltar airport between two Member States. In any case, the revised Regulation on Air Passenger Rights is not expected to enter into force within the next years."[50] Therefore, the Commission adopted Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002[51] of the European Parliament and of the Council[52] to facilitate and improve the application of the Regulation and to promote best practices. With the interpretative guidelines, the Commission aims to explain more clearly a number of provisions contained in the Regulation, in particular in the light of the Court's case-law, so that the current rules can be more effectively and consistently enforced.[53]

In any case, a difficult task to amend the existing Regulation follows. We emphasize that during its amendment it should be noted that the provisions on the protection of passengers should be clear to every passenger in order to easily and clearly understand them if needed.

2.5. Passenger rights in multimodal transport

Current EU passenger rights legislations exist for all modes of transport but regulate each mode separately. Therefore these rules cannot be applied in the context of multimodal passenger transport (when different modes of transport are used by a passenger one after the other to complete one journey). Passenger rights cannot be guaranteed when an event occurring during one transport segment affects the

50 *Op. cit.* note 45, p. 2

51 Regulation (EC) No 889/2002 aligns EU legislation on air carriers' liability in respect of passengers and their luggage with the provisions of the Montreal Convention of 1999, to which the EU is one of the contracting parties, and extends the application of the Convention's rules to air services provided within the territory of a Member State

52 [2016] OJ C 214, C/2016/3502

53 *Ibid.* p. 6

following one if the latter segment is operated with another mode of transport because no legislation applies in this case.[54]

The European Commission published an Inception Impact Assessment on the rights of passengers in multimodal transport on 22 December 2016.[55] Passengers using multimodal services have inadequate protection of their rights, especially: if as a result of a transport disruption in the context of a single contract of carriage, the passenger misses the connecting service provided by another mode of transport, his or her rights are not adequately protected; the passengers cannot seek compensation from National Enforcement Bodies because those authorities do not have a legal basis to deal with complaints related to multimodal journeys; assistance is not guaranteed for passengers with disabilities using multimodal products at the connecting points: on the basis of the current modal passenger right EU legislation, carriers are only obliged to provide assistance in relation with their own modal services, but not during the multimodal connection.[56] In order of better protection of passengers in multimodal transport, the European Commission started open public consultation in 2017. In 2018, the Commission puts the emphasis on multimodality and announces working towards a legislative framework to protect passenger rights in multimodal journeys.[57] We consider that the rights of passengers in multimodal transport certainly need to be addressed. Thus we propose the adoption of new rules for the multimodal transport of passengers. We are aware that this will probably be a long process, but since a large number of passengers combine different modes of transport on their journey, the legislation needs to be aligned with new needs and provide these passengers adequate protection and safety.

3. CONCLUSION

Reliability, safety, information and ease of access are essential for developed passenger transport. Ensuring a high level of protection of passenger rights, including of passengers with reduced mobility, is very important part of transport policy.

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54 European Commission, *Public consultation on a possible initiative at EU level in the field of passengers rights in multimodal transport*, [https://ec.europa.eu/transport/themes/passengers/consultations/2017-pax-rights-multimodal-transport_en] Accessed 20 March 2018

55 European Commission, *Inception Impact Assessment*, [http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_move_005_passenger_rights_multimodal_transport_en.pdf] Accessed 24 March 2018

56 *Ibid.*

57 European Commission, *Logistics and multimodal transport, 2018 - Year of Multimodality*, [https://ec.europa.eu/transport/themes/logistics-and-multimodal-transport/2018-year-multimodality_en] Accessed 24 March 2018

Today passengers have efficient and significant rights when the carrier breaches the contract and fails to fulfil its obligations. However, what is guaranteed by legislation, in practice, does not have to be carried out. Therefore there is a need for education of passengers about their rights and carriers about their obligations.

A greater number of journeys in different modes of transport should be encouraged by an appropriate combination of passenger rights. Passengers achieve the protection of their rights through international treaties, EU passenger rights legislation and national legislation. In all modes of transport except road (bus and coach), liability in the case of death and physical injury, and for damage on luggage is covered by international treaties that are transposed into EU law: Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June and Regulation (EC) No 1371/2007 in rail transport, the Athens Convention on the carriage of passengers and their luggage by sea 1974, as amended by the Protocol of 2002 and Regulation (EC) No 392/2009 in maritime transport; the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) of 1999 and Regulation (EC) No 889/2002 in air transport.

EU passenger rights are adapted for all modes of transport (road, rail, air, maritime and inland waterways) and the relevant provisions of the main regulations (Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights) and reports on their application were presented in the paper. Nevertheless, a number of rights are not yet completely and correctly implemented. Passengers are not aware of the rights they have, or they give up the exercise of rights. National authorities (NEBs) still apply the law in different way. We emphasise that inconvenience experienced by passengers due to cancellation or significant delay of their journey should be reduced. There is no EU legislative framework *de lege lata* regarding the protection of passengers' rights in a multimodal context, thus we propose the adoption of new rules for the multimodal transport of passengers. Further action should be also taken to guarantee the right of mobility of people with disability and reduced mobility. In order to provide passengers with disabilities or reduced mobility with appropriate assistance,

all staffed terminals with significant passenger flow should be designated as being able to assist passengers.

There are some differences between regulations in different modes of transport. This different application and enforcement of the Regulations creates confusions, legal uncertainty, does not contribute to the unification of the rules and ultimately weakens passengers' rights. We agree that amendments to Regulation aimed at better protection of passengers should be supported. At the amendment process the legislator must take into account that provisions on the protection of passengers rights should be clear to every passenger in order to easily and clearly understand them if needed.

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NORMAL FUNCTION OF A VEHICLE AS A MEANS OF TRANSPORT OR A MACHINE FOR CARRYING OUT WORK IN MOTOR THIRD PARTY LIABILITY INSURANCE WITH SPECIAL REGARD TO THE LATEST RULINGS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

ABSTRACT

The European law of motor third party liability (MTPL) insurance is based on six directives. The failure of the directives in defining the concept of "use of vehicles" and the transposition of relevant rulings into of the Member States national laws have resulted in different national case-laws. The "use of vehicles" is the main prerequisite for the incurrence of the insurer's liability concerning the damages awarded to persons harmed and legal positions have been adopted according to which the concept in question refers only to the use of a vehicle that is consistent with its normal function, i.e. as a means of transport in road traffic. This paper discusses the rulings of the Court of Justice of the European Union (CJEU), the highest judicial authority in the EU, regarding their interpretation of the concept of the "use of vehicles" in the Case C-162/13 and generation of legal instability in the EU motor insurance law. In this paper the author analyses the latest rulings of the CJEU in the Case C-514/16 in relation to the contested question whether the concept of "use of vehicles" also covers the use of vehicle as a machine generating motive power when the vehicle itself is not travelling. Considering the justification, and pointing out to the grounds of the judgement of the CJEU in the Case C-514/16, the author considers it necessary to examine the legal aspects of insurance protection and legal consequences of the aforementioned interpretation according to which the compulsory MTPL insurance refers also to damages resulting from the use of a vehicle when the vehicle is out of traffic.

Keywords: *normal function of vehicles, use of a vehicle as a machine, CJEU case law*

1. INTRODUCTION

Civil liability in respect of the use of motor vehicle or the motor third party liability insurance (MTPL insurance) is the oldest and in practice the most widespread insurance in traffic. It's a compulsory[1] contractual property[2] insurance whose primary goal is to provide protection to third parties (injured parties) relating to the damages that may ensue from the use of a vehicle.[3] The precondition for existence of the insurer's liability for damages that have arisen as a consequence of a traffic accident is that the insured person had caused damage to third parties by the use of a vehicle. The European legal framework of MTPL insurance was built with the adoption of the *Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability,*[4] by defining the concept of "vehicles"[5] and outlining the scope of insurance cover in such a way that the "use of vehicles" in EU Member States must be covered by the MTPL insurance. All five Directives on European MTPL insurance (adopted gradually over a period of 30 years)[6] were consolidated in the codified *Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability*[7] which was adopted

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1 More on compulsory liability insurance see Clarke, M. A., *The Law of Insurance Contracts*, Informa, London, 2009, pp. 808-809

2 See more Radionov Radenković, N, *Zaštita prava putnika u cestovnom prometu i usluga osiguranja*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 58, No. 1-2, 2008, p. 408; Pavić, D., *Ugovorno pravo osiguranja*, Tectus, Zagreb, 2009, p. 68

3 More on concerns about affordability and availability of compulsory MTPL insurance for most drivers in EU and USA see De Mot, J., Faure, M. G., *Special Insurance Systems for Motor Vehicle Liability*, The Geneva Papers on Risk and Insurance – Issues and Practice, 2014, pp. 569-584

4 Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L 103, beyond: Directive 72/166/EEC. Directive 72/166/EEC was repealed by the Directive 2009/103/EC (see more Art. 28 (1) of Directive 2009/103/EC)

5 "Vehicle" means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled (Art.1(1) of Directive 72/166/EEC and Directive 2009/103/EC)

6 Mantrov, V., *Clarifying the Concept of Victim in the Motor Vehicle Drivers' Liability Insurance: The ECJ's Judgment in Case C-442/10*, European Journal of Risk Regulation, Vol.3, No. 2, 2012, p. 257. See more Williams, D. B., Johnson, M., *Guide to Motor Insurers' Bureau Claims*, The Law Society, UK, 2012, pp. 5-7

7 Council Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, [2009] OJ L 263/11, beyond: Directive 2009/103/EC. Directive 2009/103/EC repeals all earlier Directives, yet Directive 72/166/EEC will still be applicable in the case of a traffic accident that occurred at the time it was in

on the legal basis for harmonization in the field of the internal market (Art. 114 TFEU).[8] The European harmonized substantive rules on the MTPL insurance are embedded in the striving of the European legislator to establish an effective European internal market.[9] Directive 2009/103/EC requires that each Member State take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance,[10] e.g. all motor vehicles in the EU must be covered by the MTPL insurance.[11] The starting point of this paper is the analysis of the Court of Justice of the European Union (CJEU) case-law on the interpretation of the rule of "use of vehicles" in accordance to the MTPL insurance cover.

2. CONCEPT OF "USE OF A VEHICLE" IN ACCORDANCE WITH ITS "NORMAL FUNCTION" OR AS A "MACHINE" IN THE CJEU CASE LAW

The issues of liability for damages to third parties by the use of a vehicle and the protection of the injured parties constitute the framework of a system of compulsory MTPL insurance. Since the adoption of Directive 72/166/EC more than 45 years have passed, but nevertheless regular adaptation of its provisions and the provisions of the successive directives continue indicating uncertainty regarding the interpretation of certain legal norms and differing interpretations[12] contributing to the creation of a legal uncertainty. Directive 2009/103/EC provides a minimum harmonization of the rules on compulsory civil liability insurance for road traffic accidents caused by motor vehicles[13] and although the concept of the

force. See more Daves, J., *A compulsory diet of chicken and eggs: The EU Motor Insurance Directives as a shadow tort regime*, in: Research Handbook on EU Tort Law, Edward Elgar Publishing, UK-USA, 2017, pp. 244-246

8 Ćapeta, T., *Prometno pravo i politika Europske Unije*, in: Europsko prometno pravo, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2011, p. 36

9 Van Schoubroeck, C., *Compensation of road traffic accidents under the EU law*, in: 16. Conference Proceedings "Insurance law, Governance and Transparency: Basics of the Legal Certainty", Palić, 2015, p. 220

10 Art. 3(1) of Directive 2009/103/EC. A member state may act in derogation of Art. 3 in respect of certain types of vehicles having a special plate; the list of such types or of such vehicles shall be drawn up by the state concerned and communicated to the other Member States and to the European Commission (Art. 4, point (b)) of Directive 77/166/EEC)

11 See more Metzler, M., *Europska načela osiguranja motornih vozila i prometnog prava*, Zbornik 19. Savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija, 2011, pp. 93-104

12 More on increasing number of errors in interpretation of "use of vehicles" see Marson, J., Ferris, K., Nicholson, A., *Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives*, The Journal of Business Law, No. 1, 2017, p. 51, p. 68

13 Van Schoubroeck, *op.cit*. note 9, p. 221

"vehicle"[14] is defined by its provisions, this definition does not limit interpretation of the vehicle in relation to the purpose for which the vehicle is used or can be used.[15] The European legislator has not defined the concept of the "use of vehicles", therefore it has remained unclear whether compulsory insurance could be considered to cover the damages caused by a vehicle in the context of road use alone or that it covers any damage, however connected to the use or the operation of a vehicle, irrespective of the fact whether the situation may be defined as a situation involving road use or not.[16] Realising that the European legislator failed to define the concept "use of vehicles", since he was unable to specify all the situations that should fall within the definition of that concept within the meaning of Directive 2009/103/EEC, practice has shown that new situations occur daily with regard to legal interpretation of this concept. In view of the fact that, according to some authors, the concept "use" should be interpreted as broadly as possible[17], it is undisputed that the content of this concept should be evaluated by the courts depending on the circumstances of each separate case. Where there is a dispute as to the interpretation of the motor insurance law, in certain circumstances the court can look back at the terms in the Motor Insurance Directives.[18] However, only the CJEU decides on the interpretation of the European law which contributes to the protection and exercise of subjective rights of individuals before the Member States national courts that are bound by that decision, thus ensuring the uniformity of the European law. Failure to give a normative definition of the concept of the "use of vehicles" in the context of the European compulsory MTPL insurance has resulted in different conceptions of the subject term within the national legislations of the EU Member States (e.g. Circulation of vehicle - France, Spain, Italy and Portugal; Use of vehicle - Germany, Austria, Great Britain, Finland, Slovenia, Croatia, etc.)[19] which has directly caused the increasing number of proceedings by

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14 See more, note 5

15 The broad scope of the term "vehicle"in Directive 2009/103/EC includes all sorts of motorized vehicles, including electric wheelchairs, with the exception of a train, tram or metro because these run on rails (Van Schoubroeck, *op.cit.* note 9, p. 223)

16 Grubišić Đogić, N., *Direktive EU-a o obveznome osiguranju od građanske odgovornosti za* štete *od motornih vozila u praksi suda EU-a*, Conference Proceedings Dani hrvatskog osiguranja, 2014, p. 76. See Proceedings from 2015, [http://www.poslovnaucinkovitost.eu/images/uploads/HGKdani_hr_osiguranja_2015.pdf] Accessed 20 March 2018

17 Ćurković, M., *Komentar Zakona o obveznim osiguranjima u prometu*, Inženjerski biro, Zagreb, 2013, p. 98

18 See Williams, Johnson, *op.cit.* note 6, p. 5

19 More on significant disconnect between national and EU law in MTPL insurance see Marson, Nicholson, *op.cit.* note 12, p. 51; Ćurković, M., *Postoji li razlika između pojmova „uporaba motornog vozila" iz Zakona o obveznim osiguranjima u prometu i „motorno vozilo u pogonu" iz Zakona o obveznim odnosima*, Hrvatska pravna revija, No. 3, 2012, pp. 26-27

the Member States national courts which made references for a preliminary ruling from the CJEU to interpret or examine validity of the EU laws. The CJEU aims to ensure the uniformity of the EU law appreciating the fact that the Member States national courts are bound by the meaning of its interpretation since it takes the *erga omnes* effect, without prejudging the content of the decision by the national courts in relation to a compensation claim.

2.1. "Use of a vehicle" – "Normal function" (Case C-162/13)

The interpretation of the concept of the "use of vehicles" within the meaning of Art. 3(1) of the Directive 77/166/EEC was considered by the CJEU in the Case C-162/13.[20] The aforementioned case is extremely important because it represents a legal void in the Union law that need to be solved by the CJEU because the directives failed to define what can be considered to be an accident caused on road or accident resulting from the use of a motor vehicle, and (at the same time) is covered by the obligation of the MTPL insurance.[21] Namely, on 13 August 2007, while bales of hay were being stored in the loft of a barn, a tractor to which a trailer was attached, which was reversing in the farm courtyard in order to position the trailer in the barn, struck the ladder on which Mr. Vnuk had climbed, causing him to fall. Mr Vnuk brought an action seeking payment of the sum of EUR 15 944.10 in compensation for his non-pecuniary damage, plus the default interest, against Zavarovalnica Triglav, the insurance company with which the owner of the tractor had taken out compulsory insurance. The insurance company argued that in the case in question the tractor (vehicle) was not used in the context of performing its function in road traffic, but that the tractor was used as a machine inside a private courtyard (so, outside of road traffic).[22] The first-instance court and the second-instance court dismissed Mr. Vnuk's application because in the Slovenian case-law there is no compulsory insurance cover when a vehicle is used as a machine[23] (for example in a farming area), stating that a compulsory insurance policy in respect of the use of a motor vehicle covered damage caused by the use of a

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20 Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav d. d.* [2013] CJEU 2013/C 156/37, OJ C 156/24

21 Grubišić Đogić, *op.cit*. note 16, p. 76

22 The insurance company argued that the aforementioned compulsory insurance policy against civil liability does not cover damage caused by the use of a tractor as a machine

23 It is important to note that Art. 4, point (b) of Directive 72/166/EEC made it possible for the Member State to exclude from insurance certain types of vehicle or certain vehicles having a special plate; the list of such types or of such vehicles shall be drawn up by the State concerned and communicated to the other Member States and to the Commission. It is an exception that provided for the possibility of derogation from provisions of Art. 3 of Directive 72/166/EEC which imposes an obligation of MTPL insurance

tractor as a means of transport, but not damage caused when a tractor is used as a machine or propulsion device.[24] Mr. Vnuk appealed to the Supreme Court of the Republic of Slovenia referring to an overly narrow interpretation of the concept of the "use of vehicles" by the Slovenian first-instance and second-instance courts limiting the concept of the "use of vehicles" only to means of travel. While there was no definition of the "use of vehicles" in the Slovenian legislation, the Supreme Court of the Republic of Slovenia was unable to estimate whether the MTPL insurance covers only the damage caused by a vehicle in the context of road use alone or any damage, however connected to the use or the operation of a vehicle, irrespective of whether the situation may be defined as a situation involving road use.[25] Therefore, the Supreme Court of the Republic of Slovenia decided to stay the proceedings and to refer the following question to CJEU for a preliminary ruling: "*Must the concept of "the use of vehicles" within the meaning of Article 3(1) of Directive 77/166/EEC be interpreted as not extending to the circumstances of the present case, in which the person insured by the defendant struck the applicant's ladder with a tractor towing a trailer while hay was being stored in a hayloft, on the basis that the incident did not occur in the context of a road traffic accident*?" Until the judgement in the Case C-162/13, most of the European legal systems took the view that MTPL insurance covers only damage caused by the use of a vehicle in road traffic. Hence, the insurance policies taken out insofar have not provided an insurance cover relating to the damages caused as a result of the use of a motor vehicle on private land. But, on 4 September 2014, the Third Chamber of CJEU in the case C162/13 interpreted that it cannot be considered that the European legislature wished to exclude from the protection, granted by those directives, the parties injured in an accident caused by a vehicle in the course of its use, if that use is consistent with the normal function of that vehicle.[26] CJEU decided that the *concept of "use of vehicles" in Art. 3(1) of Directive 72/166/EEC refers to "any use"*[27] *of a vehicle that is consistent with the normal function of that vehicle*. Therefore, MTPL insurance must cover any motor vehicle in its normal use, in any location,[28] and reversing a tractor into a hay barn represents normal tractor behaviour and falls under "normal function".[29] Therefore vehicles used in certain locations (also out-

[24] This refers to the explanation given by the insurer "…Zavarovalnica Triglav submits that the case in the main proceedings concerns the use of a tractor not in its function as a vehicle for road use, but for work in front of a barn on a farm" (so according to para. 22 Case C-162/13)

[25] See more para. 24 Case C-162/13

[26] See para. 56 Case C- 162/13

[27] It is not about limiting the use of a vehicle solely to its traffic purposes

[28] Even beyond a road or public place (Marson, Ferris, Nicholson, *op.cit*. note 12, p. 17)

[29] Wiseman, E., *New European ruling means changes to insurance law – but do I really need a policy for my lawnmower*,

side of road traffic) and/or certain activities which might not have been initially understood as being covered, now are clarified as covered by the obligation of insurance cover under the Motor Insurance Directives.[30] It is unquestionable what a vehicle is used for or can be used for, so the fact that a tractor to which a trailer is attached and can be used as an agricultural machine, has no effect on the finding that such a vehicle corresponds to the concept of "vehicle" in Art. 3(1) of Directive 72/166/EEC.[31] Such a position regarding the concept of "vehicle" is considered to be justified by the author. Nevertheless, the author stresses that the main purpose of the use of a vehicle is – circulation, and the main goal of the introduction of compulsory MTPL insurance is to provide protection for victims in road traffic. Furthermore, the author gives support to the position of the modern insurance theory according to which MTPL insurance should provide an insurance cover only for damages caused by the use of a vehicle in road traffic. Consequently, the author considers the judgment in Case C-162/12 to be controversial since it is an accident that didn't occur in the context of a road traffic and by this decision the concept "use of vehicle" applies beyond a road or public place. The author takes positive note of the parking procedure which can be considered as use that is consistent with normal function of that vehicle (according to Case C-162/13), since the normal use of that vehicle is – circulation. However, the author does not support the argument relating to the place where the damage occurred, i.e. the fact that it is a case of providing insurance cover for damages caused by the use of a vehicle in a private courtyard. This is a case of a broader interpretation of CJEU with respect to "use of vehicles" in Case C-162/13 by means of which the insurance cover is extended to damages caused by the use of a vehicle on private properties, in spite of the fact it is not in conformity with the existing legal provisions, nor with the case-law of most European legal systems. Likewise, according to ruling in Case C-162/13, under the obligation of the MTPL insurance fall all motor vehicles that are a source of danger to third parties, such as "working machines".[32]

[http://www.telegraph.co.uk/cars/features/new-european-ruling-means-changes-insurance-law-do-really/] Accessed 20 January 2018

30 The European Consumer Organisation, *Consultation Response of the Review of the Motor Insurance Directive*, p.5, [http://www.beuc.eu/publications/beuc-x-2017-149_review_of_the_motor_insurance_directive.pdf] Accessed 6 January 2018

31 See more explained in para. 37-38 Case C-162/13

32 Ćurković, M., *"Uporaba vozila" u obveznom osiguranju od automobilske odgovornosti – nova definicija pojma u presudi Suda pravde Europske unije od 4.rujna 2014. (C-162/13)*, Hrvatska pravna revija, No. 10, 2015, p. 43

2.2. "Use of a vehicle" as a machine (Case C-514/16)

The concept of the "vehicle" as defined by the directives does not stipulate using a vehicle for the purposes for which it is usually and/or rarely used or could be used. The definition of the "use of vehicle" in the Case C-162/13 according to which the use of a vehicle refers to the vehicle's use in accordance with its "normal function" does not necessarily mean "use of a vehicle" for the purposes of circulation.[33] Although the judgement in the Case C-162/13 explained that the normal function of a vehicle is to be in motion, it did not indicate if the concept of the "use of vehicles" also covered the use of a vehicle as a machine generating motive power (machine for carrying out work) when the vehicle itself was not travelling. Addressing the scope of the Directive 2009/103/EC through the interpretation[34] in the Case C-162/13 raises challenges to the settled legal concepts in national legislations such as "use" or "circulation" of vehicles, particularly in the instances of vehicles which may also be used not for the transport, in traffic, of persons or goods, but instead as machines or tools of a commercial trade or business.[35] The judgement in the Case C-162/13 made possible providing insurance cover also for the damage made by a vehicle which is used as a machine for carrying out work in a private courtyard (!) e.g., it is a case of extension of the compulsory MTPL insurance to private land. It is important to point out that the CJEU in Case C-162/13 provided an explanation for the judgment on the extension of the insurance cover to damages caused by the use of a vehicle in a private courtyard by stating that the case in question was a case of the use of a vehicle in its normal function, i.e. use as a means of transport since the parking procedure of the vehicle should be considered its normal function.

The broad interpretation of the judgment in Case C-162/13 on compulsory MTPL insurance for "any use of a vehicle that is consistent with the normal function of that vehicle" has contributed to the need for a new interpretation before the CJEU already in 2016, namely with respect to dual use vehicles. The issue of dual use vehicles has been considered by the CJEU in the Case C-514/16.[36] On

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33 *Ibid.*

34 More on effect of the application of judgement in Case C-162/13 within national law see Daves, *op.cit*. note 7, pp. 250-251

35 BLM Response, *REFIT review of Directive 2009/103/EC relating to motor insurance third party liability*, p. 1, [*https://ec.europa.eu/info/law/better.../090166e5b47c4b5a_en] Accessed 10* November 2017

36 Case C-514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade and Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agricola Seguros – Companhia de Seguros de Ramos Reais SA and Jorge Oliveira Pinto* [2016] CJEU 2018/C 032/04, OJ C 475. Proceeding concerns the fact that Mr. and Mrs. Rodrigues de Andrade were ordered to pay compensation for the loss suffered by Mr Salvador as a result of the death of his wife following an accident involving an agricultural tractor, which occurred on the farm on which she was working

23 June 2016, the Court of Appeal - Tribunal da Relação de Guimarães in Portugal made a request for a preliminary ruling concerning interpretation of Art. 3(1) of the Directive 72/166/EEC. In the trial the court concluded that on 18 March 2006 Mrs. Alves was applying herbicide to the vines in the vineyard of Mr. and Mrs. Rodrigues on land that was on a slope and terraced. The herbicide was in a drum with a spraying device mounted on the back part of an agricultural tractor. The tractor was stationary, on a flat track, but with the engine running to drive the spray pump for the herbicide.[37] The tractor in question fell down the terrace and Mrs. Alves was hit by the tractor and she died. The court of the first instance concluded "…*the tractor was not involved in a traffic accident capable of being covered by insurance against civil liability in respect of the use of motor vehicles since the accident had not occurred when the tractor at issue was being used as a means of travel*". Against that judgement Mr. and Mrs. Rodrigues appealed to the Court of Appeal (Tribunal da Relação de Guimarães) arguing that the accident suffered by Mrs. Alves occurred while the tractor was operating in the course of agricultural work and therefore had to be covered by insurance irrespective of whether the tractor was stationary, parked or travelling along the track on farm. The Court of Appeal held that the first-instance judgment was consistent with the case law of the Portugal Supreme Court according to which, in order for an incident to be classified as a "traffic accident", the vehicle involved in the accident must be moving when the accident occurs and the damage to the third parties must result from that movement. Also, the Court of Appeal observed judgement in the Case C-162/13[38] and held it could be considered that the normal function of a vehicle is its being in motion. But, CJEU has not yet ruled on the question whether the concept of the "use of vehicles" also covers the use of a vehicle as a machine generating motive power when the vehicle itself is not travelling.[39] The Court of Appeal decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling: 1. Does the obligation, laid down in Art. 3(1) of Directive 72/166/EEC apply to the use of vehicles, in any place, be it public or private, solely in cases in which the vehicles are moving, or also in cases in which they are stationary but with the engine running?; 2. Does the aforementioned concept of the use of vehicles, within the meaning of Art. 3(1) of Directive 72/166/EEC,

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37 The weight of the tractor, the vibrations produced by the engine and by the spray pump and the movement, including Mrs Alves, of the herbicide hose leading from the drum, together with the heavy rainfall that day, caused a landslip which carried the tractor away

38 In Judgement of the CJEU (Third Chamber), 4 September 2014 (Case C-162/13), Digital reports, ECLI:EU:C:2014:2146, concerning a reversing manoeuvre by an agricultural tractor CJEU held that the concept of "use of vehicles" encompasses any use of a vehicle that is consistent with the normal function of that vehicle

39 See Judgment of the CJEU (Grand Chamber), 28 November 2017 (Case C-514/16), Digital reports, ECLI:EU:C:2017:908, para. 20

encompass an agricultural tractor, which was stationary on a flat mud track on a farm and was being used, as was usual, in the performance of agricultural work (herbicide spraying in a vineyard), with the engine running to drive the pump in the drum containing the herbicide?

An agricultural tractor falls within the definition of "vehicle" in Art. 1(1) of the Directive 77/166/EEC since it corresponds to a motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails. In the Case C-162/13 the CJEU has ruled that Art. 3(1) must be interpreted as meaning that the concept of the "use of vehicles" is not limited to road use, e.g. to travel on public roads, but covers any use of a vehicle that is consistent with the normal function of that vehicle. So it is necessary to determine whether at the time of accident a vehicle was being used principally as a means of transport, in which case that use can be within the concept of the "use of vehicles" within the meaning of Art. 3(1), or a machine for carrying out work, in which case the use in question cannot be covered by that concept. In the Case C-514/16 of 28 November 2017 the Grand Chamber of the CJEU points out that Art. 3(1) of the Directive 77/166/EEC *must be interpreted as meaning that the concept of "use of vehicles", referred to in that provision, does not cover a situation in which an agricultural tractor has been involved in an accident when its principal function, at the time of that accident, was not to serve as a means of transport but to generate, as a machine for carrying out work, the motive power necessary to drive the pump of a herbicide sprayer*.

Taking into account the foregoing explanation of the author's position concerning the main purpose of the compulsory MTPL insurance and the fact that the damage caused by the use of vehicles in both cases before the CJEU is not a result of the vehicles' use in road traffic, and in Case C-514/16 the author takes the view that for the abovementioned reasons the applicant's claim for compensation must be rejected. With regard to the explanation of the decision adopted by the CJEU according to which in the case in question the vehicle used (a tractor) wasn't used as a vehicle for purposes of circulation but as a machine the author considers this to be an addition to the position taken by the CJEU in Case C-162/13. More precisely, it was emphasised that for granting an insurance cover it was important that the damage occurred with "any use of vehicle that is consistent with the normal function of that vehicle". In view of the fact that this was not a case of use of a vehicle as a means of transport but that the damage caused was a result of its use as a machine (while his principal function was using as a machine), the damages caused in such a way are not covered by the insurance policy from the compulsory MTPL insurance. The author concurs with that position.

With respect to the "use of a vehicle" as machine it is important to emphasize that the owners of all the vehicles used as machines for carrying out work (which we consider to be vehicles under Art. 3(1) of the Directive 77/166/EEC) shall be required to get an insurance cover in respect of the MTPL insurance if the vehicle in question is normally based in the territory of a Member State which has not excluded that type of vehicle from the scope of that provision.[40] However, it is also important to conclude that, in relation to the insurance cover for damage caused by the use of a vehicle as a machine for carrying out work, it is necessary to establish that the "normal function" of that vehicle is - circulation, and that vehicle was being used principally as a means of transport.[41] If the vehicle (that is used exclusively as a machine) were to cause damages in road traffic – the author considers that damages caused in such a case would be covered by the insurance policy of compulsory MTPL insurance.

3. "USE OF A VEHICLE" AND REVIEW OF THE DIRECTIVE 2009/103/EC

While the CJEU judgement in the Case C-162/13 has not defined whether the concept of the "use of vehicles" also covers the use of a vehicle as a machine generating motive power (when the vehicle is not travelling) – the question was raised on the compensation for damages caused by use of "mixed vehicles or dual use vehicles"[42] when a stationary vehicle is being used in its normal function as a machine generating motive power, and not as a means of transport. In accidents involving dual use vehicles, in its judgement C-514/16 the CJEU concluded that the use of the tractor was principally connected with its function as a machine for carrying out work and that this use is not covered by the concept of the "use of vehicles" within the meaning of the Directive 2009/103/EC[43] so, insurer was not liable to pay the compensation for the damage.

Relying on the judgement in the Case C-162/13 and the clarification of the concept of the "use of vehicles" in accordance with its "normal function", new judicial proceedings that have been brought before the CJEU regarding further interpreta-

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40 See more Art. 4, point (b) of Directive 72/166/EEC

41 Relevant is "normal function" of the tractor at the time of the accident. There is no definition what is use "as a means of transport"

42 "Mixed" vehicles can be used both as a means of transport and merely as machine generating power and which are capable, as such, of causing damage to third parties not only when the vehicles are travelling but also when they are being used while stationary as machines generating motive power (see para. 21 Judgement of the CJEU in Case C-514/16)

43 Court of Justice of the European Union, *Press Release No 124/17 - Judgement in Case C-514/16*, [https://www.juridice.ro/wp-content/uploads/2017/11/CP170124EN.pdf] Accessed 15 January 2018

tion of the abovementioned concepts indicate that there is still legal uncertainty in that area. It can be assumed that the judgment of the CJEU in the Case C-514/16 will contribute to achieving greater legal certainty, according to which the compulsory MTPL insurance does not provide insurance cover for damage caused by a vehicle whose principal function at the time of an accident was to operate as a machine for carrying out work (not to serve as a means of transport), which indicates that the CJEU wishes to restrict wide interpretation of Art. 3(1) of the Directive 2009/103/EC.

The European Commission is of the opinion that the provision of Art. 3(1) of the Directive 77/166/EEC applies to the use of vehicles, whether as a means of transport or as machines, in any area, both public and private, in which risks inherent in the use of vehicles may arise, whether those vehicles are moving or not.[44] Since the judgments in the Case C-162/13 and the Case C-514/16 have a significant impact on the insurers, the insurance industry, but also the Member States themselves - the European Commission has launched a public consultation regarding Inception Impact Assessment for reviewing the Directive 2009/103/EC. In these reviews ("Inception Impact Assessment" - REFIT review of Directive 2009/103/EC relating to MPLL insurance)[45] the European Commission set out 4 options for reviewing the Directive 2009/103/EEC: 1) Do nothing; 2) Create new guarantee schemes; 3) Limit the scope of the Directive 2009/103/EC to the use in traffic; 4) Exclude some types of vehicles from the Directive's scope.[46] These reviews focus also on the scope of the Directive 2009/103/EC in relation to the CJEU judgement in the Case C-162/13 – which is the option 3). This is a special field of interest of the initiative which proposes a new provision to limit the Directive's scope only to accidents caused by vehicles in the context of traffic (the use of traffic could mean where the use of a vehicle is for the transport of persons or goods, whether stationary or in motion, in areas where the public has access in accordance with national law).[47] Numerous insurers' associations are against extending MTPL insurance cover to damages caused by the use of a vehicle on private property. More precisely, Insurance Europe and the Council of Bureaux support the proposal set out as option 3) while damage caused as a result of a vehicle being

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44 See para. 35 Case C-162/13

45 Directorate-General for Financial Stability, Financial Services and Capital Markets Union, "*Inception Impact Assessment" - REFIT review of Directive 2009/103/EC relating to motor insurance third party liability*, [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3714481_en] Accessed 17 December 2017

46 European Commission Initiative, *Adaptation of the scope of Directive 2009/103/EC on motor insurance*, [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf] Accessed 3 December 2017

47 *Ibid*. p. 3

used for such things as purely agricultural, construction, industrial, motor sports or fairground activities should not be included in the MTPL insurance mandatory cover.[48] But, the European Commission has still not decided whether it will adopt option 3). Regardless of the option to be chosen for the amendment of the Directive 2009/103/EC, in order to provide legal certainty to victims there must be a uniform interpretation of the scope of the Directive 2009/103/EC by different Member States.[49]

4. CONCLUSION

The need to define the concept of "use of vehicles" within the European legal provisions was stressed by the CJEU judgement in the Case C-162/13 in which the CJEU extends the requirement for compulsory MTPL insurance cover to any use of vehicle irrespective of how or where it is used (even on private land) if that use is consistent with normal function of that vehicle. According to the CJEU ruling in the judgement C-162/13, if a tractor causes damage on private land this damage should be covered by the MTPL insurance because the action (the parking manoeuvre) that the tractor does in a private yard can be considered the "use of a vehicle" according to Art. 3(1) of the Directive 72/166/EEC. The author considers this to be a decision of the CJEU that unnecessarily extends the insurance cover (in addition to the insurance cover for damages caused by the use of a vehicle on public roads and other traffic areas) to damages that are caused by the use of a vehicle inside a private courtyard, i.e. in non-traffic areas that is not consistent with the purpose of introducing compulsory MTPL insurance. The wide interpretation in the judgement C-162/13 ("any use" of a vehicle that is consistent with the normal function of that vehicle) creates legal uncertainty and as a consequence of the aforementioned decision, insurers, as well as the courts, are obliged to change the existing insurance and court practice by extending the MTPL insurance cover also for damages caused by the use of a vehicle outside of road traffic.

Considering the *pro* and *contra* positions regarding the extension or reduction of the insurance cover in respect of the damages caused as consequence of the "normal function" of vehicle use (as a means of transport) or use of vehicle as a machine generating motive power (when the vehicle is stationary), it is undisputed that the

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48 Insurance Europe and the Council of Bureaux, *Common Response to the EC Inception Impact Assessment (IIA) on the REFIT Review of the Motor Insurance Directive*, p. 2, [https://www.insuranceeurope.eu/sites/default/files/attachments/Joint%20response%20to%20the%20European%20Commission%20inception%20impact%20assessment%20on%20the%20REFIT%20review%20of%20the%20Motor%20Insurance%20Directive_0.pdf] Accessed 10 January 2018

49 The European Consumer Organisation, *op.cit*. note 30, p. 6

amendments to the Directive 2009/103/EC will go in the direction of providing insurance cover only in respect of the damages that may arise through the use of a vehicle in traffic (as a means of transport or as a machine) when a vehicle is in motion for the purposes of transport (i.e. in the context of circulation), as the last CJEU judgement in the Case C-514/16 indicates. The author has also taken this position given that the main purpose of introducing compulsory MTPL insurance is precisely the protection of victims in the context of traffic (road traffic). Moreover, the Directive 2009/103/EEC itself seeks to standardise the issues of insurance against civil liability in respect of the use of vehicles which are defined as any motor vehicle intended to travel on land. In both of the cases analysed in this paper the caused damage was not a result of the use of a vehice in road traffic, therefore the author considers that the national courts should not have addressed the substance of the argument of the following legal issues: whether the parking procedure is considered to be circulation of a vehicle (Case C-162/13); whether the normal function of a vehicle at the moment of the accident was circulation or its use as a machine (Case C-514/16). However, since the contested case was a subject of discussion of the CJEU due to the raised issues regarding the interpretation of the concept "use of vehicle" as a legal standard, CJEU has analysed in detail each and every position taken by the parties to the proceedings. By accepting the CJEU's view that parking a tractor represents a normal function of a vehicle (Case C-162/13), the author has elaborated the reasons for which she does not justify providing insurance cover for damages caused by the use of a vehicle inside a private courtyard and by the same analogy explaining the damages that can be caused by the use of a vehicle in a vineyard (Case C-514/16). In relation to the above analysed decisions of the CJEU the author concurs that it is important to establish the "principal function of the vehicle at the time of accident", but considers it necessary to make amendments as soon as possible to Directive 2009/103/EC by defining the concept "use of vehicles" since this cannot be left to individual Member States to determine. Accordingly, this would contribute to achieve a uniform interpretation of the content of the Directive 2009/103/EC in the legal systems of various Member States ensuring legal certaintly to victims.

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THROUGH LEGAL EDUCATION TOWARDS A EUROPEAN EDUCATION AREA

ABSTRACT

With special focus on laying the foundations for a European Education Area by 2025, "The first European Education Summit", held on 25 January 2018, aimed at determining how quality, inclusive and values-based education can fight the current challenges and contribute to a successful Europe. Although the primary competence for education policies lies with the Member States, the European Commission has explicitly advocated that joint efforts should be made to strengthen the European identity through education. In particular, a number of initiatives were proposed in order to foster employability in the common market, improve the international competitiveness, promote common values and develop critical thinking for an active citizenship.

For all these reasons, this paper aims at determining how Croatian legal education, taking into account its tradition, can contribute to achieving those objectives. Therefore, by analyzing its history and tradition, the first part of the contribution will try to identify the specific features of Croatian higher legal education. Keeping in mind that the success of the process is often influenced by various social, political, economic and historical factors, the central part of the paper will examine the importance of education for shaping the national legal culture and, consequently, efficient harmonization. Considering the challenges that the Croatian educational system is currently facing, as a conclusion, an attempt will be made to offer some preliminary solutions in the debate on how the potential of education can be used to ensure the goals of the European Education Area.

Keywords: *common values, education, harmonization, legal culture, tradition*

1. INTRODUCTION

Building on the conclusions of the Gothenburg Summit,[1] where the idea to generate a European Education Area (EEA) by 2025 had been established, at the first European Education Summit,[2] held on 25 January 2018 in Brussels, the European Commission gathered numerous education professionals in order to set the roadmap and present further initiatives to strengthen the European identity through education. Even though the competences for education, in compliance with the principle of subsidiarity, lie primarily within the scope of Member States and their authorities,[3] it has been agreed, as a shared agenda, to work jointly on advancing the education (and culture) as 'drivers for jobs, social fairness, active citizenship and ultimately European identity.'[4] In addition to all the numerous individual objectives that are planned to be achieved through certain measures,[5] we may conclude that there are some capital goals which repeatedly stand out and appear to be generally sought through investing in education in the long run.

First of all, education and training should equip young people with the skills to facilitate employability in the common market, especially by enabling them to respond to the changing circumstances the labor market is prone to, because highly qualified and flexible workforce is seen as the backbone of a strong economy.[6] A

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1 Strengthening European Identity through Education and Culture. The European Commission's contribution to the Leaders' meeting in Gothenburg, 17 November 2017, [https://ec.europa.eu/commission/sites/beta-political/files/communication-strengthening-european-identity-education-culture_en.pdf] Accessed 21 January 2018

2 Laying the foundations of the European Education Area: for an innovative, inclusive and values-based education, [https://ec.europa.eu/education/education-summit] Accessed 25 January 2018

3 The legal basis for the Union's action in the field of education was for the first time regulated in Article 126 TEC of the Maastricht Treaty. Today, Article 165 TFEU stipulates that the EU contributes to the development of quality education by encouraging cooperation between Member States and, if necessary, supports and complements their activities while at the same time nrespecting Member States' responsibility for the content of education and the organization of education systems and their cultural and linguistic diversity

4 Proposal for a Council recommendation on promoting common values, inclusive education, and the European dimension of teaching, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A23%3AFIN] Accessed 21 January 2018

5 *E.g.* EEA aims at mutual recognition of degrees by initiating a new 'Sorbonne process', building on the 'Bologna process', modernizing the curricula, encouraging mobility through the Erasmus+ programme and creation of the EU Student Card, establishing a network of European universities, supporting teachers, funding education through investment instruments, promoting innovations and digital skills, preserving cultural heritage etc. *Cf.* Future of Europe: Towards a European Education Area by 2025, [http://europa.eu/rapid/press-release_IP-17-4521_en.htm] Accessed 25 January 2018

6 *Cf.* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Rethinking Education: Invest-

special focus is placed on promotion of lifelong learning to ensure sufficient access to learning opportunities for adults whose skills and qualifications do not fully correspond to the current labor market.[7] Furthermore, by introducing competences of critical thinking in learning outcomes of the curricula, a development of active citizenship could be contributed. Ultimately, values-based education built on knowledge about cultural diversity and the heritage, traditions and political realities of one's own country, as well as the European history should provide a deeper understanding of common values.[8]

By supporting the mentioned objectives, the purpose of the following contribution is to analyze the current challenges of Croatian legal education and ponder some preliminary solutions on how to contribute to their achievement. After identifying the tradition and specific features of Croatian legal education via historical method, through conceptual analysis we will address primarily the impact that legal culture may have on defining the content and the realization of the educational process within a legal system, as well as, reversely, the influence of legal education on the concept of legal culture. Finally, by highlighting the current status of the educational system, we will try to systematize the preconditions that legal education should fulfill in order to contribute to the European Education Area.

2. THE TRADITION OF CROATIAN LEGAL EDUCATION

Legal education has a long tradition in Croatia, its origins dating back to the Middle Ages, when many Croatian students and professors were present at the most important European law faculties.[9] Long before the formation of the EU, those students, together with their European peers, were educated to become the

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ing in skills for better socio-economic outcomes, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0669&from=EN] Accessed 15 February 2018

7 *Cf.* Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006H0962&from=EN] Accessed 15 February 2018

8 As President Juncker highlighted in his 2017 State of the Union speech, "Europe is more than just a single market. More than money, more than the euro. It was always about values." State of the Union Speech, 13 September 2017 [http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm] Accessed 15 February 2018

9 *E.g.* Pavao Dalmatinac was a law professor at the oldest university in Bologna in the first half of the 13th century, and Croatian students were present at other Italian universities, such as Rome, Ferrara, etc. Later on, the presence of Croatian students can also be found at universities in Central Europe, Vienna, Prague, Krakow, etc. Čepulo, D., *Legal education in Croatia from medieval times to 1918: institutions, courses of study and transfers,* in: Pokrovac, Z. (ed.), Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg, Vittorio Klostermann, Frankfurt am Main, 2007, p. 90-92

professionals that we would regard today as European jurists in the truest sense of the word.[10]

Given that acquisition of legal knowledge and legal culture was furthermore related to church institutions (churches and monasteries), some elements of legal education were incorporated within the canon law lectures at the cathedral school in Zagreb in the early 14th century.[11] Apart from the Zagreb area, short-term attempts at public legal education were also recorded in the area of Dubrovnik in the second half of the 15th century. That those were only short-sighted attempts of legal education reflects in the fact that the oldest Croatian higher education institution, the Dominican *studium generale,* founded in Zadar in 1396, unfortunately did not establish separate legal studies.[12]

Even though the Jesuit Academy of the Royal Free City of Zagreb was officially founded as a university through privileges granted by King Leopold I Habsburg,[13] due to lack of legal education Croatian youth was referred to foreign universities, mostly to the universities of Vienna or Graz or the University of Trnava.[14] For this reason, resolving the issue of institutionalization of legal training in our area would be initiated during the reign of Maria Theresa (1740-1780) through implementation of intensive reforms of the institutional structure of the country in the second half of the 18th century, by which the Kingdom of Croatia would take on some elements of 'modernity'. Besides the implementation of various tax, civil law, health, education and administrative reforms, the most significant change in administrative practice was the founding of the Croatian Royal Council, with its seat in Varaždin in 1767, as the first Croatian government. Considering that the existing administrative apparatus was ineffective and conservative, while the numerous reforms required professional civil servants, in order to obtain highly qualified staff Maria Theresa decided to establish the Political and Cameral Studies

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10 *Cf.* Spengler, H.-D., *Römisches Recht und europäische Rechtskultur*, in: Buchstab, Günter (ed.), Die kulturelle Eigenart Europas, Freiburg in Breisgau, Herder, 2010, p. 50, Ranieri, F., *Der europäische Jurist. Rechtshistorisches Forschungsthema und rechtspolitische Aufgabe,* Ius Commune 17, 1990, p. 11

11 Čepulo, D., *Razvoj pravne izobrazbe i pravne znanosti u Hrvatskoj od 1776. godine i Pravni fakultet u Zagrebu od osnivanja 1776. do 1918. godine*, in: Pavić, Ž. (ed.), Pravni fakultet u Zagrebu, Zagreb, 1996, p. 52

12 *Ibid.* p. 53; Vereš, V.T., *U potrazi za najstarijim hrvatskim sveučilištem*, Prilozi za istraživanje hrvatske filozofske baštine, Vol. 25, No. 1-2 (49-50), 1999, p. 219

13 Dobronić, L., *Zagrebačka akademija*, Dom i svijet, Zagreb, 2004, pp. 32-36

14 The study of law in the Jesuit universities in the Monarchy was predominantly based on the teaching of Roman, canon and civil law. *Cf.* Horbec, I., "*Učiti administraciju":* školovanje *javnih službenika u 18. stoljeću*, Hrvatska javna uprava, god. 9, No. 4, 2009, p. 1017

in Varaždin in 1769,[15] conceived as a reflection of Sonnenfels's chair at the Vienna Law School.[16]

Apart from being the first institutionalized concern for the education of civil servants, the Political and Cameral Studies were the first systematic form of legal education in Croatia. Among other things, by founding this institution Maria Theresa took control of education in the state, which would, after the abolition of the Jesuit order in 1773, experience the high point of the formation of state education.[17] Namely, in 1776 Maria Teresa introduced a new system of education, based on which state institutions had full control of the educational process. A key role in the process of creating national education and the professionalization of education would be attributed to the influence of the Pietism, a movement of German Protestantism.[18] Apart from the establishment of state control over education, the need to develop useful and practical education for the needs of the state and society also arose, leading to the introduction of practical subjects in education, such as history, mechanics, administrative science and the like. What constituted an essential prerequisite for educational improvement, according to the Pietists' idea, was the intense control of the state over education.[19]

By introducing the new system of education in Croatia, in parallel with the Austrian and Czech hereditary countries, in August 1776 Maria Theresa sent a mandate to the Croatian Royal Council on school management in Croatia,[20] through which, by integrating the former Political and Cameral Studies, the Royal Acad-

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15 For more detailed studies regarding education at the Political and Cameral Studies s. Bayer, V., *Političko-kameralni studij u Hrvatskoj u 18. stoljeću (1769-1776*), in: Bayer, V., Pusić, E., Štampar, S. (eds.), Osnivanje Pravnog fakulteta u Zagrebu (1776. god.) i njegovo definitivno uređenje, Pravni fakultet, Zagreb, 1976, p. 3; 17-18; Herkov, Z., *Iz povijesti javnih financija, financijskog prava i razvitka financijske znanosti Hrvatske : od početka 16. stoljeća do polovice 19. stoljeća,* Pravni fakultet, Centar za stručno usavršavanje i suradnju s udruženim radom, Zagreb, 1985, p. 178-185

16 For Joseph van Sonnenfels, one of the most influential Austrian cameralists, s. Bayer, *op. cit.* note 15, p. 15

17 At the time of its cessation in the Croatian and Habsburg Monarchy, the Jesuit order held almost the entire education system. Melton, R., *Absolutism and the Eighteen-Century Origins of Compulsory Schooling in Prussia and Austria,* Cambridge University Press, Cambridge, 1982, pp. 209-210

18 Horbec, I., Švoger, V., Školstvo *kao politicum: Opći* školski *red iz 1774.*, Anali za povijest odgoja, god. 9, 2010, p. 8

19 Melton, *op. cit.* note 17, pp. 24-38

20 Bayer, V., *Osnivanje pravnog fakulteta u Zagrebu (god. 1776) i njegovo definitivno uređenje (1777. god.)*, in: Bayer, V., Pusić, E., Štampar, S. (eds.), Osnivanje Pravnog fakulteta u Zagrebu (1776. god.) i njegovo definitivno uređenje, Pravni fakultet, Zagreb, 1976, p. 127

emy of Sciences in Zagreb was established, consisting of three faculties: theology, law and philosophy.[21]

Despite some changes in organization, the Royal Academy of Sciences in Zagreb operated until 1850, when it was abolished by the decision of the Viennese Minister of Education, Count Leo von Thun-Hohenstein (1849-1860), as part of a thorough reform of the entire secondary and higher education.[22] This was enabled by the revolutionary events of the spring of 1848, which forced the ruling circles to introduce liberal political rights and freedoms, including the freedom of teaching and learning (*Lehr- und Lehrnfreiheit*).[23] The aim of the education reform, modeled after the Prussian (Germanic) University, was to abandon the previous strictly utilitarian education system, which was primarily aimed at meeting the need for academically educated civil servants, including school-based institutions that taught state-prescribed content. Within the reform, the Royal Academy of Sciences was transformed into a three-year program of the Academy of Legal Sci-

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21 The legal studies lasted two years and could only be enrolled after the two-year studies of philosophy. The Faculty of Law was organized into four chairs (or four professors): canon law; natural, international and general public law; civil law and the theory of the homeland law and the police (administrative, chamber and economic sciences). *Ibid.* p. 93. Since the Queen's mandate of 1776 was only a provisional arrangement of state education in Croatia, in 1777 Maria Theresa issued a fundamental document of state education for the Lands of the Crown of St. Stephen, as the first administrative-legal document on the development and regulation of the educational system in Hungary, called *Ratio educationis*. *Cf. Ibid.* p. 114; Cuvaj, A., *Građa za povijest školstva kraljevine Hrvatske i Slavonije od najstarijih vremena do danas,* Trošak i naklada Kr. hrv.-slav.-dalm. zem. vlade, Odjela za bogoštovje i nastavu, Zagreb, 1907, p. 380-383

22 For a detailed analysis of the Austrian reform of legal studies in the times of neo-absolutism, which introduced a major paradigm shift, initiated and enforced by the state, s. Paletschek, S., *Die Erfindung der Humboldtschen Universität. Die Konstruktion der deutschen Universitätsidee in der ersten Hälfte des 20. Jahrhunderts*, Historische Anthropologie, 10, 2002, pp. 183sqq; Simon, T., *Die Thun-Hohensteinische Universitätsreform und die „Geschichtliche Rechtswissenschaft*", Beiträge zur Rechtsgeschichte Österreichs 2017, pp. 132-143; Ash, M. G., *Wurde ein „Deutsches Universitätsmodell" nach Österreich importiert? Offene Forschungsfragen und Thesen*, in: Mazohl, B., Aichner, C. (eds.), Die Thun-Hohenstein'schen Universitätsreformen 1849–1860: Konzeption – Umsetzung – Nachwirkungen, Veröffentlichungen der Kommission für Neuere Geschichte Österreichs, Böhlau, Wien, 2017, pp. 76-98; Čepulo, *op. cit.* note 11, p. 61; Rüegg, W., *A History of the University in Europe: Volume 3, Universities in the Nineteenth and Early Twentieth Centuries (1800–1945)*, Cambridge University Press, New York, 2004, p. 51

23 Švoger, V., *O temeljima modernog školstva u Habsburškoj Monarhiji i Hrvatskoj*, Povijesni prilozi, god. 42, No. 42, 2012, p. 312. Furthermore, the reform was intended to break the practice of 'rote learning' and to allow the transformation of universities into scientific institutions in the Catholic spirit, but not under the full control of the Catholic Church. It was also proclaimed that the core of the legal study should be historical subjects, with the main task of emphasizing the tradition in shaping legal and state forms versus revolutionary demands. Cf. Gross, M., *Počeci moderne Hrvatske: neoapsolutizam u civilnoj Hrvatskoj i Slavoniji 1850-1860,* Globus: Centar za povijesne znanosti Sveučilišta u Zagrebu, Odjel za hrvatsku povijest, Zagreb, 1985, pp. 305-307

ences - a transitional solution until a uniform law study program for all lawyers in the Austrian countries was established.[24]

The Academy of Legal Science ceased to operate in 1874, when the University of Franz Joseph I, modeled after Austrian university organization, was founded in Zagreb, including, amongst others, the Faculty of Legal and Administrative Sciences.[25] Built on the liberal ideas of the philosopher and theologian Friedrich Schleiermacher, the implemented German concept, the so-called Humboldtian model of the university, was founded on the objective that the function of the university was not to convey instant and directly usable knowledge but to stimulate the students to independent scientific approach.[26] According to Wilhelm von Humboldt, the task of universities was to show how to discover knowledge by "making apparent the principles at the basis of all knowledge in such a way that the ability to work one's way into any sphere of knowledge would emerge."[27] Teachers should not only teach what they already know but actively reproduce their path to knowledge. Consequently, students should not just gather knowledge but 'learn how to learn' by directly observing the process of creating knowledge.[28] Therefore, the Humboldtian tradition was based on the idea of freedom reflected in methodology and the content of the teaching, as well as autonomy of the university. Through development of scientific and not merely knowledge-transferring methods of education, this model opened the way for a modern, research-based university.

The above-mentioned organization of studies remained basically the same until the dissolution of the Austro-Hungarian Monarchy in 1918, when the circumstances in the period between two World Wars, put the Faculty through numerous

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[24] Teaching at the Academy was practically oriented and limited to positive law that was needed by state clerks and attorneys. Despite the fact that the Academy of Legal Science did not achieve many scientific and educational results, it contained a modern system of legal study and served as a good basis for further building of systematic university education. *Ibid.* pp. 312-313; Čepulo, D., *Hrvatska pravna povijest i nastava pravne povijesti na Pravnom fakultetu u Zagrebu od 1776. do danas,* Zbornik Pravnog fakulteta u Zagrebu, god. 63, No. 5-6, 2013, p. 888; Čepulo, *op. cit.* note 11, p. 68

[25] Even earlier, after the return to constitutionality in the Habsburg Monarchy and Croatia in 1861, there were aspirations to establish a university instead of the Academy of Legal Science in Zagreb, and the Parliament in 1861 adopted the Law on the Establishment of a University in Zagreb. However, the king refused to accept the aforementioned law and quickly disbanded the council. Nevertheless, after the conclusion of the Croatian-Hungarian Settlement in 1868, the reorganization of the Academy of Legal Science took place on a four-year basis in accordance with the Austrian model of legal education. *Ibid.* p. 888

[26] Ruegg, *op. cit.* note 22, p. 5; Rüegg, W., *A History of the University in Europe: Volume 4, Universities since 1945*, Cambridge University Press, 2010, p. 11

[27] *Ibid.* p. 11

[28] Ruegg, *op.cit.* note 22, p. 21-22

systemic changes.[29] However, after the end of World War II, new legal regulations were adopted, aiming to establish a distinct legal order by aligning the centuries-old tradition of legal education with new ideas. Apparently, it was necessary to create a so-called new lawyer, who would not be a mere applicator of legal norms but an active participant in the regulation of citizens' life issues.[30] However, by limiting the education to mostly theoretical aspects of legal institutes and regulations, while treating students as passive listeners and devoting little attention to the more practical aspects of law, the expected result was unfortunately not achieved. Despite additional unsuccessful attempts to introduce ideological uniformity in its work during the socialist regime, the Faculty of Law in Zagreb, as well as other law faculties in Rijeka, Split and Osijek, established in the 1960s and 1970s, continued to act in accordance with the principles of free scientific work.

Only minor changes to the curriculum were introduced in the period after Croatia became independent. The widespread legislative activity since 1991 has systematically effected changes in the content of the core subjects within the legal education system. Some of the subjects, especially those related to the former regime, were abolished, while conceptual changes were introduced only in those areas of law that were important to align with the transition to the market economy and the establishment of civic democracy and, later on, the harmonization with the EU acquis. However, the permanent problem was that the teaching methods, as well as the manner of interpretation of the content, did not differ significantly. After the signing of the Bologna Declaration at the Ministerial Conference in Prague in 2001, as a key element of its higher education reform, Croatia began to implement the Bologna process in the academic year 2005/2006. Despite its best intentions, the re-examination of higher education under the reform did not show the expected results and has led to numerous challenges that will be discussed more closely in further analysis.

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29 From its foundation until 1926, the Faculty of Law acted under the Law of 1874, i.e. according to the newly renamed Act of 1894. From 1926, the Serbian Law on the University was applied at the Zagreb University until the adoption of the 1930 Law on Universities. Legislative regulations passed in 1940 and 1941 also provided for the legal subjectivity of the faculty, although with numerous provisions that threatened the academic autonomy. Engelsfeld, N., *Pravni fakultet u Zagrebu od 1918. do danas,* in: Krapac, D., Vranjican, S., Jureković, M. (eds.), Pravni fakultet u Zagrebu, Zagreb, 2001, pp. 126-127

30 Consequently, the 1977 Higher Education Act sought to link the theoretical learning taught in the faculties and the practical needs that came into practice. The studying plan and program sought to organize the education as a work process, whereby lectures, seminars, exercises and introduction to practices were mandatory. Thus, they sought to educate lawyers in specific areas, i.e. to associate them with branches of activities that make experts. *Ibid.* pp. 133-134; pp. 139-140

3. THE INTERDEPENDENCE BETWEEN LEGAL CULTURE AND LEGAL EDUCATION

In order to understand the interdependence between legal education and legal culture in Croatia, we will try to underline primarily the conceptual framework of the legal culture, i.e. legal tradition. As these two concepts in their definition incorporate values related to an almost similar social background, and the boundary between them is not clear,[31] we will not attempt to delineate them in the content of this research but use them interchangeably in order to determine their influence on the process of legal education, as well as reversely, the importance of education for the formation of a particular legal culture.

In his research of the sources, development and features of legal systems in Europe and South America, Marryman defines the legal tradition as "...a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught**.**"[32] Accordingly, legal theorist Mayer observes the interrelationship of culture and law by claiming that law is an integral part of a particular society's culture and that there is no law or legal system that is not permeated by the culture of the society.[33] A more detailed analysis of the content of the two recognized definitions clearly identifies that the concept of legal culture encompasses several important elements: the concept of law observed through written or living law, legal infrastructure relating to the judicial system and the legal profession, a legally relevant behavioral model obtained through court proceedings and legal awareness.[34] Understanding each of the elements mentioned above, partly influ-

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[31] Numerous debates are present, mostly in legal theoretical research, about the concepts of legal culture and legal tradition. As their boundaries are almost impossible to establish with certainty, some authors do not determine a general concept, but decide to use a particular one depending on the purpose of their research. Thus, for example, Van Hoecke & Warrington use the notion of legal culture to emphasize that law is not just a set of rules or concepts, but also a social practice which determines the actual meaning of those rules and concepts, their weight, implementation and role in society (s. Van Hoecke, M., Warrington, M., *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, International and Comparative Law Quarterly 47, 1998, p. 500), while the same content in Genn's research is covered by the notion of legal tradition. Glenn, H. P., *Legal Traditions and Legal Traditions*, Journal of Comparative Law Vol. 2, Issue 1, 2007, pp. 70-72. For more on the etymology of the two terms s. Husa, J., *Legal Culture vs. Legal Tradition – Different Epistemologies?*, Maastricht European Private Law Institute Working Paper 18, 2012, p. 1

[32] Merryman, J., H., *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford University Press, Stanford, 1969, p. 15

[33] Mayer, M., E., *Rechtsnormen und Kulturnormen*, Breslau, 1903, p. 24

[34] *Cf.* Visegrady, A., Tucak, I., *Mađarska i hrvatska pravna kultura, Suvremeni pravni izazovi*, in: Župan, M., Vinković, M. (eds.), Suvremeni pravni izazovi: EU-Mađarska-Hrvatska, Osijek, Pécs, p. 15. For

enced by the educational process, has a significant impact on shaping the opinion on law and thus indirectly on the creation of legal culture. As we have identified in recent research, there are numerous indicators through which it is possible to describe the features of a legal culture within a legal system, and we are going to focus in particular on legal education, and consequently legal profession.[35]

What would be the typical features which constitute the European legal culture in general? According to Hesselink, they imply a specific national aspect, internal perspective, systematic approach (*Systemdenken*), the use of abstract rules, deductive concluding, aspiration for objectivity and focus on the text.[36] There is a common agreement that these dominant characteristics are mirrored in legal education, so that legal positivism, dogmatic and authority based approach remain important features of the European education system.[37] However, due to the legacy of the socialist legal circle that Croatia was once a part of, its legal culture is considered even more positivist and formalistic.[38] Unlike the Western European countries, which were early sensitized by the EU integration process and its case law and have therefore adopted a pragmatic approach to legal standards, eastern European countries have maintained a positivist approach to the interpretation of legal norms, which is inherent to the period immediately following the entry into force of major European private law codifications.[39]

Formalism is manifested in the ubiquitous understanding of the courts as mere applicators of legal rules, and by no means as active factors in the process of their formation. In her research on the features of the Croatian legal culture, Ćapeta points out that Croatian courts in court proceedings only apply legal texts and rarely and exceptionally bylaws. By comparing the concepts of Western and East-

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comparison, Van Hoecke and Warrington, *op. cit.* note 31, pp. 514-515, define the concept of legal culture by providing the following content elements: the concept of law, the theory of valid legal sources, legal methodology, legal arguments, a theory of legitimation of the law and the common view on the role of law in a society and on the (active or passive) role of lawyer

35 In his presentation on legal culture in five Central European countries, Blankenburg cites several indicators by which it is possible to determine the state of legal culture in each country. These are legal education, legal profession, civil and criminal justice and the institutions of administrative and constitutional review. S. Blankenburg, E., *Legal Culture In Five Central European Countries*, WRR Scientific Council for Government Policy, The Hague, 2010, p. 11

36 Hesselink, M. W., *The New European Legal Culture*, Kluwer, 2001, p. 9

37 *Cf.* Hesselink, *op. cit.* note 36, p. 9; Merryman, J. H., *Legal Education There and Here: A Comparison*, Stanford Law Review, Vol. 27, No. 3, 1975, p. 869

38 *Cf.* Rodin, S., *Discourse and Authority in European and Post-Communist Legal Culture*, Croatian Yearbook of European Law & Policy, Vol. 1, No. 1, 2005, p. 11; Ćapeta, T., *Courts, Legal Culture and EU Enlargement*, Croatian Yearbook of European Law & Policy, Vol. 1, No. 1, 2005, p. 8; Uzelac, A., *Survival of the Third Legal Tradition?*, Supreme Court Law Review 49, 2d, 2010, p. 383

39 Ćapeta, *op. cit.* note 38, p. 7

ern European legal cultures, the author further observes that the courts do not question the validity of legal rules when applying them. The consequence of this established practice is that the courts do not even consider the Constitution as a legal source, but it is viewed through its political framework as the basis of the legal system used to adopt and implement laws.[40] The crucial influence on the formation of legal culture within a legal system is the way in which legal rules are interpreted. In the process of their application to a concrete case, the Croatian legal practice does not take into account the purpose of adopting certain norms, but their texts are applied in a formalist way, with no wider interpretation of their meaning and with very limited legal arguments.[41] As in other transitional countries, which seek to align their legal arrangements with the *acquis communautaire*, textualism stands out as the foundation of legal interpretation in Croatia as well.[42] Unclear parts of legal norms are interpreted in the way they are portrayed by legal doctrines, i.e. they are applied through some forms learned during university education.[43] The aforesaid way of interpretation of legal rules and the legal arguments that can be seen in court practice undoubtedly affect the formation of legal culture. Judicial decisions, as Rodin points out, have social consequences because courts indirectly, by making decisions, form a judicial policy.[44]

It is evident that the same features concerning the legal profession are evident in all the countries that developed their legal systems under the influence of socialism.[45] Law is applied and interpreted by lawyers educated in the pre-war system, especially when it comes to criminal and civil law proceedings. Despite the need to harmonize the legal systems of the transition countries with the EU acquis, it cannot be neglected that new regulations are still based on the legitimacy of pre-war regulations, and that university programs, as well as chambers that unite

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40 *Ibid.* p. 10

41 Rodin also asserts that judges are guided by language interpretations of norms, thus finding the justification for making decisions in the content of a particular provision, not in the broad sense of the content of the law. Rodin, *op. cit.* note 38, p. 58

42 An example of a formalist and dogmatic legal system shaped by the influence of socialism and caused solely by historical factors is Poland. For more about the Polish legal culture s. Manko, R., *The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective*, European Law Journal, Vol. 11, No. 5, 2005, pp. 527-548

43 Ćapeta cites several examples from the Croatian legal practice where the text of the legal rule is the only one that is taken into account when making judicial decisions. These cases have resulted in rather awkward judgments that are completely contrary to the intended purpose of the regulation applied to the disputed case. More in Ćapeta, *op. cit.* note 38, p. 12

44 Rodin, *op. cit.* note 38, p. 58

45 More on the features of the Croatian legal system in the period of socialism see in: Uzelac, *op. cit.* note 38, pp. 377-396

certain predominant legal professions are based on precedents that should be re-examined.[46]

Furthermore, it seems that the understanding of the legal culture in a way inherent to the previous regime also contributes to the important role that most prominent legal practitioners have lately had in the political process. The unanimous opinion that judges and practitioners in the Croatian legal system hardly ever or never participate in the legislative process, which is the peculiarity of our legal system in the first place, is questioned in some of the studies. The participation of practitioners in the legislative process, as Uzelac points out, often results in the limitation of changes in the legal system that would surely be used to depart from the established legal forms of the former system.[47] In connection with this, law professors are often criticized that they are educated solely on theoretical legal settings and are often deprived of the role they ought to have in the process of creating legal rules because of their limited practical experience. Thus, the possibility of effecting a different concept of the Croatian legal culture is even narrower.

In some studies that analyze the impact of traditional elements on the formation of legal systems under the influence of foreign law, Croatia, as well as other countries of former Yugoslavia, is taken into account as an example of a country that is prone and open to the acceptance of different forms of transnational justice. It also states that the traditions of these countries are based on written laws applied by courts in dispute settlement procedures. This undoubtedly confirms that the perception of the Croatian legal culture as described earlier has echoes outside of the boundaries of our legal system. It is further stated that the secular influence of the legal culture, which is moderately individualistic, serves as the starting point for accepting foreign judgments (such as those of the International Criminal Tribunal).[48] This peculiarity of the Croatian legal culture is also encouraging when it comes to the possible unification of foreign legal rules. Although the issue of unifying the rules of European law requires special attention and broader research, existing legal culture should not hinder this complicated process.

The previously analyzed understanding of legal culture, including the way it manifests itself in the court system, is certainly based on the educational process. Moreover, we dare to assert that the methodology of legal education exerts a dominant influence on the creation of future lawyers and thereupon on the formation of

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46 Blankenburg, *op. cit.* note 35, p. 11

47 Uzelac, *op. cit.* note 38, p. 395

48 Zartner, D., *The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, Indiana International & Comparative Law Review, Vol. 22, No. 2, 2012, p. 205, with reference to the literature in the note 62

legal culture itself. Unfortunately, the present system of Croatian legal education, despite numerous reforms, continues to support to some extent the formalist legal culture resulted from decades of various historical influences. Conversely, the influence of legal culture on the content and the realization of the educational process is, in our humble opinion, less pronounced.

4. THE CURRENT STRUGGLE WITH A BURDENED LEGACY

Since the development of the modern society began, no area of life has been imbued with more hope than education.[49] The same is true for Croatia, but given the current perspective of general education and the stumbling curricular reform, hope and hard work is exactly what is needed the most.

Active engagement and critical thinking of young students - future jurists who would work in the common labor market and participate as active citizens - can be expected only if we set a good foundation in the education vertical.[50] However, the present curricular reform which should modernize school curricula and teaching methods is at its crossroad. As stated in the European Commission's *Education and Training Monitor 2017* for Croatia, which assesses the main recent policy measures in the field of education and training, the current comprehensive curricular reform has been detected as one of the major challenges.[51] Despite the positive side effect, which was increased public interest in education, the implementation of the reform remains troublesome, especially due to the restructuring of its enforcement committees and political turbulences.

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[49] The idea is represented by Konrad Paul Liessmann, *Wissen als Provokation. Oder: Warum es so unangenehm ist gebildeten Menschen zu begegnen*, Symposium „Aktuelle Herausforderungen an Erziehung und Bildung", 20 March 2015, Salzburg,
[https://www.youtube.com/watch?v=cbxCgN4k4oY] Accessed 30 March 2018

[50] Some of the key objectives that are proposed for implementation via the comprehensive curricular reform in elementary and secondary education that would assist higher education in achieving its goals are: language skills, adult learning, work-based learning, digital and entrepreneurship skills, enhancement of critical thinking and media literacy, ensuring the acquirement of social, civic and intercultural competences, promoting intercultural dialogue and integration of disadvantaged groups etc. *Cf. Proposal for a new national framework curriculum*
[http://mzos.hr/datoteke/Nacionalni_okvirni_kurikulum.pdf] Accessed 30 March 2018

[51] Concerning its direction, the Council of the European Union made the following statement: "After ambivalent stakeholder reactions, the curricular reform was revised, and implementation has been significantly delayed. The process now needs to continue in line with the original objectives." The Council also issued a country-specific recommendation to accelerate the reform. *Education and Training Monitor 2017*,
[https://ec.europa.eu/education/sites/education/files/monitor2017-hr_en.pdf] Accessed 30 March 2018

Regarding the impacts of the previously mentioned major higher education reform carried out within the Bologna process, the debate continues to be largely followed by criticism.[52] Although it is undeniable that the Bologna process has proved to be beneficial in many aspects, especially in terms of cooperation in the European Higher Education Area, Croatia has entered this process completely unprepared. Namely, even prior to the introduction of the Bologna reform, many structural problems existed at the Croatian universities,[53] and quality of the reform was further aggravated by problems which arose during the implementation.[54] As an explanation for the extensive gap between the envisaged ideas and end results, Rodin highlighted a lack of deeper understanding of the essential elements of the process, which does not come as surprise since there was never a general consensus by the stakeholders on the basic parameters (employability, qualification etc.).[55] Due to individual and country-specific perception of the Bologna system, it seems that there were as many distinct interpretations as signatory states. Kwiek drew attention to the important aspect of diversification in higher education between universities in the Western and Central and Eastern Europe. Indeed, no official document recognized that Bologna might be successful at western European universities and at the same time encounter difficulties in the transition countries,

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52 *Cf.* Akšamović, D., *Croatian Legal Education Reform at the Crossroads: Preparing the Modern Lawyer*, in: Ikawa, D., Wortham, l. (eds), The New Law School: Reexamining Goals, Organization and Methods for a Changing World, Public Interest Law Institute and Jagiellonian University Press, 2010, pp. 87-93; Lučin, P., Prijić Samaržija, S., *The Bologna Process as a Reform Initiative in Higher Education in Croatia*, European Education, Vol. 43., Issue 3, 2011, pp. 26-42; Kurelić, Z., Rodin, S., *Failure of the Croatian Higher Education Reform*, CEPS Journal, Vol. 2, No. 4, 2012, pp. 29-52

53 *E.g.* what stood out among these problems are the facts that universities in general had no clear mission and development strategies, the four largest and oldest universities were not integrated, and the system lacked independent external evaluation of quality. Furthermore, there were not enough financial resources and equipment, and at the same time there was a lack of interest in hiring assistants and non-teaching staff, while academic staff was burdened with increasing administrative workload. An insufficient number of teachers in relation to the number of students, modest mobility of all stakeholders in the academic community, underdeveloped international cooperation and a neglected science proved to be the major issues. For more information s. Krištof, M., Pisek, K., Radeka, I., *Primjena Bolonjskog procesa na hrvatskim sveučilištima*, 2010, [http://www.nsz.hr/novosti-i-obavijesti/vijesti_iz_znanosti_i_obrazovanja/istrazivanje-o-primjeni-bolonjskog-procesa-na-hrvatskim-sveucilistima/] Accessed 7 February 2018

54 The implementation was often declarative, without substantial content changes, so that a combination of old ways of studying interfered with the incomplete application of the new ones. There was a frequent incompatibility of ECTS credits with the actual student load in the curricula, as well as unclear definition of learning outcomes. Unsuitable preparation of high school students and compression of classes in a semester form led to a drop in criteria. Ultimately, the faculties were not able to adjust fast enough to the labor market, just as the economy and the public sector did not support the Bologna concept of education (Bachelor degree in particular) with appropriate workplaces and employment opportunities

55 Rodin, S., *Higher Education Reform in Search of Bologna*, Politička misao, Vol. 46, No. 5, 2009, p. 21

particularly because of the blend of old and new problems that they faced at the same time, as well as their constant underfunding.[56] As is usually the case in Croatia, there was a discrepancy between good intentions expressed while introducing the reform and the reality of the functioning living system in practice. Ultimately - plain and simple - it did not provide competences and raise employability, it did not facilitate recognition of degrees, and it did not foster true mobility. So, may the reforms continue!

Right now, we are witnessing a period of dynamic and increasingly market-driven European economies in which our sluggish high education curriculum often cannot maintain a foothold without a more agile and serious redefinition of tasks. At the same time, hoping for fast results (especially if there is an upcoming external evaluation), usually through more formal than substantive implementation of the various reforms, we either opt for mere cosmetic changes or inflict more harm than good to the existing system. Such vicious cycle of continuous reforms and consequent transitional systems was perfectly highlighted in Liessmann's *Theory of Miseducation* by his ironic comment: "With each new reform, there is a growing need for a reform. All the problems, which the reforms entail, can be again solved only with the help of new reforms."[57] He adds that scientists are permanently engaged in the reforms of the institution, instead of spending more energy on teaching and research; meanwhile, they are investing too little energy on teaching and research, which is why the university must urgently reform and so on. Therefore, it will surely present a challenge to reform the legal studies in order to meet the needs of students and the economy without a radical transformation of values common to Croatian higher education today.

The shift should probably begin with the most disregarded field of Croatia's educational scheme and at the same time an area where universities can make a major contribution - lifelong learning. As reported by *Education and Training Monitor 2017*, adult participation in lifelong learning in Croatia for 2016 was only 3%, compared to the EU average which is 10.8%. Basically, the most vital area of lifelong learning can be therefore characterized as the weakest link in the education system. Since lifelong learning programs are intended for people of all ages, this

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[56] Kwiek, M., *The Emergent European Educational Policies Under Scrutiny. The Bologna Process from a Central European Perspective*, Poznan, 2003, pp. 36-37, 42 [http://www.policy.hu/kwiek/PDFs/KwiekBologna_Long.pdf]. Accessed 15 February 2018; Compare also the arguments by Hörner who called attention to the fact that the reform in western countries was intended to coordinate the standardization of higher education, while in transition countries it was a part of political transformation and break with the old system. See Hörner, W., *Introduction,* in: Tamás Kozma, T. *et al.* (eds.), The Bologna Process in Central and Eastern Europe, Springer, Wiesbaden, 2013, p. 7

[57] Liessmann, K. P., *Teorija neobrazovanosti: Zablude društva znanja*, Jesenski i Turk, Zagreb, 2008, p. 140

would enable continuous education and personal development of senior lawyers at the same standards of quality which are required for university studies. Guided by the idea that legal professions require renewal and considering the dynamic development of some branches of law, law faculties could quickly adapt to the market needs, connect the academic community and legal professions, and, no less important, generate immediate financial income.[58] This format is especially convenient for training in EU law and policies. Namely, the whole process of Europeanization must have felt overwhelming to judges in a transitional country, as they were trained in the application of one's own national law and the diploma one obtained had an effect limited to that particular country.[59] Contrary to their previous experience, the flood of European regulations was perceived as something that was imposed top down in order for Croatia to meet the requirements of the EU accession. Significant advances have also been made in the institutional training of practitioners within the Judicial Academy, together with other specialized trainings for legal professions. Simultaneously, some objections have been raised as to the methodology and approach to training. Namely, as Uzelac pointed out, the circumstance that the education process in those legal schools is conducted by lawyers educated in the old system prevents a more critical discussion of the issues that arise there.[60]

Furthermore, the current methodology of legal education is without any prejudice criticized as being based on theoretical rather than practical approach, preventing students from applying the acquired knowledge to specific problems that arise after graduation. We have already concluded that a formal argument, previously passed by the legislator, plays a central role in our formalistic legal culture, as the judiciary is often limiting itself to mere application of law and is not keen to take on any creative role. Since law creation is beyond the limits of their constitutional competence, we can understand their cautiousness with respect to suggesting a possible creation of new law in their judgements. Nevertheless, the education system still fails to encourage future jurists to use a teleological approach and rely on the fundamental legal principles proclaimed primarily by the Croatian Constitution but increasingly by the EU regulations and thus the common European legal tradition. In a largely positivistic and dogmatic education, by introducing the structure of the legal system and basic concepts to the students at the beginning

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58 *E.g.* Within its lifelong learning program, the Faculty of Law Osijek has offered the following courses: *Professional Training for Lawyer Linguists* and *Interdisciplinary Professional Training Communication with the Child in Judiciary*

59 *Cf.* Schneider, H., *The Free Movement of Lawyers in Europe and its Consequences for the Legal Profession and the Legal Education in the Member States*, in: Faure, M., Smits, J., Schneider, H. (eds.), Towards a European Ius Commune in Legal Education and Research, Antwerp, 2002, pp. 15–38

60 Uzelac, *op. cit.* note 38, p. 396

of their journey they are given a misleading impression that the legal system is a coherent and rational network, which provides previously prescribed solutions to all possible legal questions.[61] Since critical thinking and discussion is still not generally encouraged in the methodological approach, especially not right from the first year of studies, the confrontation between the law in the books and its practical application is rarely stimulated. Because of that, we can expect the judiciary to eventually only become the 'mouth that pronounces the words of the law'[62] and in Croatia, unfortunately, not always exclusively independent of political influence.

Therefore, it is of utmost importance to cultivate critical assessment of society during the entire education process and transfer the responsibility for learning to students. The legal system should be taught in all its complexity and in touch with real examples, rather than in a linear manner as shown in the text books. There have been requests to introduce more practice in a form of traineeship in the legal curriculum. Although we agree that clinical practice should be further developed as a part of the studies, it should be based on thorough theoretical grounds and organized in a way that actually enables active participation in legal process and not just offer a check mark for attendance. Legal curricula often include many compulsory subjects and not enough space for optional courses, but as far as our experience goes, it is much less important what the particular subjects are, as opposed to the way in which they are taught. Indeed, we would qualify methodology as the weakest link in the whole educational process. Despite some fresh and unconventional approaches to teaching which have been able to break through,[63] the general style tends to be rather conservative. Given that their promotion depends almost exclusively on scientific work, teachers are not sufficiently stimulated to invest additional efforts in the teaching methodology, and the mandatory teacher training which was required from younger staff was merely a set of unrelated lectures unsuitable for higher education. Nevertheless, in a system where PowerPoint is not considered a technical aid but the greatest methodological achievement of legal education, we need to motivate teachers and provide them with a support

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61 Hesselink *op. cit.* note 36, p. 19

62 Referring to Montesquieu's famous phrase: '*la bouche qui prononce les paroles de la loi*' (*De l'Esprit des Lois,* 1748), in which he attempts to elucidate all the implications of the principle of separation of powers, Hesselink highlights the need for the judge to evolve from a mere applicator to a real creator, and, respectively, to regard the jurisprudence as a source of law. *Cf. Ibid.* pp. 11-12

63 *E.g.* seminar method, discussion method, case method, problem method, Socratic method, simulation and role play, collaborative teaching, clinical legal education etc. For detailed description on particular methods see Ranđelović, D., *Kliničko pravno obrazovanje - nužni dio obrazovanja pravnika*, Legal topics, Year 4, No. 7, p. 23; Dokmanović, M., *Legal history course development challenges in Croatia, Serbia and Macedonia*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 63, No. 5-6, 2013, p. 992; Avramović, S., *From General Legal History towards Comparative Legal Traditions*, The Annals of the Faculty of Law in Belgrade – Belgrade Law Review, Vol. 58, No. 3, 2010, p. 35

that will not overload them. The former 'Humboldtian' ideal bears little connection to the realities of contemporary mass legal education and crowded lectures, but in student-centered learning only smaller groups would allow respect for diversity instead of the previous one-size-fits-all approach.

Students tend to be unprepared for the labor market not only because of the traditional gap between theoretical education and practice, but because law enforcement often comes down to strict formalism or uneven application. In fact, the ideas, values and mentality of a particular culture, besides widely accepted practices and social norms, exercise strong influence on law in action. Contrary to the logical and systematic legal system presented during their studies, it is more likely that students will eventually encounter an inefficient and sluggish justice system, as well as an unresponsive bureaucratic administration which often requires time and fulfillment of many formal requests to resolve the case or even interventions through intermediary in order to accelerate the process or ensure a successful outcome.

Although it may not be immediately apparent, education is under constant influence of the environment and legal culture, which is essential if we want to convey values. We should not expect students to become responsible members of the society and use their knowledge with integrity if the standards we teach them within institutions are in opposition to the real world, or, in extreme cases, even to the behavior of teachers themselves. It also seems absurd that the state seeks to raise the share of highly educated citizens while at the same time political elites find such citizens rather inconvenient because they are thinking with their own heads. From a teacher's perspective, it is not easy to educate professional jurists in a country where citizens have (justifiably) little trust in public institutions.[64] After all, values cannot be taught, they need to be lived.

5. CONCLUSION

There is a growing awareness within the EU's agenda that education is becoming an essential utility for reinforcing cohesion and the European identity. Therefore, the Commission has recently proposed numerous initiatives to help seize the full

[64] *Cf.* Kovačić, I., *Trust in Croatian state institutions low*, [https://eblnews.com/news/croatia/trust-croatian-state-institutions-low-56456]. Accessed 30 March 2018; *Special Eurobarometer 461 Report - Designing Europe's future: Trust in institutions. Globalisation. Support for the euro, opinions about free trade and solidarity,* [http://ec.europa.eu/commfrontoffice/publicopinion] Accessed 30 March 2018

potential of education at Member States level in order to ensure employability and competitiveness, empower active citizenship, promote personal fulfillment and assure a deeper understanding of common values.

Building on the analysis about the nature and tradition of our legal education, as well as its interdependence with legal culture, the aim of this paper was to detect the current status and challenges of Croatian legal education and, finally, offer a humble contribution to its improvement and thus support the aforementioned European goals.

We encountered a general consensus within academia that legal education should be much less formal and positivistic and much more problem-oriented. However, this does not mean to continue the usual practice of rushed legal curricula reforms which tend to crop the curriculum of some traditional subjects in order to achieve fast production of legal technicians. On the contrary, pursuant to our Humboldtian legacy we should encourage historical, philosophical, sociological, and economic aspects of our common legal tradition. This is not only inevitable, as a result of the Bologna process, but also desirable for formation of personality, deepening of European identity and common values.

For the past few decades, the European market has seen a significantly increased demand for experienced legal services, which has encouraged international orientation of legal education. Fostering employability, however, does not mean that universities should act as service companies which deliver instant and highly specialized workforce. They should rather provide knowledge and necessary skills for flexible adaptation to changing market circumstances and thereby foster mobility. This primarily implies a shift in paradigms. From elementary education onwards, instead of rewarding the memorizing and reproducing of facts, we should encourage teamwork, problem solving capacities, reinforce initiatives and learning skills. Only a change in the methodology of teaching would allow for a confrontation between the law in the books and law in action. Allowing students to question the legal system objectively and argue for its reform instead of just blindly accepting the current state would create both independent and socially responsible jurists and active citizens.

Ultimately, a key prerequisite for long-term successful progress is a change of mentality, and it starts with education.

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CONTEMPORARY CHALLENGES OF THE CROSS BORDER MAINTENANCE OBLIGATIONS SYSTEM IN THE REPUBLIC OF MACEDONIA

ABSTRACT

The legal rules in the Republic of Macedonia regarding cross border recovery of maintenance have been more or less unchanged from the Yugoslav Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (PIL act of 1982). This means that most of the jurisdictional rules and the conflict of law rules are now turning 35 years. Meanwhile the Hague Conference of Private International Law has provided for two new legal acts, the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations which introduce new conflict of law rules regarding maintenance obligations. Moreover, the EU has adapted a new Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. In this context the Republic of Macedonia (as a EU candidate country) now faces contemporary challenges to adjust its legal system to the new jurisdictional criteria and conflict of law rules developed by the Hague Conference of Private International Law and the EU. This article firstly gives a brief overview of the current PIL rules regarding recovery of maintenance in the Republic of Macedonia, comparing them to the rules provided in the 2007 Hague Protocol and the Maintenance Regulation and secondly it will address the means of the adjustment of such rules in the Republic of Macedonia.

Keywords: *Jurisdiction, Conflict of law rules, Maintenance, 2007 PIL Act of R. Macedonia, 2007 Hague Maintenance Protocol, Maintenance Regulation (EC) 4/2009*

1. GENERAL

Private international law rules in Republic of Macedonia are regulated in the Private International Law Act (PIL Act of 2007).[1] In October 2007, Macedonia enacted its first codification in the area of Private International law as an indepen-

[1] Published in the "Official Gazette of the Republic of Macedonia" (Службен весник на Република Македонија) no. 87/2007 and 156/2010

dent country. However, this new codification of Private International Law was not the first systematization of such rules in the country.[2] In its structure, this legal act has many similarities with the Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (PIL act of 1982)[3] which was a law enacted on a federal level in the Socialist Federative Republic of Yugoslavia(SFRY). The PIL act of 1982 law represented the first codification of private international law rules in SFRY. Before that law came into force, private international law legal issues in SFRY were either scattered among different acts or they were not regulated.[4] All of these legal issues and the legal vacuum that existed over some issues in SFRY were settled with the codification and coming into force of the PIL act of 1982.[5] This legal act remained in force in Republic of Macedonia until 2007, fifteen years after the dissolution of SFRY, on the base of the Constitutional Law for the application of the Constitution of Republic of Macedonia.[6]

Their similarity is evident, both laws are systematically divided in six chapters in which rules for international jurisdiction, conflict of law rules, recognition and enforcement rules and other rules are contained. In the aspect of family law issues the PIL Act of 2007 is strongly influenced from its predecessor. This provides for consistent understanding of the rules and the use of the practical and doctrinal materials in the interpretation of the solutions in the both PIL Acts.

The scope of application of both laws, the PIL Act of 2007 and the PIL act of 1982 is identical and given in Article 1.[7] A large part of these acts is directed towards solutions to private international law problems which refer to family relationships. There are special conflict of law rules, jurisdictional rules and rules regarding recognition and enforcement that regulate family law issues with foreign elements.

Specifically, in the PIL acts there are rules for the determination of the applicable law in vast number of family law issues such as matrimonial matters,[8] matrimonial

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2 Гавроска П., Дескоски Т., Меѓународно приватно право, Скопје, 2011, p. 66

3 Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters (Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima), Official Gazette of the SFRY, no.43/1982

4 Varadi, T, *et al.*,, *Međunaodno privatno pravo*, deseto izdanje, JP „Službeni Glasnik', Beograd, 2008 p. 61

5 For the historical aspects of the PIL act of 1982 see, Živković, M., Stanivuković, M, *Međunarodno privatno pravo (opšti deo),* Beograd, Službeni glasnik, 2006, p. 41-42

6 Official Gazette of the Republic of Macedonia, No.52/1991

7 cf Article 1 of the PIL Act of 2007 and Article 1 of the PIL act of 1982

8 Articles 38-41 of the PIL Act of 2007

property regimes,[9] relationships between parents and children,[10] recognition, establishment and contesting of paternity or maternity,[11] maintenance obligations,[12] legitimization,[13] adoption,[14] custody rights and provisional measures.[15]

The PIL Act of 2007 contains rules for the determination of the jurisdiction of courts and other authorities of the Republic of Macedonia in matters having an international element. The general rules determines the jurisdiction of the courts of Republic of Macedonia on the base of the domicile of the defendant.[16] However in large numbers of family law issues, the PIL Act of 2007 departs from the general jurisdictional criteria and covers many family law issues with specific jurisdictional rules referring to matrimonial property regimes,[17] matrimonial matters,[18] establishment and contesting of paternity or maternity,[19] parental responsibility issues,[20] maintenance,[21] granting marriage license to minors,[22] adoption,[23] custody rights,[24] and provisional measures.[25]

The recognition and enforcement of foreign judicial decisions in the PIL act of 2007 is regulated in the IV Chapter and contains the conditions and the procedure for recognition and enforcement of all judicial decisions[26] or court settlements[27] rendered by foreign court or another authority which is in the State of origin equivalent to the judgment or settlement in court.[28] As was the case with the other PIL issues which are regulated with this law, the recognition and en-

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9 Articles 42-44 of the PIL Act of 2007. Also Article 45 covers the determination of the applicable law regarding the property regimes in non-martial relationships

10 Article 46 of the PIL Act of 2007

11 Article 47 of the PIL Act of 2007

12 Article 48 of the PIL Act of 2007

13 Article 49 of the PIL Act of 2007

14 Articles 50-51

15 Article 17

16 Article 52 of the PIL Act of 2007. The same jurisdictional criteria was provided in the 1982 PIL Act (Article 46)

17 Article 72 of the PIL Act of 2007

18 Articles 73-75 of the PIL Act of 2007

19 Articles 76 and 77 of the PIL Act of 2007

20 Articles 78, 81, 82 of the PIL Act of 2007

21 Articles 79 and 80 of the PIL Act of 2007

22 Article 83 of the PIL Act of 2007

23 Article 87 of the PIL Act of 2007

24 Articles 88 and 89 of the PIL Act of 2007

25 Article 90 of the PIL Act of 2007

26 Article 99(1) of the PIL Act of 2007

27 Article 99(2) of the PIL Act of 2007

28 Article 99(3) of the PIL Act of 2007

forcement applies to all maters which fall under the scope of application given in Article 1. Although in this aspect the grounds for recognition are referring to all decisions, there are several rules specifically mentioning family matters. These rules are related to the exception from the ground on non-recognition of decision in the cases of violation of the exclusive jurisdiction of the Court of Republic of Macedonia[29] and decisions relating to the personal status.[30]

The system for the cross border recovery of maintenance obligations in Europe is shared between the Hague Conference of Private International Law (Hague Conference) conventions and the European Union regulations.[31] The Hague Conference has dealt with the problem of cross border recovery of maintenance from the 1950's in the form of the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children. Moreover in the 1970's the Hague Conference adopted two new conventions: the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. The importance which is attributed to the question of cross border recovery of maintenance by the Hague Conference can be seen by fact that a third generation of conventions was presented in 2007: the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.[32] On the other hand the EU in 2009 introduced the Maintenance Regulation (EC) No 4/2009.[33] This regulation covers broad legal issues such as: rules regarding direct jurisdiction,

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29 Article 104(2) of the PIL Act of 2007

30 Articles 108-110 of the PIL Act of 2007

31 Another Convention is relevant in this aspect that is the New York Convention on the Recovery Abroad of Maintenance from 1956 however it contains rules regarding the international cooperation between the authorities and does not contain direct jurisdictional rules and rules regarding the determination of the applicable law

32 More on the position of the maintenance obligations regime established by the Hague Conference see, Walker, S., *Maintenance and Child Support in Private International Law*, Oxford and Portland, Oregon, 2015, p. 18-24

33 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. More on the background of the adoption of the Maintenance Regulation see, Ferrand, F., *The Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, Latest Developments in Private International Law, Díaz, C. B. (eds), Intersentia, Cambridge-Antwerp-Portland, 2011, p. 83-90

recognition and enforcement, legal aid and administrative cooperation. However there is huge interdependence between the Maintenance Regulation and the 2007 Hague Convention on Maintenance and the 2007 Hague Maintenance Protocol. Moreover, a genuine novelty in legal standardization[34] in the Maintenance Regulation is that instead of providing for conflict of law rules it contains a referring clause which allows for direct application of the 2007 Hague Protocol and its rules for the determination of the applicable law regarding maintenance.[35]

Large analysis is needed for the rules in the PIL Act of 2007 which are particular for the family law relationships and providing contextual analysis of these rules with the new tendencies in the cross border family law, however such aspect would exceed the purpose of this article.[36] Its goal is to analyze to take a look of the European system of cross border recovery of maintenance and compare them with the rules provided in the PIL Act of 2007 in order to answer two simple questions: Are the solutions provided in the PIL Act of 2007 compatible with the direct jurisdiction rules in the Maintenance Regulation and the conflict of law rules given in the 2007 Hague Protocol and which steps should Republic of Macedonia take in order to provide for standardized recovery of maintenance in cross border cases?

2. JURISDICTIONAL RULES

2.1. Jurisdictional rules contained in the Private International Law Act of Republic of Macedonia from 2007 regarding maintenance obligations

In the PIL Act of 2007 there are fifteen articles regarding family law issues that determine jurisdiction of the Courts of Republic of Macedonia even in situations when the defendant doesn't have domicile in Republic of Macedonia (special jurisdiction), only three articles refer to maintenance obligations. These rules are provided in Articles 79, 80, and 81 of the PIL Act of 2007.

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34 Župan, M., *Innovations of the 2007 Hague Maintenance Protocol*, in Beaumont, P., *et al.* (ed.), The Recovery of Maintenance in the EU and Worldwide, Oxford and Portland, Oregon, 2014, p. 314

35 Article 15 of the Maintenance Regulation

36 For more on the new tendencies in private international law in family matters see, Boele-Woelki, K., *The principles of European family law: its aims and prospects,* Utrecht Law Review, Volume 1, Issue 2, 2005, p. 160-168; Župan, M., *Europska pravosudna suradnja u prekograničnim obiteljskim predmetima (European judicial cooperation in cross border family matters),* Pravni aspekti prekogranične suradnje i EU integracija: Mađarska – Hrvatska, Pravni fakultet Sveučilišta Pečuh i Pravni fakultet u Osijeku, 2011, p. 591-618

Article 79 of the 2007 PIL Act is almost identical in the wording with Article 67 of the 1982 PIL Act.[37] It provides for special jurisdiction of courts of Republic of Macedonia in two cases: regarding maintenance of children and spouses or ex-spouses. In the first case, the Courts of Republic of Macedonia would have jurisdiction even in cases when the defendant does not have domicile in Republic of Macedonia, if alternatively one of these situations is met:

1. the lawsuit is filed by a child domiciled in the Republic of Macedonia;
2. the plaintiff and the defendant are citizens of the Republic of Macedonia, irrespective of their domicile; or
3. the plaintiff is a minor and a citizen of the Republic of Macedonia.[38]

In the second case which refers to maintenance between spouses and former spouses, the Courts of Republic of Macedonia would have jurisdiction even in cases when the defendant does not have domicile in Republic of Macedonia, if the spouses had their last common domicile in Republic of Macedonia and if the plaintiff is still domiciled in Republic of Macedonia at the time of the filing of the lawsuit.[39] In all of these cases of determining the jurisdiction regarding maintenance obligation, prorogation of jurisdiction is expressively excluded.[40]

It can be concluded that in the case of determining of the jurisdiction regarding maintenance of children in Republic of Macedonia the jurisdictional criteria are: the domicile of the defendant, child's domicile, cumulatively the nationality of the plaintiff and the defendant (irrespective of the domicile) and the nationality of the minor. In the second case the main jurisdictional criteria are: the domicile of the defendant and cumulatively the last domicile of the spouses and the plaintiffs domicile.

Article 80 and 81 of the 2007 PIL Act determine jurisdiction of Courts of Republic of Macedonia regarding maintenance on other bases outside the subjects of the dispute. Article 80 determines jurisdiction based on the property of the defendant (if its located in Republic of Macedonia) while Article 81 sets rules for attraction of jurisdiction in cases over protection, care and maintenance of children if the disputes are resolved together with disputes relating to legitimization or disputes

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37 Article 67 (2) of the 1982 PIL Act which was referring to jurisdiction in cases of maintenance of persons other than children when the defendant does not have a domicile in SFRY if the plaintiff possess Yugoslavian nationality and has domicile in SFRY

38 Article 79(1) of the 2007 PIL Act

39 Article 79(2) of the 2007 PIL Act

40 Article 56(4) of the 2007 PIL Act

relating to establishment and contesting of paternity and maternity (jurisdictional criteria predominantly based on the nationality of the parties).[41]

Articles of the 2007 PIL Act	Jurisdictional criteria			
Art.52 (General rule on international jurisdiction)	Domicile of the defendant is in RM			
Art. 79 (maintenance of children and (ex) spouses)	The child files the lawsuit and the child's domicile is in RM	Cumulatively the nationality of the plaintiff and the defendant is in RM (irrespective of the domicile)	The minor files the lawsuit and is a citizen of RM	Cumulatively the last domicile of the spouses and the plaintiffs domicile is in RM
Art.80 (maintenance based on the property from which the maintenance can be paid)	Property of the defendant is located in RM			
Art. 81 (attraction of jurisdiction)	Attraction of jurisdiction on the bases of Articles 76, 77 and 82	Articles 76, 77 and 82 base the international jurisdiction of Courts of Republic of Macedonia mostly on the nationality (RM) of the subjects of the dispute		

What is common for these rules is that the nationality or a combination of nationality and domicile as a jurisdictional criteria is predominant in these cases in the PIL Act of 2007.[42] This aspect was considered to be the reason why SFRY restrained itself from participating in the Hague Conventions.[43]

41 See Article 76, 77 and 82 of the 2007 PIL Act

42 For more on the predominance of the nationality as an jurisdictional criterion and a as a connecting factor in the conflict of law rules in the 1982 PIL Act see, Stanivuković, M., *Srpsko međunarodno privatno pravo u vremenu tranzicije: promenjeni značaj državljanstva i prebivališta*, in Knežević, G., Pavić, V. (eds), Državljanstvo i međunarodno privatno pravo, Haške konvencije, Beograd 2007, p. 45-47

43 Sajko, K., *Haška Konvencija o dječjoj zaštiti od 19.Listopada 1996; Značajni segment budućeg Hrvatskog Prava*, Novejše tendence razvoja otroškega prava v evropskih drňavah - prilagajanje otroškega prava v republiki Sloveniji, Maribor, 1997, p. 50

2.2. Jurisdictional rules contained in Maintenance Regulation

The jurisdictional rules in the 2007 Hague Convention and of the Maintenance Regulation differ substantially, because the rules given in the Regulation are direct jurisdictional rules[44] while the rules of the Convention are indirect jurisdictional rules.[45] Another prominent aspect given in the Maintenance Regulation is that the jurisdictional rules have universal application, meaning that they do not leave a room for national law rules and are always applicable to courts of Member States.[46] The general jurisdictional criteria in the Maintenance Regulation, is the defendant/creditors habitual residence.[47] Moreover it allows parties to agree on the competent court and with that it provides party autonomy in maintenance cases.[48] In order to provide for effective access to justice, the Regulation provides for subsidiary jurisdiction[49] and a *forum neccessitatis.*[50]

From such position it can be seen that the jurisdictional criteria in the 2007 PIL Act and in the Maintenance Regulation are different (the nationality and domicile on one hand and the habitual residence and party autonomy on the other) that it represents problem for the national legal systems. So in that context, amendments of the 2007 PIL act is needed so it could be in line with the new tendencies in the jurisdictional criteria in maintenance cases.

3. APPLICABLE LAW

3.1. Rules for the determination of the applicable law contained in the Private International Law Act of Republic of Macedonia from 2007 regarding maintenance obligations

The 2007 PIL Act concerning determination of applicable law in maintenance cases provides for different rules regarding the maintenance of marital or extra

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44 Walker, S., *op. cit.* note 32, p. 52

45 Explanatory Report on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance; Alegría Borrás & Jennifer Degeling, 2013 (Borrás/ Degeling Report), p. 59-63

46 Ferrand, *op. cit.* note 33, p. 91

47 Article 3 of the Maintenance Regulation. More on habitual residence see, Bouček, V., *Uobičajeno boravište u hrvatskom međunarodnom privatnom pravu,* Zbornik pravnog fakulteta u Zagrebu, Zagreb, 2015, p. 885-915; Rumenov, I., *Determination of the Child's Habitual Residence According to the Brussels II bis Regulation*, Pravni Letopis, Ljubljana 2013, p. 57-81

48 Hess B., Spancken S., *Setting the Scene – The EU Maintenance Regulation*, The Recovery of Maintenance in the EU and Worldwide (Beaumont P., eds.), Oxford and Portland, Oregon, 2014, p. 333

49 Article 6 of the Maintenance Regulation

50 Article 7 of the Maintenance Regulation

marital partners, parents and children, adoptive parent and adopted children, and maintenance of other persons. The approach taken was not to have a single rule that covers all of the maintenance cases, but to have the rules divided on the basis of the legal relationship between the creditor and the debtor. So the rules for the determination of the applicable law regarding maintenance are given regarding:

- Marital partners – Articles 42,43 and 44 of the 2007 PIL Act
- Extra-marital partners – Article 45 of the 2007 PIL Act
- Parents and children – Article 46 of the 2007 PIL Act
- Adoptive parent and adopted children – Article 51 of the 2007 PIL Act
- Other persons – Article 48 of the 2007 PIL Act

Articles of the 2007 PIL Act	Connecting factors			
Art.42 (Personal relations and statutory property relations of spouses)	Common nationality of both spouses	Common domicile	Last common domicile	The Law of Republic of Macedonia
Article 43 (Contractual property relation of spouses)	Limited Party autonomy - law of the nationality of one of the spouses - law of the domicile of one of the spouses - for immovables, place where the immovable is situated	Otherwise, the rules provided in Article 42 apply		
Article 44 (relations of spouses in cases of annulment or dissolution of the marriage)	Same rules as those in Article 42 and 43 of the 2007 PIL Act			
Article 45 (Property relations between persons living in extra-marital cohabitation)	Common nationality of both persons	Common domicile		
Article 46 (Relations between parents and children)	Common nationality of the parent and the child	Common domicile	Childs nationality	
Article 51 (Legal effect of adoption)	Common nationality of the adoptive parent and adopted child	Common domicile	Childs nationality	
Article 48 (Maintenance obligations)	Nationality of the relative who is claimed to be liable for the maintenance			

It can be seen that most of the rules in the 2007 PIL Act predominantly relay on the nationality as a connecting factor or the common domicile as a secondary connecting factor.

3.2. Rules for the determination of the applicable law contained in the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations

The applicable law in the EU regarding maintenance obligations is not regulated with the Maintenance Regulation, but with the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations.[51] This Protocol is with universal application meaning its provisions are applicable with respect to all situations concerning the relevant subject matter.[52] In this Protocol, Article 3 provides for general rule, while Articles 4, 5, 6, 7 or 8 provide for other connecting factors. The main connecting factor determined in article 3 is the habitual residence of the creditor. Moreover, the Hague 2007 Protocol provides for a dual cascade system of subsidiary reference.[53] Article 4 of the Protocol contains special rules that favour certain types of creditors upon which the law of their habitual residence is found to be contrary to their interest.[54] This rule provides for several alternatives to the creditors habitual residence as a connecting factor such as the law of the forum (*lex fori*) or the common nationality as a final option.[55] Articles 5 and 6 include for special rules with respect to spouses and ex-spouses and special rule on defence. With respect to article 5 the connecting factor is the last common habitual residence (together with the closer connection principle). A genuine novelty in the 2007 Hague Maintenance Protocol is the possibility of the parties to choose the applicable law. Such position deviates from the traditional approach in family law relations were the parties were not allowed to dispose of their rights and obligations, even in international situations.[56] The new trend in family law (also in maintenance obligations) is that there is encouragement of the persons which are subjects of family law relations to think about their needs and to organize their family law relations amicably.[57] In that context, articles 7 and 8 both allow the

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51 On the difference between the Hague 1973 Convention on the Law Applicable to Maintenance Obligations and the Hague 2007 Protocol see, Župan, *op. cit.* note 34, p. 318

52 Article 2 of the 2007 Hague Protocol. More on the issue see, Bonomi Report, para 34-35; Župan, *op. cit.* note 34, p. 316

53 Župan, *op. cit.* note 34, p. 320

54 Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations prepared by Andrea Bonomi, 2013, para 45

55 For more on these connecting factors see Walker, *op. cit.* note 32, p. 78-83

56 Župan, *op. cit.* note 34, p. 320

57 *ibid*.

parties to designate an applicable law (limited *optio iuris*), subject to a variety of restrictions.[58]

The connecting factors criteria in the 2007 PIL Act and in the 2007 Hague Protocol are different (the nationality and common domicile on one hand and the habitual residence and party autonomy on the other) that it represents problem for the national legal systems. In near future Republic of Macedonia should adjust its rules to these new tendencies.

4. CONCLUSION

Republic of Macedonia should take serious systematic measures for updating its legal system with the ratification of the Conventions that are referring to the maintenance obligations especially the 2007 Hague Maintenance Convention or/ and adapt its national rules with the main conflict of law rules provided in the 2007 Hague Protocol. It could be stated that such action could be done earlier, however, the 2007 PIL act was enacted in July while the 2007 Hague Convention and the Protocol were enacted in November. It was understandable that the Macedonian legislator waited for the development inside the Hague Conference before it amended its national legislation.[59]

On the other hand, the European legislator took into consideration the legal evolution on the global, worldwide level of cross border maintenance relations (in order to avoid incompatibility between the European instruments and the Conventions applicable with third states) when the new Regulation 4/2009 was enacted and in that aspect Republic of Macedonia should adapt to these new tendencies. There are two possible approaches. First, Republic of Macedonia could restrain itself from amendments of the national legislation and rely on the universal application of the Maintenance Regulation and the 2007 Hague Protocol (regarding direct jurisdiction and the determination of the applicable law). However, such approach is hazardous because the EU passes through re-evaluation of its structure and the period for full membership of Republic of Macedonia is uncertain. The second approach, could mean introducing the European jurisdictional criteria and conflict of law rules as national and with that provide for adaptation period of the persons which are implementing these rules with these European standards. Such approach, together with the accession to the 2007 Hague Convention could provide for comprehensive standardization of the PIL rules (direct jurisdiction, con-

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58 Walker, *op. cit.* note 32, p. 87-91

59 The 2011 amendment of the Macedonian 2007 PIL act was referring only to non-contractual obligations and the rules derived from the Rome II Regulation

flict of law rules and exequatur) of the maintenance obligation system in Republic of Macedonia with the modern tendencies.

Moreover this adaptation to the new tendencies in the area of private international law for maintenance obligations in the form of introduction of habitual residence as a new jurisdictional criteria and as a criteria for determining the applicable law will be in line with the trend that was introduced in 2011 when habitual residence was introduced for the first time in PIL act of Republic of Macedonia, but only regarding non-contractual obligations. There is obvious fact that the court of the habitual residence of the creditor is most appropriate to hear the case because of the proximity with the case. The new tendencies of enlarged number of cross border marriages and people living outside their Country of their nationality diminishes the absolute supremacy of nationality as a criterion in PIL Act of Republic of Macedonia and gives ground for the adaptation to the more liberal understanding that there might be situations where the law of the creditors habitual residence can apply. In conjunction, the jurisdictional criteria in the Maintenance Regulation and the rules in the 2007 Hague Protocol position the habitual residence of the maintenance creditor (ultimately this will represent applying the *lex fori*) as the most favorable forum for the maintenance dispute resolution in terms that such position will provide for guarantee of the fair and efficient procedures and easier understanding of the social background of the case.[60] Lastly, the idea that the parties can determine the applicable law is also a welcomed solution. The modern understanding of the relations within the family, especially the encouragement of the persons which are subjects of family law relations to think about their needs and to organize their family law relations amicably provides space to depart from the traditional approach in family law relations where the parties were not allowed to dispose of their rights and obligations, even in international situations.

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[60] Župan, M, *op. cit.* note 34, p. 327

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Topic 3

EU criminal law and procedure

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REOPENING OF PROCEEDINGS IN CASES OF TRIAL *IN ABSENTIA*: EUROPEAN LEGAL STANDARDS AND CROATIAN LAW*

ABSTRACT

In contemporary criminal procedure, trial in absentia is considered an exception to the general principle that that a person charged with a criminal offence is entitled to take part at the hearing. The case law of the European Court of Human Rights defined several rules on trial in absentia, as prerequisites of compliance with fair trial standards from Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). One of those rules concerns the possibility of retrial. Recently Croatia was condemned before in Sanader case, for violation of the right to a fair trial proclaimed in Article 6 ECHR, for the applicant's inability to obtain a rehearing after conviction in absentia, without prior surrendering to custody based on that conviction. The execution of Sanader judgment included legislative amendments, which were adopted in July 2017. The paper analyses to what extent the present regulation of reopening of proceedings in cases of trial in absentia in Croatian legislation and practice corresponds to the European legal standards. The paper contains theoretical and normative analysis, as well as the research of the jurisprudence of the European Court of Human Rights and of recent jurisprudence of the Supreme Court of the Republic of Croatia. It showed that in Croatian judicial practice there are doubts on the purpose of reopening of proceedings in case of trial in absentia, which should provide "a fresh determination of the merits of the charge" by a court" in "full respect of defence rights". Finally, the paper contains recommendations for the improvement of Croatian legislation and practice of reopening of criminal proceedings in cases of trial in absentia, in order to fully comply with European legal standards.

***Keywords**: trial in absentia, retrial, reopening of criminal proceedings, fair trial*

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1. INTRODUCTORY REMARKS ON TRIAL IN *ABSENTIA* AS EXCEPTION TO THE RIGHT TO BE PRESENT AT THE HEARING

Trial *in absentia* is considered an exception to the general principle that a person charged with a criminal offence is entitled to take part at the hearing. Origins of the right to be present at own trial go back to the earliest days of common law,[1] when the presence of the accused was a prerequisite for the jurisdiction of the court.[2] Although legal orders of common-law tradition in rule do require presence of the accused on trial,[3] over the years, American courts acknowledged the possibility, if the accused waived his right to be present at trial by voluntarily absenting himself, to continue the trial *in absentia*.[4] Thereby the fact that the defendant's absence was "voluntary" had to be clearly determined before the trial continued.[5] On the other hand, in some European countries of continental legal tradition, proceedings conducted in contumacy originally were proceedings against the defendant who "refused to come before the court (*in contumaciam*)".[6] It implied that the defendant was considered a rebel who committed a serious criminal offence but refused to take responsibility before the court and the society.[7] Therefore in some European legal orders, such as French, Italian and Belgian, trial conducted in contumacy used to imply loss of particular rights of defendants.[8] At present, some European countries do not accept the possibility of trials *in absentia* at all, while other countries regulate it under different regimes,[9] under influence of the jurisprudence of the European Court of Human Rights.

The right to be present at the one's own trial is one of many aspects of the right to a fair trial, proclaimed in Art. 6(1) ECHR. Although not expressly mentioned, "the object and purpose of the Article taken as a whole shows that a person 'charged with a criminal offence' is entitled to take part in the hearing".[10] Article 6, "read as a whole, guarantees the right of an accused to participate effectively in a criminal

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1 Starkey, J. G., *Trial in absentia*, 53 St. John's Law Review, 1979, pp. 721-722

2 *Ibid*., p. 723

3 Munivrana, M., *Univerzalna jurisdikcija*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 13, br. 1, 2006, p. 200

4 Starkey, *op. cit.* note 1, p. 724

5 *Trial, Circuit Note: Criminal*, The Georgetown Law Journal, vol. 59, 1971, p. 653

6 *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 616

7 Mauro, C., *Le défaut criminel Réflexions à propos du droit français et du droit comparé*, Revue de science criminelle et de droit pénal comparé, Janvier/Mars 2006, p. 35

8 *Ibid.*

9 Klip, A., *European Criminal Law An Integrative Approach*, Intersentia, 2016, p. 282

10 ECHR, Colozza v. Italy, 9024/80, 12 February 1985, §27; and in ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, §67

trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings".[11] If the accused cannot exercise the right to be present at the trial, he or she can hardly exercise any other procedural rights, particularly minimum defence rights proclaimed in Art. 6(3) ECHR. Therefore the right to be present at the hearing may also be considered as an element of the right to defend oneself enshrined in Art. 6(3)c ECHR,[12] as well as an element of the right to question prosecution witnesses guaranteed in Art. 6(3)d ECHR.[13]

As it has been pointed, trial *in absentia* may be considered an exception to the principle that the accused has the right to be present at the trial. Although presence and participation of the accused in criminal proceedings are two different principles, as Summers points, "the presence requirement is inevitably connected to the benefits that the accused is said to derive from having the opportunity to participate in the proceedings".[14] Conducting trial in absence of the accused seriously affects fundamental procedural rights. Even though the European Court of Human Rights makes clear distinction between a trial *in absentia* in cases when the accused deliberately decided not to appear, and cases when the absence of the accused was a result of circumstances beyond his control[15] (see *infra* 2.1.1.), in any case, the accused has a right to be effectively defended by a defense counsel.[16] In addition, any waiver of the right to be present at the trial "must be established in an unequivocal manner".[17]

Though "generally undesirable", according to Trechsel, trial *in absentia* may be justified with the need to avoid the statute of limitation, as well as the need to determine the charge while the evidence is still available.[18] The European Court of Human Rights acknowledged legitimacy to stated reasons,[19] and in principle, from the perspective of the right to a fair trial, a trial *in absentia* is not disputable

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11 ECHR, Stanford v. United Kingdom, 16757/90, 23 February 1994, § 26

12 Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 251

13 In the jurisprudence of the USA Supreme Court, the right to be present at the trial was considered within both the Due Process Clause and the Confrontation Clause. Shapiro, E. L., *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to be Present*, Marquette Law Review, Vol. 96, 2012, pp. 599–600

14 Summers, S. J., *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, 2007, p. 63

15 Trechsel, *op. cit.* note 12, p. 255

16 ECHR, Sejdovic v. Italy, GC, 56581/00, 1 March 2006, § 91

17 ECHR, Colozza v. Italy, 9024/80, 12 February 1985, § 28. Trechsel, *op. cit.* note 12, p. 256

18 *Ibid.*, p. 253

19 ECHR, Colozza v. Italy, 9024/80, 12 February 1985, § 29, Sanader v. Croatia, 66408/12, 12 February 2015, §77

as long as there is a possibility for the convicted person to obtain a retrial either by asking it, or automatically.[20]

2. REOPENING OF CRIMINAL PROCEEDINGS IN CASES OF TRIAL *IN ABSENTIA* - LEGAL FRAMEWORK

2.1. European legal framework

2.1.1. Jurisprudence of the European Court of Human Rights

"When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence'"…" that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge".[21] The need for retrial however depends on whether the accused contributed to conducting the proceedings *in absentia*. On one side, in Medenica v. Switzerland, the domestic court dismissed the applicant's application to have the conviction quashed on the ground of failure "to show good cause for his absence", as domestic legislation required, "and that there was nothing in the case file to warrant finding that he had been absent for reasons beyond his control…".[22] The European Court of Human Rights considered "that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the Geneva Assize Court".[23] Having that in mind, and since the applicant as a defendant received the summons to appear before the domestic court, and he was not denied the assistance of a lawyer, the Court considered that the applicant's conviction *in absentia* and the refusal to grant him a retrial did not amount to a disproportionate penalty.[24]

On the other side, in Sejdovic v. Italy, it has not been shown that the applicant, who was tried *in absentia*, had sufficient knowledge of his prosecution and of the charges against him so the Court was "unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court…"[25] The applicant "did not have opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence

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20 Trechsel, *op. cit.* note 12, p. 254

21 ECHR, Colozza v. Italy, 9024/80, 12 February 1985, § 29, Krombach v. France, 29731/96, 13 February 2001, § 85. Also in Sanader v. Croatia, 66408/12, 12 February 2015, § 68

22 ECHR, Medenica v. Switzerland, 20491/92, 14 June 2001, § 57

23 *Ibid.*, § 58

24 *Ibid.*, § 59

25 ECHR, Sejdovic v. Italy, GC, 56581/00, 1 March 2006, § 101

rights", and that amounted to a violation of Art. 6 ECHR.[26] There were similar findings of the Court in Sanader v. Croatia judgment (*infra* 3.1.).[27]

2.1.2. Other instruments within the Council of Europe

Within the Council of Europe, the right to the new hearing of the case, when the person was convicted *in absentia*, is explicitly proclaimed in the European Convention on the International Validity of Criminal Judgments (Art. 24 - 26).[28] Under the Second Additional Protocol to the European Convention on Extradition,[29] "the right to a retrial which safeguards the rights of defence" excludes one of provided grounds for refusing extradition – if the proceedings leading to the judgment did not satisfy the minimum defence rights (Art. 3). Finally, the Committee of Ministers Resolution (75)11 on the criteria governing proceedings held in the absence of the accused provides that a person tried *in absentia* should have a remedy enabling him or her to have the judgement annulled (para 8).[30]

2.1.3. Instruments of the European Union

Within the European Union, even before the Lisbon Treaty, proceedings *in absentia* was considered as a major obstacle to efficient judicial cooperation between member states.[31] The jurisprudence of the European Court of Human Rights did not provide the desired level of harmonization of national laws, which led to legislative efforts in the European Union.[32] The Council Framework Decision 2009/299/JHA of 26 February 2009,[33] introduced new legal standards regarding the right of the person tried *in absentia* to reopening the proceedings. According to the Amendments to Framework Decision 2002/584/JHA, the fact that the

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26 *Ibid*., § 105–106

27 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 95

28 European Convention on the International Validity of Criminal Judgments of 28 May 1970, ETS No. 70

29 Second Additional Protocol to the European Convention on Extradition of 17 March 1978, ETS No. 98

30 Committee of Ministers Resolution (75)11 of 21 May 1975 on the criteria governing proceedings held in the absence of the accused

31 Mauro, *op. cit.* note 7, p. 36

32 *Ibid.*, p. 36

33 The Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, Official Journal of the European Union L 81, 27.03.2009

person was tried *in absentia* may be a ground for refusal to execute the European arrest warrant, unless it states that the person, "after being served with the decision expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly stated that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable time frame;…" (Art. 4a(1) c)). If the person was not personally served with the decision, the European arrest warrant should state that the person will be served with it and informed of the rights mentioned above, as well as of the time frame within which he or she has to request a retrial or appeal (Art. 4a(1)d). The Court of Justice confirmed that the new provision of Art. 4a(1) of the Framework decision actually restricts the opportunities for refusing to execute a European Arrest Warrant, in conformity with the mutual recognition objectives of EU law.[34] Although the definition of in absentia formally applies in the context of international cooperation, the concept will lead to harmonization of the manner of summoning an accused.[35]

Finally, Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[36] provides exceptions to the right of suspects and accused persons to be present at the trial (Art. 8(2)). If a suspect or accused person, tried *in absentia*, was not informed, in due time, of the trial and of the consequences of non-appearance, or was not represented by a mandated lawyer (Art. 8(2)), they have "the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, which may lead to the original decision being reversed" (Art. 9). States must assure that those suspects and accused persons in the new trial "have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise rights of the defence" (Art. 9).

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[34] CJ Case C-399/11, Melloni v Ministerio Fiscal, judgment 26.2.2013., para 41 and 43. Mitsilegas, V., *EU Criminal Law after Lisbon*, Hart Publishing, 2016, p.133

[35] Klip, *op. cit.* note 9, p. 282

[36] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJEU L 65, 11.3.2016

2.2. Croatian constitutional and legislative framework

The Constitution of the Republic of Croatia,[37] within provisions proclaiming the right to fair trial, provides that the suspect, defendant or accused, in respect of any criminal charge brought against him, has the right "to be present at the trial, if he is available to the court" (Art. 29). Though the right to be present at the trial is a fundamental right,[38] it is conditioned by the accused's availability to the court, which opens the possibility of trial *in absentia*, which is considered as an exception to adversarial principle.[39] The trial, as well as rights of the person tried *in absentia* to request reopening of criminal proceedings, are regulated in detail in the Criminal procedure Act (CPA).[40]

According to the CPA, the accused may be tried in his absence only provided that particularly important reasons exist to try him and if the trial is not possible in a foreign country, or the extradition is not possible, or the accused is on the run or inaccessible to the state authorities (Art. 402(3) CPA). Trial *in absentia* implies mandatory defence by appointed defence counsel (Art. 66(1)6 CPA). In rule, a person who was tried and convicted *in absentia* may claim reopening of proceedings on two bases. On one side, person tried and sentenced in absence, or his or her defence counsel, may request reopening if there is a possibility of retrial in his or her presence (Art. 497(3) CPA). The convicted person must be available to Croatian judicial authorities, which means that the request must contain the address of the convicted person and a promise that he or she will respond to the court's summons. In addition, the request must be submitted within a term of one year from the day the convicted person became aware of the final judgment. The first instance court, that brought the judgment *in absentia*, decides on the request. The Supreme Court of the Republic of Croatia (VSRH) stated that, from the cited provision it is clear that "the reopening of criminal proceedings is mandatory by the termination of reasons for which the defendant was tried *in absentia*".[41] It can be considered as "automatic" or even "privileged"[42] reopening of proceedings, since the convicted person does not have to present new facts or evidence in order

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37 Constitution of the Republic of Croatia, Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14

38 Đurđević, Z., *Rasprava*, in: Kazneno procesno pravo Primjerovnik, Narodne novine, Zagreb, 2017, p. 153

39 Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2015, p. 168

40 Criminal Procedure Act, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

41 VSRH, I Kž 873/12-4, 1 October 2014

42 Grubiša, M., *Krivični postupak Postupak o pravnim lijekovima*, Informator, Zagreb, 1987, p. 373

to justify the claim for reopening, but simply file the request. If the formal prerequisites are met, the court must grant the reopening of proceedings.[43]

On the other side, the reopening of criminal proceedings terminated by a final judgment is allowed, regardless the fact that the convicted person is not present in proceedings and available to Croatian judicial authorities, if new evidence or new facts appear, that could lead to acquittal or more lenient sentence (Art. 501(1)3 CPA). In that case, however, the panel of the court which rendered the decision at first instance may reject a request if the facts and evidence presented are clearly inadequate to allow the reopening (Art. 506(1) CPA), or dismiss the request if the new evidence does not warrant the reopening of proceedings (Art. 507(1) CPA). So, unlike the "automatic" reopening of proceedings under Art. 497(3) CPA, the reopening of criminal proceedings based on new facts or new evidence depends on the first instance court preliminary assessment of the new facts and evidence and therefore the right to reopening of proceedings is rather restricted and obviously not guaranteed to all persons convicted *in absentia*.

There is also a possibility to request reopening of criminal proceedings on the ground of the decision of the Constitutional Court of the Republic of Croatia (Art. 502(1) CPA), or on the ground of the final judgment of the European Court of Human Rights, under conditions prescribed by CPA and within a term of 30 days since the judgment became final (Art. 502(2) and (3) CPA). In addition, a final judgment may be revised even without reopening of criminal proceedings if, after the judgment became final, new circumstances appeared which were not there or which were unknown to the court at the time of the judgment, and that would obviously have led to a more lenient sentence (Art. 498(1)4 CPA). According to the Supreme Court, new circumstances related to the decision on punishment can be evaluated within the reopening of proceedings under Art. 498(1)4 CPA.[44] If the court in the reopened proceedings conducted in presence of the defendant, "establishes the same facts [as in previous proceedings] that are relevant for the conviction, the court is not authorized to change the type or duration of the final prison sentence", only to put one part of the judgment, the one on the punishment, out of the force.[45]

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43 See Garačić, A., *Obnova kaznenog postupka kod suđenja u odsutnosti*, Hrvatska pravna revija, vol. 9, br. 7-8, 2009., p. 107

44 VSRH, I Kž 58/17-4, 9 February 2017

45 *Ibid.*

3. REOPENING OF CRIMINAL PROCEEDINGS PROVIDING "FRESH DETERMINATION OF THE MERITS OF THE CHARGES" BY A COURT IN "FULL RESPECT OF DEFENCE RIGHTS"

3.1. Judgment Sanader v. Croatia

In Sanader case, the applicant was tried *in absentia* and convicted for war crimes against prisoners of war committed in 1992. He was sentenced to 20 years' imprisonment and the judgment became final in 2004, though the applicant had only learned of it in 2009. His request to reopen the proceedings was dismissed due to the fact that, living in Serbia, he was not available to Croatian authorities. The applicant complained before the European Court of Human Rights that he had not been able to obtain a rehearing after his conviction *in absentia* and that he had not been effectively represented by a legal-aid lawyer during the proceedings conducted in his absence, relying on Art. 6(1) and (3)c ECHR.[46]

Regarding the alleged inability of the applicant to obtain a rehearing after his conviction *in absentia*, the Court pointed that "there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention, for that would entail making the exercise of the right to a fair hearing conditional on the accused offering up his or her physical liberty as a form of guarantee…".[47] The Court reminded that "the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or at a retrial – ranks as one of the essential requirements of Article 6"[48] and that "accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein"…"[49]

Regarding the facts of the concrete case, the Court first noted that there was no evidence, nor any of parties argued that the applicant was ever notified of criminal proceedings against him, or that the reason for his absence was to escape trial.[50] Even though the domestic law did permit automatic reopening of criminal pro-

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46 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, §54

47 *Ibid*. § 70, § 87

48 ECHR, Stoichkov v. Bulgaria, 9808/02, 24 March 2005, §56; Sanader v. Croatia, 66408/12, 12 February 2015, § 71

49 *Ibid*.

50 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 76

ceedings, at that time according to Art. 497(2) CPA, the possibility of reopening "has been interpreted in the case-law of the domestic courts to mean that a person convicted *in absentia* must appear before the domestic authorities to request a retrial and provide an address of residence in Croatia during the criminal proceedings".[51] Hence a convicted person who was not under the jurisdiction of Croatian authorities could not apply for reopening of proceedings based on Art. 497(2) CPA.[52] The Court found particularly disputable the requirement that convicted persons had to present themselves to the Croatian judicial authorities, in order to apply for automatic reopening of the proceedings, since it would in ordinary course of action imply deprivation of liberty until the decision on reopening of proceedings became final, which in practice could even take more than a month.[53] The Court added that the obligation of an individual tried *in absentia* to appear before the domestic authorities and provide an address of residence in Croatia was "unreasonable and disproportionate from a procedural point of view", since the mere reopening of proceedings does not affect substantive validity of the judgment, which actually remains in force until the end of the trial.[54] The Court concluded that Croatian authorities created a disproportionate obstacle for the applicant to the use of remedy provided under Article 497(2) CPA, "restricting the exercise of his right to obtain a retrial in such a way or to such extent that the very essence of the right is impaired…"[55]

Regarding the remedy under Art. 501(1)3 CPA, which leads to "regular" reopening of proceedings, the Court stated that, even though it does not require physical presence of the convicted person, it "is applicable only to a restricted category of cases tried *in absentia* since the condition for its use is the existence of new evidence of facts capable of leading to acquittal or resentencing under a more lenient provision", adding that it is "of a secondary and subsidiary nature for those tried *in absentia*".[56] The Court stressed that the applicant should have been given "an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him"[57] and exercise defence rights form Article 6 of the Convention.

The Court concluded that the applicant "was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges

51 *Ibid.*, § 81
52 *Ibid.*
53 *Ibid.,* § 85
54 *Ibid.,* § 90
55 *Ibid.*, § 91
56 *Ibid.*, § 92
57 *Ibid.*, § 93

against him by a court in full respect of defence rights"[58] and it amounted to violation of Art. 6(1) of the Convention.[59] Regarding the alleged deficiency of the applicant's legal representation, the Court held that it was unnecessary to examine these allegations, in view of the Court's findings concerning the applicant's inability to obtain a rehearing.[60]

3.2. Execution of Sanader judgment

Execution of Sanader judgment implied that the State should take individual measures to remedy the established violation of the right to a fair trial from Art 6(1) ECHR, and general measures to prevent possible future violations.[61] The individual measure of execution of Sanader judgment included not only paying the non-pecuniary damage and costs and expenses awarded to the applicant by the European Court of Human Rights,[62] but also providing for the convicted person the possibility to claim reopening of proceedings. In the concrete case, the applicant, as convicted person, did request reopening of proceedings under Art. 502 (2) CPA, on the ground of the Sanader judgment, but only after the prescribed deadline of 30 days from the day that the judgment became final expired. The request was dismissed by the Supreme Court as delayed.[63]

Regarding general measures of execution of Sanader judgment, the amendment of CPA was passed in July 2017,[64] redefining conditions for person convicted *in absentia* to claim automatic reopening of proceedings. The requirement of "availability" of the convicted person to domestic judicial authorities has been redefined in a way that it now provides the possibility to file the request for automatic reopening of proceedings even from abroad (*supra* 2.2.). Yet, since Sanader judgment, another disputable issue appeared in practice and it concerns the purpose of reopening of criminal proceedings against a person convicted *in absentia*.

3.2.1. New standard of "availability" of the convicted person

In the jurisprudence of the Supreme Court of the Republic of Croatia, before Sanader judgment, the fact that the defendant, who requested reopening of crimi-

58 *Ibid.*, § 95

59 *Ibid.*, § 96

60 *Ibid.*, § 98

61 See Konforta, M., *Implementacija presuda Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, vol. 24, br. 2, 2017, p. 276

62 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 104, § 107

63 See VSRH, I Kž 644/15-6, 21 January 2016

64 Official gazette 70/17

nal proceedings, lived abroad was sufficient to conclude that he or she was unavailable for the judicial authorities of the Republic of Croatia in terms of art 497(3) CPA.[65] The Supreme Court clearly stated that it was not sufficient for the defendant to "only show willingness to respond to the court hearing and the desire to be tried in the presence" to conclude that the defendant is available to Croatian judicial authorities.[66] Execution of Sanader judgment clearly implied change of such reasoning. Though, previous provisions of the CPA could have been interpreted in a way that "availability" requirement would not necessarily mean deprivation of liberty and placement into pre-trial detention, the legislator decided to intervene into legislative framework, in order to make it more precise and clear. But even before the legislative amendment, the Supreme Court referred to Sanader judgment and directly applied legal standards specified in that decision, accepting the appeal of the person convicted *in absentia* and living abroad, against decision of the first instance court denying the request for reopening of proceedings.[67]

Current provision stipulates that criminal proceedings shall be reopened under Art 497(3) CPA, if there is a possibility of a re-trial in presence of the accused, also beyond the conditions provided for in Art. 498 and Art. 501 CPA, if the convicted person or his counsel submits a request for the reopening of the proceedings within a period of one year from the day the convicted person learned about the final judgment. It should be added that, according to the Supreme court, the very fact that the judgment has not yet become final does not disallow the convicted person to file the request for automatic reopening under Art. 497(3).[68] In case there are difficulties with determining when the convicted person learned about the judgment, the rule *in dubio pro reo* should be applied.[69] The request must state the address at which the convicted person can be delivered writings and the convicted person must promise to respond to a court summons. If those conditions are fulfilled, the court shall postpone the execution of the previous judgment and shall notify the judge of execution of sentences so that he withdraws the arrest warrant (Art. 507 (4) CPA). If the accused person, who requested the reopening of proceedings, does not fulfil the obligation to be available to the court, the court

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65 VSRH, I Kž 588/13-6, 23 September 2014. Also I Kž 805/10-4 19 January 2011, I Kž 640/12-4 2 October 2012. See also Garačić, A., *Prava i neprava obnova kaznenoga postupka*, Hrvatska pravna revija, Vol. 5, No. 3., 2005, p. 118, and Mršić, G., *Obnova kaznenog postupka – sudska praksa o nekim pitanjima ovog izvanrednog pravnog lijeka*, Hrvatska pravna revija, Vol. 4, No. 5, 2004, pp. 110–111

66 VSRH, I Kž 283/14-4, 29 May 2014

67 VSRH, I Kž 13/16-4, 13 April 2016

68 VSRH, I Kž 709/11-5, 20 December 2011. Grubiša was of the same opinion – see Grubiša, *op. cit.* note 42, p. 373. Also see Garačić, A., *Zakon o kaznenom postupku Pravni lijekovi*, Organizator, Zagreb, 2010, p. 544 and Garačić, *op. cit.* note 65, p. 118

69 Grubiša, *op. cit.* note 42, p. 374

shall put out of force the decision granting reopening of proceedings and delaying the execution of the judgment (Art. 598(3) CPA). If the accused person abused the right to automatic reopening of proceedings guaranteed in Art. 497(3) CPA, in a way that he or she became unavailable to the court without justified reason (Art. 508(3) CPA), there is no possibility for that accused to use the same legal remedy in the same proceedings twice (Art. 506(1) CPA).

3.3. Doubts in jurisprudence of the Supreme Court - what is the purpose of reopening of proceedings in case of trial *in absentia*?

In Sanader judgment, the European Court of Human Rights stated that the applicant, "who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges against him by a court in full respect of his defence rights… ".[70] What "fresh determination of the merits of the charge" by a court and "full respect of his defence rights" actually imply? Do those standards imply the possibility for the accused to actively participate in presentation of all evidence that is relevant for the decision of the court, and not only the new evidence proposed for the reopened proceedings? The applicant should be given "an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him"[71] and exercise defence rights. If there would be possibility to discuss only newly presented facts and evidence that would hardly lead to fresh determination of the merits of the charge. Yet, it seems that the jurisprudence of domestic courts still does not differentiate the purpose of automatic reopening of proceedings in cases of trials *in absentia*, regulated under Art. 497(3) CPA, and regular reopening of proceedings under Art. 501(1) CPA, in cases where the accused was present at the trial and had the opportunity to actively participate in the proceedings and use all defence rights.

On one side, according to the Supreme Court, the purpose of reopening of criminal proceedings, on the ground of Art 497(3) CPA, "is to give the convicted person, who was deprived of one of fundamental procedural rights, and that is the right to defend himself before the court, the opportunity to reopen the trial in his presence".[72] In the jurisprudence of the Supreme Court it is clear that under Art.

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70 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 95. See also Colozza v. Italy, 9024/80, 12 February 1985, § 29, Krombach v. France, 29731/96, 13 February 2001, § 85, and Sejdovic v. Italy, GC, 56581/00, 1 March 2006, §101, § 105

71 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 93

72 VSRH, I Kž 873/12-4, 1 October 2014

497(3) CPA, it is not necessary to supply the request for reopening of proceedings with new facts or new evidence,[73] and that the reopened proceedings must be conducted in compliance with requirements of a fair trial guarantees.[74] It is also possible for the person convicted *in absentia* to file request for "regular" reopening of proceedings based on Art. 501(1)3 CPA, notwithstanding his or her presence, under condition that the request is based on new facts or new evidence, that are per se or in relation with previous evidence, suitable to lead to acquittal or more lenient sentence.[75] In this case, the convicted person must supply the request for reopening of proceedings with new fact or new evidence. So, obviously, the Supreme Court acknowledges the distinction between two models of reopening of proceedings.

Yet, on the other side, according to the Supreme Court, there is no "substantive difference" between the automatic reopening of proceedings in cases of trial *in absentia* (Art. 497 (3) CPA) and the regular reopening of proceedings (Art. 501 (1) 3 CPA), since in both cases the reopened proceedings has "for the goal to re-examine facts that have been established in the final judgment under condition that there are new facts or new evidence that would, those evidence alone or in relation with previous evidence, lead to acquittal of previously convicted person, or to conviction of that person based on more lenient law".[76] "Thereby, the goal of the new proceedings is not testing and eventual removal of previous procedural violations, nor to review the validity of previously established facts on the ground of the same evidence that was at the disposal of the court in previous proceedings." [77] The Supreme Court clarified that, even in case of automatic reopening of proceedings under Art. 497(3) CPA, if the accused does not succeed in efforts to put to doubt the previously established facts, either through changing previously presented defence or through new evidence, the reopening of proceeding will not succeed and the court may leave the previous final judgment, in a whole, in force.[78] According to the Supreme Court, "in the reopened proceedings, the court should not re-examine the evidence that have already been examined, but establish whether, in the context of defence, there are some new facts or evidence that could lead to acquittal or more lenient sentence."[79] Such attitude of the Supreme Court does not comply with basic purpose of automatic reopening of criminal proceedings

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73 See the reasoning of VSRH in I Kž 248/10-3, 30 June 2010

74 VSRH, I Kž – Us 94/14-4, 2 September 2014

75 VSRH, I Kž 283/14-4, 29 May 2014

76 VSRH, I Kž 104/2017-9, 8 June 2017

77 *Ibid.*

78 *Ibid.* See also Garačić, *op. cit.* note 43, p. 107

79 VSRH, I Kž 104/2017-9, 8 June 2017

in a case of conviction *in absentia*, and that is, as the European Court of Human Rights pointed, to provide "fresh determination of the merits of the charge" by the court and "full respect of defence rights". The same requires the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Art. 9).The accused should be given an opportunity to defend himself before the court and to have a hearing where he could challenge the evidence against him.[80] After all, the European Court of Human Rights in Sanader judgment, regarding the applicant's allegations of his deficient legal representation, reasoned that it was unnecessary to examine these allegations in view of the Court's findings concerning the applicant's inability to obtain a rehearing.[81] In other words, when the accused obtains a rehearing, he should be provided with an adequate legal representation throughout the entire reopened proceedings, including examination of all relevant evidence. Different reasoning would actually disable remedying possibly deficient legal representation at the trial *in absentia*.

Grubiša clearly pointed the difference between purposes of regular reopening of proceedings, based on new facts and new evidence, and automatic reopening of proceedings in cases of conviction *in absentia*.[82] He explained that in proceedings that have been reopened automatically on the request of person convicted *in absentia*, "both the parties and the court are in almost the same procedural positions as they would have been in a new main hearing after the judgment had been quashed by the higher court".[83] That is logical since the purpose of reopening of proceedings is to give the accused "the opportunity that the trial is repeated in his presence".[84] Since the prohibition of *reformatio in peius* applies (Art. 508(6) CPA), possibility for the prosecution and for the court to present evidence is narrowed, but there is practically no limitation for the defence to present evidence that have previously been examined, as well as new evidence.[85] The presence of the accused person is not per se the purpose of retrial, but the possibility to actively participate in the proceedings through exercising his or her procedural rights.

Finally, the Constitutional Court of the Republic of Croatia, in the context of reopening of proceedings, stressed that the fair trial implies equality of arms of parties in proceedings,[86] which includes the rights of parties concerning choice

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80 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 93

81 ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 98

82 Grubiša, *op. cit.* note 42, p. 376

83 *Ibid.*, p. 377

84 *Ibid.*, p. 373

85 *Ibid.*, pp. 377 – 378

86 USRH, U-III-7227/2014, 15 January 2015, point 8

and presentation of evidence.[87] In the concrete case, in the reopened criminal proceedings (under Art. 497, 498 and 501 CPA), the Constitutional Court found no violation of equality of arms, notwithstanding the fact that the court refused the proposal of the defence to question two witnesses, since reopened proceedings included a detailed evidentiary proceedings that included questioning of witnesses, injured parties, expert witnesses etc.[88]

4. CONCLUSION – DEFINING THE PURPOSE OF REOPENING OF PROCEEDINGS IN CASE OF TRIAL *IN ABSENTIA*

Execution of Sanader judgment resulted in amendment of the CPA provisions regulating reopening of proceedings in cases of conviction *in absentia*, and in the new standards of "availability" of the accused before Croatian judicial authorities. Yet, it is possible to conclude that the Supreme Court of the Republic of Croatia actually overlooks important distinction between automatic reopening of proceedings under Art. 497(3) CPA and regular reopening of proceedings under Art. 501(1) CPA. In case of regular reopening of proceedings, the defendant was in a position to actively participate in the proceedings that resulted in a conviction, so there is no ground for automatic re-examination of evidence and facts that have already been established in the final judgment. The reopening of proceedings is conditioned with presenting new facts and new evidence that will be examined before the court. On the other hand, the proceedings reopened "automatically" under Art. 497(3) CPA naturally imply re-examination of the same facts and evidence that have already been presented in the previous trial that resulted with conviction *in absentia*,[89] in full respect of defence rights. Prescribing such purpose of reopening of proceedings under Art. 497(3) CPA could be considered as a possible solution *de lege ferenda*.

Regarding the right to reopening of the proceedings, or a new trial, unlike Croatian law, both European Court of Human Rights and the Directive on the presumption of innocence do make distinction between accused persons who have been shown to have sought to escape trial or to have unequivocally waived their right to appear in court, and those who have not. The possibility to make distinction between those two procedural positions of the accused could be considered within solutions *de lege ferenda*, having in mind that the accused must not be re-

87 *Ibid*.

88 *Ibid.*, point 3, 8.1

89 Grubiša, *op. cit.* note 42, pp. 376–377

quested to prove that he did not seek to evade justice or that his absence was due to force majeure.[90]

It is possible to conclude that, after execution of Sanader judgment, Croatian law still does not fully comply with European legal standards regulating reopening of criminal proceedings in cases of trial *in absentia*. New interpretation of "availability" requirement is only a step forward, and it is on the jurisprudence, or on the legislator in a future legislative amendment, to remove doubts on the purpose of reopening of proceedings that still exist in practice.

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ECONOMIC POLICY AND CRIMINAL POLICY IN THE PRACTICE: NEW TRENDS AND CHALLENGES IN THE FIGHT AGAINST MONEY LAUNDERING IN EUROPE AND HUNGARY[1]

ABSTRACT

Criminal policy prevails mainly in the field of legislation. Judicial power is an independent power; judges are only subject to the laws. Economic policy is more practical than science, although it has a theoretical background for applied economics. It can be defined as the state's active intervention in the economy, a conscious, coherent and targeted action that affects production, consumption, and exchange and capital formation. The relationship between economic policy and criminal policy in the area of combating economic crime can be characterized by the fact that criminality policy should be more in keeping with economic policy considerations than vice versa. Badly elected criminal policy does not necessarily help the development of the economy, economic policy and criminal policy considerations need to be carefully coordinated. In this essay we will examine the relationship between the economic policy and the criminal policy in the light of the new anti-money laundering and counter-terrorist financing regulation.

Keywords: *criminal policy, economic policy, money laundering, terrorist financing, criminal law, 4th EU Anti-Money Laundering Directive, MONEYVAL*

1. INTRODUCTION

Economic Policy and Criminal Policy sometimes can affect each other at the same time. A good example is the field of the fight against money laundering and terrorist financing. Perpetrators of certain crimes can spend the assets originating from criminal activities without money laundering. There are, however, such crimes:

- in which the perpetrators gain extremely huge amount of income or,

[1] „EMBERI ERŐFORRÁSOK MINISZTÉRIUMA Supported BY the ÚNKP-17-4-III. New National Excellence Program of the Ministry of Human Capacities"

- in case of which the perpetrators regularly (weekly, monthly) realize illegal benefit originating from criminal activities without having legal sources of income.

In these 2 cases the risk of being detected is too high, criminal can watch the money rose from the crime at home but he cannot spend it. Or in other words he can try it but with it he can draw the attention of tax authority and of the investigating authorities. They need money laundering what is in criminological sense such an illegal economic service whose aim is to make justifiable the origin of the wealth from the criminal activity, getting rid of its obviously illegal being.

The European Union's Fourth Anti-Money Laundering Directive came into force last year, on the 26th June 2017. The 4th AML Directive includes some fundamental changes to the anti-money laundering procedures, including changes to CDD, a central register for beneficial owners and a focus on risk assessments.

Hungary was the first from the Council for Mutual Economic Assistance (or Comecon) member states who enacted the regulations against money laundering in 1994. Since then the regulation has been numerously modified, but in spite of this the crime has not got significant practice. Annually, in average less than ten investigations begin with the suspect of money laundering. This activity was developed with capitalism in our country in the '90s.

The Hungarian anti-money laundering regulation, operating from 2017, can be found in two acts, in the Criminal Code (act C of 2012) and in the Act of Prevention of Financing Money Laundering and Terrorism (Act LIII of 2017). The previous mentioned Criminal Code contains presently two crimes in connection with money laundering and one crime in connection with terrorist financing.

In this article I will examine the possible the effectiveness of the Hungarian criminal policy (in connection with the economic policy) in the light of the new EU regulation.

2. SOME THOUGHTS ABOUT THE ECONOMICS OF MONEY LAUNDERING

Money laundering is the complex entirety of illegal economic transactions pursued under the concealment of legal economic transactions that aim to justify the origin of wealth obtained through criminal act, this way getting rid of its recognisably illegal nature. "Therefore the reason and origin of money laundering is al-

ways a crime that becomes non rentable, while its aim is that the fortune obtained this way should be used in the legal economy."[2]

On the other hand money laundering has become one of the most paying and vast businesses in the world. According to the IMF estimations in the last two decade the volume of money laundering amounts to 2-5% of the unified GDP of all the countries on Earth. This seems to be true in 2018 too. Translated to concrete sums this means at least 590-1.500 billion USD annually[3] ten years ago, but in 2018 we can estimate this sums about more than 10.000 billion USD. In 1999 John Walker estimated this amount to be 2.850 billion USD annually in his work about modelling the tendencies of money laundering.[4] According to the estimations of the FATF the sum of the annually laundered "dirty money" equals to the total annual production of the economy of Spain, that also underlines the largeness of the danger. [5] This number does not seem to be exaggerated if we take into consideration that behind an important number of crimes committed all over the world there is a motive to gain material benefit. (To the question why he had robbed banks, the notorious American bank robber, Willie Sutton gave the laconic answer: "Because money is there."[6]) We could almost regard it as logical that perpetrators of a crime try to avoid to raise the attention of the investigating or tax authorities by newer and newer, diverse methods. On the following pages we introduce nineteen such techniques.

Who has money deriving from crime in his possession first has to decide whether there is need for money laundering. That is to say up to a certain amount (for an average Hungarian citizen this is about 50.000 EUR) the sum can be spent without any problem or it can be used in legal economic activity (this latter is also qualified as money laundering). In cases of financial or bank transactions with the division of the sum (for example 50.000 EUR can be divided to five 10.000 EUR) the limit of 3.600.000 HUF (approximately 11.500 EUR) can be easily avoided.

If the sum of money of suspicious origin reaches a certain amount that can make the "smooth" use risky, then still there is possibility for the perpetrator to account

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2 Ferenc K., *The criticism of the bill against terrorism and preventing money laundering* [www.jogiforum.hu/publikaciok/index.php?p=47&print=1] Accessed 5 November 2001

3 Moulette, P., *Money laundering: staying ahead of the latest trends* In: Observer No. 220. April 2000. 28. oldal

4 Lilly, P., *Dirty transactions. The world of money laundering Perfekt Economic Consulting*, Educational and Publishing Spa., Budapest, 2001 p. 39

5 Johnson, J., *In Pursuit of Dirty Money*: *Identifying Weaknesses in the Global Financial System,* in Journal of Money Laundering Control Henry Stewart Publications London, Autumn 2001. 122. oldal

6 Levy, S. M., *Federal Money Laundering Regulation (Banking, Corporate, and Securities Compliance),* New York, 2003. Chapter 1, p. 3

for the origin of the guilty money in case of the danger of being caught: the source is a family gift, succession, loan from a friend. There is no need for anything else just to invent a credible legend (expression used at Secret Service) about the origin of the money. The main point is the adequately worked out strategy for crisis and of course it is advisable to consult a lawyer continually.

If it is about a really huge sum (of course it is relative what sum is to be considered "big") then there might be the need for money laundering. A sum around half million EUR absolutely "claims"laundering. Naturally the amount is very relative: if someone has already had a fortune of some million and pursues legal economic activity (also), for that person not even the spending of half million EUR of illegal origin means risk. So we can say that "above a certain level", steeled with adequate economic (and political) relations there is no need for the laundering of the money obtained in an illegal way, it can be spent "filthily"…

Moreover if the perpetrator has at least one legally registered firm, then about 30% of the turnover of the firm can be laundered through it annually with the help of an accountant with enough expertise (and "venturesome"). The adequate technique for example is fictitious billing. In this sense money laundering is nothing else then the complementary transaction for tax fraud. Tax fraud is usually committed by keeping in secret a part of the income or by showing costs bigger than they are in reality. It is a basic economic relation that the profit is the part of the total income decreased by the total costs that is usually indicated with the following formula: profit is the total revenue minus the total costs. As we define the variant of money laundering with the help of economic activity as the complementary transaction for tax fraud, the logic of the commission of this crime is reversed, that is either the costs should be showed as less than in reality or (and this is more common) income should be showed as more than in reality. It is nearly a well-known fact that in Hungary it is not a serious problem for anyone to decrease his income before taxation by fictitious cost bills. (We could only suppose it with some malice that when creating taxation laws, the tax creator reckons in advance that a lot of people admit a lot less of income than it is really, so the rates of taxes are adjusted to this de facto situation…) The generality of fictitious billing is backed up also by the fact, that so called "bill factories" – that means firms that do not pursue real economic activity and produce bills in unlimited amounts for some percentage of the bills without real economic performance and after a while the actual owners disappear with the money (the registered owners of the firms are either non-existing people or homeless from whom of course the remaining public debts cannot be recovered) – are regularly pinched. After this it is easy to see that if it is relatively easy to get fictitious cost bills, then it is even more easier to get fictitious income bills and for this even some percent of commission can be

asked for and not even the tax authority will suspect a thing if someone accepts to pay the rates and taxes after his fictitious incomes. It is conceivable that the cost of money laundering is here the least as the rates and taxes that have to be paid after the fictitious income bills can be decreased by the "commission" received for the bills. Moreover the rates and taxes are to be paid after the income decreased with costs; meanwhile "commission" can be asked for the total value of the bill. This way such a situation can occur that the operation of money laundering will not be loss-making.! (Just think it over: 50% of average cost level, 30% of rates and taxes and if the buyer pays 15% of the value of the bill for the fictitious bill then the result of the operation will be 0, so there is not going to be neither profit nor loss.) It is worth for the perpetrators to use this method even if 10-20% loss is formed, furthermore the danger of getting caught is possibly here the least.

Even those might need money laundering who realise income regularly from crimes and have no civil job, so who perpetrates crime as a life style. The easiest technique even here is to establish a cover firm.

3. ECONOMIC POLICY AND CRIMINAL POLICY[7]

Criminal policy is always a dynamic activity that is geared to a quantitative, qualitative change in crime and to a sense of social certainty, and is therefore constantly changing dynamic activity, whose instrumental system is not determined by the quantitative and qualitative changes in crime but by the civilization level of society. [8]

Criminal policy prevails mainly in the field of legislation. Judicial power is an independent power; judges are only subject to the laws.

In the legal practice (at least in the constitutional state) criminal policy only as the will of the legislator can prevail, so the courts cannot be controlled directly. [9] From that reason, we do not mention the judiciary (criminal law) policy as a separate area within the criminal justice policy. Policy is a group decision-making process. Economic policy means the totality of tools, methods and measures necessary to achieve the economic goals of the government. Economic policy is one of the elements of general policy, and therefore

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[7] See more: Gál, I. L., *Relationship Between Criminal Policy and Economic Policy* In: Mrvić Petrović, N., Grbić Pavlović N., (eds.) Usaglasavanje pravne regulative sa pravnim tekovinama (Acquis Communautaire) Evropske Unije, Banja Luka: Istraživački Centar, 2018, pp. 65-71

[8] Farkas A., *A kriminálpolitika és a büntető igazságszolgáltatás hatékonysága*, Tanulmányok Szabó András 70. születésnapjára Magyar kriminológiai Társaság Budapest, 1998. 81. oldal

[9] Finszter G., *Kriminálpolitika tegnap és ma*, Rendészeti Szemle 2006. 12. szám 77. oldal

the objectives are to be achieved by the state. Implementation of the economic policy is the task of state leadership. The purpose of the economic policy is to ensure the functioning of the economy, to meet the higher social needs and to meet social well-being. The achievement of these goals is primarily driven by the fiscal policy and the monetary policy. These two policies are the two main parts of the economic policy.

Economic policy is more practical than science, although it has a theoretical background for applied economics. It can be defined as the state's active intervention in the economy, a conscious, coherent and targeted action that affects production, consumption, and exchange and capital formation. The main components of economic policy are:

- setting objectives, such as growth, full employment, balance of payments, reducing inequalities, price stability, sustainable (and sustainable) development;
- Setting up a target hierarchy: some goals are incompatible, so a priority order has to be set up;
- Analysis of relationship between objectives: economic policy takes into account the relationships that economists have identified between each target;
- Choice of instruments: economic policy presupposes the use of instruments to achieve the objectives (monetary or fiscal instruments, etc.). [10]

The relationship between economic policy and criminal policy in the area of combating economic crime can be characterized by the fact that criminality policy should be more in keeping with economic policy considerations than vice versa. Badly elected criminal policy does not necessarily help the development of the economy, economic policy and criminal policy considerations need to be carefully coordinated.

Criminal policy, have to focus other factors in economic policy terms, but criminal policy must focus on of the medium- and long-term economic objectives of economic crime. Criminal law must show relative stability, but the regulation of economic crime often changes, and in these economic terms this is understandable. It is not advisable to use strict punishment, but it is essential to ensure the ultimate role of criminal law in the economy. This should be done even if we find that economic players doubt the effectiveness of an economic criminal law - often unjustifiably.

[10] Közgazdasági és Társadalomtudományi Kisenciklopédia Napvilág Kiadó Budapest, 2005. 165-166. oldal

"Despite the fact that the criminal law provisions on the protection of fundamental economic interests can be considered part of the criminal law concept inherent in the traditional sense, the criminal law of modern capitalism has recognized the fact that the principles of criminal policy do not fully apply to crimes committed in connection with economic activity. There have been cases of breaches in the enforcement of the criminal law of both legislation and enforcement in relation to economic crimes. The reason to create the criminological category of white collar criminals, it was precisely the recognition that there is a group of offenders who are against the general objectives of criminal policy do not apply." [11]

The common feature of economic policy and criminal policy is that they both have close relationship with social policy. The best criminal policy is good social policy (as Franz von Liszt has already recognized), that is to say, the fight against crime cannot be effectively tackled by means of criminal law.

Economic policy and criminal policy interact with each other. This interaction is basically two-way. A well-elected economic policy is able to reduce the number of criminal offenses, especially the rate of crime against property may be reduced. As a result of an economic crisis caused by an improper economic policy, the volume of crime against property may increase.

A non-novel research topic is the search for correlation between economic indicators and crime. Based on the Bavarian data series from 1835 to 1861, Georg von Mayr quantified the relationship between the price of cereal and the number of thefts. The increase in grain prices has led to an increase in stealing and vice versa. [12]

In the 1880s, the famous French criminal lawyer and criminologist, Lacassagne, also examined the relationship between economic factors and crime. He found that the change in wheat prices was almost entirely combined with a change in the number of crimes against property and the effects of economic crises. [13]

During the economic crisis of the United States in the 1890s, criminal statistics also indicated something. "At the beginning of the crisis, newspapers reported a huge increase in corruption. On January 1, 1895, in a Chicago Daily Tribune article, he claimed that in 1894 he had been the largest number of embezzlement since 1878, which was also a serious crisis." [14]

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11 Wiener, A. I., *Gazdasági bűncselekmények* Közgazdasági és Jogi Könyvkiadó Budapest, 1986, 42. p

12 Martens U., *Wirtschatfliche Krise, Arbeitslosigkeit und Kriminalitätsbewegung Freiburg* i. Br., 1978, p. 5-6

13 Lacassagne, A., *Marche de la criminalité en France 1825-80*, Revue Scientifique, 1881

14 Akerlof, G. A. ,Shiller, R.J., *Animal Spirits*, Corvina Kiadó Budapest, 2011, p. 91

According to a German research carried out by Exner after the First World War[15], the following relationship was demonstrated: the increase in the number of unemployed with every million people is expected to increase the number of convicts stealing by ten thousand on average.

Between 1882 and 1914, rye and bread prices almost all went together with the number of thefts known in Germany, according to research by Eduard Joachim[16]. At the beginning of the 20th century Dorothy Swaine Thomas examined the correlation between economic cycles and various types of offenses between 1865 and 1915. [17] And the literature examples could be prolonged.

4. KEY ELEMENTS OF THE 4TH EU ANTI-MONEY LAUNDERING DIRECTIVE

The fourth Anti-Money Laundering Directive (EU) No. 2015/849 entered into force on 26th June 2015. After it entered into force, Hungary started to make the new AML regulation. This is the Act LIII. of the year 2017. which contains the most important elements of the new Hungarian AML regulation, and totally comply with the 4th EU Directive.

The key elements of the 4th Directive according to a recent article published in this topic are the followings:

> "Under the 4th AMLD, a key role is accorded to the principle of risk analysis and the corresponding adequate safeguards. Both the EU Commission and jointly the European supervisory authorities EBA, EIOPA and ESMA (ESAs) shall conduct an analysis of money laundering and terrorism financing risks. The EU Commission is instructed to send its findings and its recommendations based on this analysis to the Member States and the obliged entities under the Directive so that the Member States can better understand and counteract such risks more effectively.
>
> In addition, the 4th AMLD will also provide for an extension of the scope of anti-money laundering legislation requirements: for example, by reducing the threshold for cash transactions above which persons trading in goods qualify as 'obliged entities' and in particular in which an obligation to identify the customer is triggered. This threshold will be reduced from €15,000 to €10,000.

[15] Exner, F., *Krieg und Kriminalität Kriminalistische Abhandlungen,* Heft 1., Leipzig, 1926

[16] Eduard, J., *Konjunktur und Kriminalität*, Offenburg, 1933, p. 19

[17] Dorothy, S. T., *Social Aspects of the Business Cycle*, New York, 1927

The 4th AMLD also extends its applicability to providers of gambling services which are now listed as 'obliged entities'. The Member States can, however, remove these providers – with the exception of casinos – partially or completely from the list of obliged entities if a low money laundering risk is evidenced.

The scope of the 4th AMLD is also extended by including as obliged entities not only real estate agents involved in the purchase or sale of real estate properties, but also those agents involved in the letting of real estate properties.

As regards beneficial ownership, the EU Member States are obliged under the 4th AMLD to create central registers containing information on the beneficial ownership of corporations, including Anglo-American trust structures.

The 4th AMLD provides that the competent national authorities (such as the Financial Intelligence Units) and obliged entities have to have access to the central register under the national anti-money laundering legislation for exercising their customer due diligence. Persons and organisations capable of evidencing a 'legitimate interest' in this information (e.g., an interest relating to money laundering) must get access to the central register except for information regarding trust structures.

The 4th AMLD no longer differentiates between politically exposed persons (PEPs) resident in the same country as the obliged entity and in other countries. Further, special obligations apply with respect to PEPs classified as beneficial owner. Furthermore, the 4th AMLD expands the category of PEPs to include members of the governing bodies of political parties, which will result in the necessity to update existing PEP lists.

Whilst already under the current European legislation, banks and certain other companies in the finance sector are obliged to establish group-wide compliance systems, including due diligence requirements relating to money laundering, this obligation will in future also apply to other obliged entities under the Directive.

As regards sanctions, the 4th AMLD is following an approach pursued in recent European legislation of requiring specific and far-reaching powers of the Member States to be exercised in case of non-compliance with the requirements of the Directive.

The approach of 'naming and shaming', which can likewise be observed more frequently in recent European legislation, is also being pursued. That means that the competent authorities shall publish the decisions based on breaches

of the requirements laid down by the 4th AMLD, unless overriding reasons require an anonymous publication."[18]

Major changes to EU (EU) 2015/849 are the followings[19]:

1) Improving access to registers of ultimate beneficial owners

This will make the ownership of businesses and trust providers more transparent. The records will be linked to facilitate cooperation between the Member States. Member States may, in accordance with their national law, continue to provide wider access to this information.

2) Handling risks associated with prepaid cards and virtual payments

For prepaid cards, the cardholder must be identified over EUR 150 instead of the former EUR 250 card and the customer identification requirements have been added. Virtual Paying Platforms and Wallet Service Providers will be required to perform customer due diligence, eliminating the anonymity of such transactions.

3) Improve cooperation between national financial information units

National information units will be able to access the data stored in central accounts of bank accounts and payment accounts so that they can identify account holders.

4) Stricter controls on high-risk third countries

The Commission has established and regularly updates a harmonized list of third countries where deficiencies exist in the money laundering prevention system.

5. THE EFFECTIVENESS OF THE HUNGARIAN AML POLICY

In the former decade the number of the money laundering investigations in Hungary was not so high. In the official crime statistics, we could see 5-10 cases in a year.

Today something is happening, only in Budapest there are more than 100 money laundering investigations. The number of the reported suspicious transactions was around 10.000 in the last decade every year. The new AML regulation is effective

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18 Kunz, J. H., *Key elements of the 4th EU Anti-Money Laundering Directive* [https://www.financierworldwide.com/key-elements-of-the-4th-eu-anti-money-laundering-directive/#.WtMmZC5uaUk] Accessed 15.04.2018

19 [http://www.consilium.europa.eu/hu/policies/fight-against-terrorism/fight-against-terrorist-financing/] Accessed 15.05.2018

enough, in the Act LIII. of the year 2017. and in the Hungarian Criminal Code (Act. C. of the year 2012.) as well.

We had a MONEYVAL monitoring process in 2016; the results were published in December 2017[20]. "As a result of Hungary's progress in strengthening its framework to tackle money laundering and terrorist financing since its mutual evaluation in September 2016, MONEYVAL has re-rated the country on 13 of the 40 Recommendations. Hungary has been in an enhanced follow-up process, following the adoption of its mutual evaluation, which assessed the effectiveness of Hungary's anti-money laundering and counter-terrorist financing (AML/CFT) measures and their compliance with the Recommendations by the Financial Action Task Force (FATF). In line with MONEYVAL's rules of procedure, the country has reported back to MONEYVAL on the progress it has made to strengthen its AML/CFT framework. This report analyses Hungary's progress in addressing the technical compliance deficiencies identified in the mutual evaluation report. The report also looks at whether Hungary has implemented new measures to meet the requirements of FATF Recommendations that have changed since the country's 2016 mutual evaluation. MONEYVAL decided that Hungary should remain in enhanced follow-up and next report back in December 2018 as per Rule 23, paragraph 1 of MONEYVAL's 5th round rules of procedure."[21]

There are countries that conduct a very profitable business through the tacit suffering of money laundering, by allowing phantom firms to be formed and, by the very strict interpretation of banking secrets, make anonymous bank deposits possible. As "unclean" money very quickly finds such areas, these countries come into outstandingly high incomes through money laundering. We have to admit, however, that Hungary must not choose this way not only for sheer moral reasons (although these alone would be enough), but also for reasons dictated by economic rationality. An average-sized European country with a democratic political culture would lose more as a result of the sanctions introduced by the international community and the organisations dealing with money laundering that the profits it would gain from the capital to be laundered coming in to be laundered in the country. We could also say that we are neither small, nor large enough to put up with money laundering. Every opinion in between, any tiny allowance could be equally dangerous as tacitly letting money launderers gain ground. Therefore, the interest of Hungary is to prosecute money laundering with all the means at its disposal, or at least try to drive it out of the country.

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[20] [https://rm.coe.int/moneyval-2017-21-hungary-1st-enhanced-follow-up-report-technical-compl/1680792c61] Accessed 15.04.2018

[21] [https://www.coe.int/en/web/moneyval/home] Accessed 15.04.2018

In the interest of the struggle against money laundering as an objective, we need to cooperate with other countries and international organisations. With respect to this, we have already undertaken several international obligations but we are to be ready to conclude further agreements or the reinforcement of the earlier ones; at the same time, we are also to initiate such.

6. CONCLUSION

The New Hungarian regulation of the AML/CFT is effective enough. We have more and more cases in the practice. We cannot give up on the development and continuous improvement of the legal regulations in view of the fact that the problem of money laundering cannot be solved through exclusively criminal law means. Criminal law – as we can unfortunately experience nowadays – is not able to remedy the deleterious social phenomena; furthermore, it cannot even solve the problems emerging in connection with crime. Crime is a social phenomenon in connection with which criminal law – to use a medical expression – can only provide symptomatic treatment. In spite of this, this branch of law cannot be neglected or replaced by anything else either. In the fight against money laundering, however, we should give priority to non-criminal law means; that is, we should develop the financial system in such a way that money laundering in Hungary would be possible only through extreme difficulties. This way, a great percentage of "unclean money" would avoid the country and would move towards areas where it would not meet such strong opposition. If we achieve this, while simultaneously taking part in the cooperation conducted for the fight against money laundering, we can say that we have performed the obligations we have undertaken internationally. However, we can still not lean back as the methods of money laundering are continuously being perfected; perpetrators are developing newer and newer techniques. As far as we can see, the fight will never end, consequently, the main aim can only be that we are a step ahead of the perpetrators, and we preserve this step for the longest possible time.

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THE TRUST IS NOT BLIND – REVIEWING THE IDEA OF MUTUAL TRUST IN THE EU IN THE CONTEXT OF CONFLICTS OF JURISDICTION AND *NE BIS IN IDEM* PRINCIPLE*

ABSTRACT

This paper will deal with the positive conflicts of jurisdiction in the EU. At the outset, as an introduction, it will seek to identify the reasons which may lead to positive conflicts of jurisdiction in the EU and explain why such conflicts may create problems on different levels; foremost for concerned individuals, who may face prosecutions in different states, but also for the efficiency of judiciary of the member states and the rule of law in the EU. The existing legal framework has so far remained unsuccessful in addressing this issue, although several initiatives have tried to provide some guiding principles and solutions aimed at avoiding positive conflicts within the joint Area of Freedom, Security and Justice. Despite these efforts, to date the only binding mechanism which can conclusively settle conflicts of jurisdictions in the EU is the ne bis in idem principle.

The issue of ne bis in idem has received a lot of scholarly attention, so the purpose of this paper is not to analyze the transnational application of ne bis in idem principle in detail, as this has been done elsewhere, but to look at the most recent decisions of the CJEU. Some of these decisions cast doubt on the idea of mutual trust on which this principle lies. Furthermore, this mechanism is far from perfect and there are many problems surrounding its application, indicating that conflicts of jurisdiction should be solved in another, more principled and forward looking manner. The paper will conclude with the set of proposals for preventing and solving conflicts of jurisdictions and assessment of their viability.

***Keywords**: positive conflicts of jurisdiction, extraterritorial jurisdiction, ne bis in idem, parallel proceedings, mutual trust, AFSJ*

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1. INTRODUCTION – OR WHY SHOULD POSITIVE CONFLICTS OF JURISDICTION BE AVOIDED WITHIN THE EU

Conflicts of jurisdiction can have different faces – they can either be positive, when two or more state bodies or national jurisdictions believe to have jurisdiction over a case, or negative, when no one is willing to prosecute, either because no one has jurisdiction to prosecute, or when those with jurisdiction choose not to exercise it.[1] This paper will only deal with the former type of conflict, with focus on its transnational dimension. At the international level conflicts of jurisdiction often arise not from misinterpretation of jurisdictional rules, but even from consistent adherence to international law, i.e. jurisdictional provisions of international conventions and other regional and EU legislative documents. A number of international conventions and sources of EU criminal law require states both to harmonize the offences in question and to prosecute and punish the perpetrators of these offences, not only according to the territorial principle, but also when these offences are committed abroad, pursuant to principles of active or passive personality, protective principle or even principle of universal jurisdiction (in its form of *aut dedere aut judicare* principle).[2] Moreover, states often independently extend their jurisdiction extraterritorially. Although positive conflicts of jurisdiction are not an entirely new phenomenon, due to technical progress and increased mobility of people, which is especially visible within the EU,[3] positive conflicts of jurisdiction have become more and more common.[4]

This issue, however, has drawn the attention of scholars and the general public only fairly recently, following the creation of the European common area of freedom, security and justice (AFSJ), which is based on mutual recognition and the underlying principle of mutual trust.[5] The desire to avoid positive conflicts of jurisdiction within the AFSJ can be seen already from the primary sources of the EU law, i.e. from the Treaty on the Functioning of the European Union. Accord-

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1 The latter type is often mentioned in the context of universal jurisdiction, as only when no state is willing or able to prosecute is there a danger of impunity, which could trigger universal jurisdiction

2 See e.g. different jurisdictional ground stipulated in article 19 of the Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

3 Since the basic foundation of the EU single market are four freedoms: free movement of goods, services, labor and capital

4 Zimmerman, F., *Conflicts of Criminal Jurisdiction in the European Union*, Bergen Journal of Criminal Law and Criminal Justice, Vol. 3, Issue 1, 2015, pp. 3-4

5 See art. 67. of the Treaty on the Functioning of the EU, OJ C 326 from 26 October 2012 (hereinforth TFEU). According to para. 1. „The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." See also art. 82(1), according to which judicial cooperation in the field of criminal law shall be based on the principle of mutual recognition of judgments and judicial decisions

ing to Article 82(1)(b) of the TFEU, the European Parliament and the Council are in charge of the measures aiming to prevent and settle conflicts of jurisdiction between member states. On the other hand, the resolution of existing conflicts of jurisdiction according to the Treaty is entrusted to Eurojust.[6] Even before the Lisbon Treaty entered into force, the issue of conflicts of jurisdictions was recognized, first in the Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings,[7] and later in the Framework decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.[8]

Why do positive conflicts of jurisdiction create specific problems within the EU? The AFSJ is not just an area of freedom and security, but also of justice, within which it is necessary to secure the fundamental rights of all people, including the perpetrators of criminal offences.[9] One of the rights that has lately emerged in national legal systems as a basic human right is the right of every individual not to be tried two or more times for the same criminal offence. [10] The so called *ne bis in idem* principle (or in common law, prohibition of double jeopardy) has been expressed in both primary and secondary sources of the EU law. [11] It is obvious that the single market and the four freedoms cannot be secured if the final judgment rendered in one Member State does not prevent prosecution and punishment in another member state. Additionally, positive conflicts of jurisdiction open up the risk of different outcomes of criminal proceedings in different Member States, which is inconsistent with the very idea of a common area of freedom, security and justice.

Although due to the principle of *ne bis in idem,* which applies horizontally within the EU, as will be elaborated further *supra*, the perpetrator cannot be punished twice, this principle cannot prevent parallel proceedings, which can also put the defendant in a much more difficult situation compared to an individual prosecuted within a single state. For example, parallel or consecutive prosecutions in different Member States against the same person for the same offence (*lis pendens*)[12] can disable effective defense or significantly raise its costs and, in the end, constitute

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6 See art. 85(1)(c) TFEU

7 European Commission, 23 December 2005

8 Council Framework decision 2009/948/JHA of 30 November 2009

9 Art. 67. TFEU

10 This right, in its internal dimension, has been expressed in international conventions as well. See e.g. art. 4. of the Protocol 7 to European Convention on Human Rights

11 Art. 51(1)(2) of the Charter of Fundamental Rights of the European Union (2012/C 326/02) as well as art. 54. and 55. of Convention Implementing the Schengen Agreement, OJ L 239 of 22 September 2000 (CISA), pp. 19-62

12 Peers, S., *EU Justice and Home Affairs Law*, Oxford EU Library, 2011, p. 828

irrational use of time, financial resources, police and judicial apparatus. Parallel proceedings further raise the issue of the principle of legality. Courts of different MS apply not just different procedural laws, but also substantive criminal codes, which may have particular implications for the sentencing regimes (having in mind significant differences between the states in this field). In extreme cases it is even possible that a certain conduct will not be a criminal offence in all the involved states.[13] Bearing in mind all of the above, the potential for forum shopping, not just by the defense, but also by the prosecution,[14] seems significant, since the choice of jurisdiction may easily affect the outcome of proceedings. Yet, despite all the negative effects of positive conflicts of jurisdiction, the EU has still not effectively responded to this problem, with an instrument which would provide binding coordination of prosecutions or determine competence.[15] Some limited efforts, made so far, will be described below.

2. THE EXISTING LEGAL FRAMEWORK

First steps to eliminate positive conflicts of jurisdiction have been taken already in the 1970s, within the Council of Europe. European Convention on the Transfer of Proceedings in Criminal Matters in part IV deals with "Plurality of Criminal Proceedings".[16] Article 31(1) introduced the duty of a state, whenever aware of proceedings pending in another contracting state against the same person in respect of the same offence, to consider whether to either waive or suspend its own proceedings, or transfer them to the other state. However, if the state decided not to waive or suspend its own proceedings, the only obligation was to notify the other state (Article 30(2)) and to strive with that other state "as far as possible" to determine, after evaluation in each of the circumstances mentioned in Article 8, which of them alone should continue to conduct proceedings (Article 31(1)).[17] Clearly this Convention did not provide for any binding solution to positive conflicts of jurisdiction, but instead insisted on consultations between the states.

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13 An interesting example is offered by Zimmerman, *op.cit.* note 4, p. 8

14 Even by the EPPO

15 Eurojust news, Issue no. 14, January 2016, p. 4 [http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2014%20(january%202016)%20on%20conflicts%20of%20jurisdiction/eurojustnews_issue14_2016-01.pdf] Accessed 1 April 2018

16 The text of the treaty is available at [https://rm.coe.int/1680072d42] Accessed 1 April 2018

17 Some of the criteria mentioned in Article 8 are the residence or nationality of the defendant; whether he or she is undergoing or is to undergo a sentence involving deprivation of liberty in any of the involved states, would transfer of proceedings to one of the involved states contribute to determination of truth and where the most important items of evidence are located

Within the EU, the first efforts to address positive conflicts of jurisdiction have been made through different sectoral instruments, such is the Framework decision on terrorism.[18] Whereas this instrument clearly aimed at centralizing proceedings in one state and provided for a sequence of criteria to be taken into consideration in order to achieve this objective,[19] again this sequence was not binding on the states and neither was the objective of centralization.[20] Similar approach has been endorsed in several other framework decisions,[21] which either explicitly endorsed territorial jurisdiction, or encouraged state cooperation with the aim to centralize criminal proceedings.[22]

Effort to avoid conflicts of jurisdictions can also be seen in the establishment of Eurojust, which was given authority to request the states to coordinate prosecutions and to accept that one may be in a better position to prosecute certain offences; but again without any binding force.[23] Its Guidelines from 2003 seek to establish the jurisdiction in a state in which a "majority of criminality" occurred or "where the majority of the loss was sustained".[24] The Guidelines further provide for several additional criteria, such as location of the suspect, availability and admissibility of evidence, interests of victims, etc. Yet, as the name of the document clearly indicates, all the criteria are serving merely as guidance. No significant change has been brought about with the decision to strengthen Eurojust in 2009.[25] Collegium of Eurojust was entrusted with a written opinion on how a conflict should be solved in the absence of agreement between the involved states,

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18 Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22/06/2002, p. 3–7

19 According to the FD on terrorism the territorial principle should have primacy, followed by the active and passive personality, and only then by the state in which the perpetrator was found/arrested

20 The aim of centralized proceedings has been taken over in the new Directive of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See art. 19(3)

21 See e. g. art. 7(2) of the Council Framework decision of 24 October 2008 on the fight against organized crime, art. 7(3) of the Council Framework decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro

22 Peers, *op. cit.* note 12, p. 829

23 Council decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA)

24 Eurojust, Guidelines for deciding 'Which jurisdiction should prosecute?' [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20%282016%29/2016_Jurisdiction-Guidelines_EN.pdf] Accessed 1 April 2018

25 Council decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L138/14, 4 June 2009., p. 14

but again without any possibility to secure that such opinion is followed by the states.

The already mentioned Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings from 2005 puts focus on exchange of information, negotiations through an intermediary such as Eurojust and the possibility of judicial supervision. The ideas of the Commission, however, were met with considerable criticism, not just by the member states, but also by the European Criminal Bar Association, which is why legislative initiatives in this field were halted for several years.[26]

The first more comprehensive effort to address positive conflicts of jurisdiction may be found in the Framework decision on prevention and resolution of conflicts of jurisdiction from 2009.[27] Yet, neither this document is overly ambitious. It essentially boils down to creation of contacts between the states and exchange of information in order to try to reach a consensus between the states on "any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings" (Article 2(1)(a) and b)). Still, the consensus need not be achieved and there is no possibility to impose a binding solution in its absence. The only obligation is to exchange the information and not to centralize the prosecution in one state. Interestingly furthermore, this Framework decision does not clarify how the consensus should be reached and which jurisdictional principles and criteria should prevail.[28] Also, it does not specifically regulate the role of the Eurojust, but refers to other relevant documents, which emphasize its role. However, the 2016 Report from the Commission warned about the ineffective implementation of this Framework decision and the limited role of Eurojust in practice.[29]

Finally, the recently established European Public Prosecutor's Office (hereinafter EPPO) needs to be at least mentioned in this context.[30] When it comes to offences under the subject-matter jurisdiction of the EPPO, defined in Article 22

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26 Peers, *op. cit.* note 12, p. 830

27 Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings from 15 December 2009

28 Only par. 9 of the Preamble refers to the criteria set forth by the 2003 Eurojust guidelines

29 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [http://ec.europa.eu/justice/criminal/law/files/report_conflicts_jurisdiction_en.pdf] Accessed 10 April 2018. In 2016 there were only about 30 cases of conflicts of jurisdiction solved through the Eurojust (Eurojust news 2016/1, p. 2-3)

30 Council regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

of the Regulation, as a rule the case will be initiated and handled by an European Delegated Prosecutor from the Member State where "the focus of the criminal activity is" or, if several connected offences within the competences of the EPPO have been committed, the member state where "the bulk of the offences has been committed" (Article 26(4)). In duly justified cases, another European Delegated Prosecutor (from a different Member state) may initiate an investigation, taking into account the following criteria, in order of priority: (a) the place of the suspect's or accused person's habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred. Additionally, the Permanent Chamber may, in a case concerning the jurisdiction of more than one member state, decide to reallocate the case to a European Delegated Prosecutor in another member state, merge or split cases and for each choose another European Delegated Prosecutor. Such decision must be in the general interest of justice and in accordance with the criteria specified above (in para. 4, Article 26(5)). Since the Permanent Chamber is not a judicial body,[31] and there is no judicial supervision over a decision allocating jurisdiction to a particular sate, this solution has already been justly criticized.[32]

3. RESOLVING POSITIVE CONFLICTS OF JURISDICTION THROUGH *NE BIS IN IDEM*?

3.1. The development of *ne bis in idem* rule as a transnational principle

Since the legal framework on preventing and settling positive conflicts of jurisdiction so far offers only soft guidelines, the only binding mechanism which can conclusively settle conflicts of jurisdictions in the EU remains to date the *ne bis in idem* principle.[33] Obviously, the reach of this principle in this context is limited, since it can resolve conflicts of jurisdiction at a relatively late point, only once a case is finally disposed of in one member state. *A contrario*, it cannot prevent parallel proceedings.

The principle of *ne bis in idem* has received a lot of scholarly attention, both in Croatia and abroad,[34] so this paper will only give a very brief overview of the de-

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31 See Art. 10. of the Regulation

32 Mitsilegas, V., *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2016, p. 93 with further references in note 57

33 Similarly, Simonato, M., *Ne bis in idem in the EU: Two important questions for the CJEU (opinion of the AG in C-486/14 Kussowski*), European Law Blog, [http://europeanlawblog.eu/?p=3071] Accessed 16 April 2018

34 See e.g. Ivičević Karas, E., *Načelo ne bis in idem u europskom kaznenom pravu*, HLJKP 21, 2/2014, pp. 271-294; Burić, Z, *Načelo ne bis in idem u europskom kaznenom pravu - pravni izvori i sudska praksa*

velopment of this principle as a transnational principle within the EU and then focus on the most recent interpretation of this principle by the CJEU.

For a long time the *ne bis in idem* was recognized solely as a rule prohibiting double punishment within one jurisdiction.[35] Its transnational application became a major issue only with the development of the EU and its AFSJ. According to Article 54 of CISA: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."[36] In addition to its transnational dimension, Article 50 of the Charter of Fundamental Rights also emphasizes its internal dimension by simply proclaiming that: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."[37] Furthermore, in contrast to CISA, the Charter does not contain any reference to the so-called enforcement clause, which makes the application of the *ne bis in idem* principle contingent on the enforcement of sentence in the state which has rendered the final judgment. The Charter also does not provide for the exception contained in the Article 55 of the CISA, according to which states may decide not to apply the *ne bis in idem* principle on the offences which took place at least in part in their own territory as well as offences against their national interests.

3.2. No more blind trust? – Recent Case Law of the CJEU

Detailed contours to the principle of *ne bis in idem* in AFSJ have been given by the CJEU,[38] which has continuously emphasized that the transnational dimension

europskog suda, Zbornik Pravnog fakulteta u Zagrebu, 60(3-4), 2010, pp. 819-859; Gutschy, M., *Tumačenje načela ne bis in idem – interakcija Europskog suda pravde i Europskog suda za ljudska prava nakon stupanja na snagu Lisabonskog ugovora* (paper published on an internal network of the Faculty of Law in Zagreb in 2014), Ligeti, K., *Rules on the Application of ne bis in idem in the EU, Is Further Legislative Action Required*, Eucrim, 1-2/2009, pp. 37-42 and Vervaele, J., *Ne bis in idem: Towards a Transnational Constitutional Principle in the EU*, Utrecht Law Review, vol. 9., issue 4, 2013

35 As such, for example, it is proclaimed by the International Covenant for Civil and Political Rights, art. 14(7)

36 *Op.cit*. note 11

37 *Ibid*.

38 Indirectly also by the jurisprudence of the ECtHR, at least in its internal dimension. See art. 52(3) of the Charter according to which „[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

of the *ne bis in idem* rests on the concept of mutual recognition and mutual trust, meaning that every member state recognizes the criminal law in force in the other member state even when the outcome would be different if its own national law were applied.[39] The ECJ relied on the concept of mutual trust in order to back up its position that the application of Article 54 of CISA is not dependent on harmonization or at least approximation of criminal laws of member states.[40] Grounding transnational dimension of the *ne bis in idem* on mutual trust has far reaching consequences on the interpretation of various aspects of this principle, foremost on the meaning of the final decision - whether the decision terminating proceedings in a member state is final is judged according to the national law of the state in which the decision was rendered.[41] According to the CJEU, the purpose of the *ne bis in idem* within the AFSJ is to ensure that a person whose trial has been finally disposed of is not prosecuted in several member states for the same acts on account of his having exercised his right to freedom of movement. The aim, according to the CJEU is "to ensure legal certainty – in the absence of harmonization of the criminal laws of the member states – through respect for decision of public bodies which have become final.[42] A prerequisite is, however, that a final decision in another member states includes a determination as to the merits of the case.[43]

As highlighted by the CJEU in one of its most recent judgments on *ne bis in idem*, in the case of *Kossowski* the interpretation of the final nature of a decision in criminal proceedings must be undertaken in the light "not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice".[44] In that light, according to the Court, the decision terminating proceedings in Poland taken by the prosecuting authority due to lack of evidence, but without conducting a detailed investigation, cannot constitute a final decision including a determination as to the merits, even though it is considered as such according to the national law of the state (Poland) in which the decision was rendered.[45] The Court further clarified that "mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by

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39 Judgment of 11 December 2008 in Bourquain, C−297/07, par. 37

40 *Ibid*.

41 More in Ivičević Karas, *op. cit.* note 34, p. 286

42 Judgment of the Court (Grand Chamber) of 29 June 2016, Kossowski, C-486/14. (hereinafter: Kossowski) para. 44

43 See Judgments of the Court, of 10 March 2005, Miraglia, C-469/03, para 30. and of 5 June 2014, M, C-398-12, par. 28

44 Kossowski, par. 47

45 *Ibid*, par. 48. The Court based its assessment on the ineffective investigation on the fact that the Polish prosecuting authorities did not interview neither the victim nor a (hearsay) witness in that case

the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case", [46] which was not the instance in the case at hand.

The decision of the CJEU in *Kossowski* could be seen as a further step in the process of undermining the concept of mutual trust, the process which has started with the decision of the CJEU in the case of *Spasić*.[47] This judgment has already been described as transformation of the presumption of mutual trust into "institutionalization of mutual distrust."[48] In the case of *Spasić*, the CJEU found that the enforcement clause from Article 54 of CISA is compatible with Article 50 of the Charter, meaning that the person finally convicted in one member state could be consecutively prosecuted in another member state if the punishment had not been enforced. Instead of relying on the premise of mutual trust, the Court emphasized the need to avoid impunity. It obviously considered the possibility of consecutive prosecution for the same offence as a more efficient way of achieving this goal than to rely on other mechanisms such as the European Arrest Warrant and enforcement of foreign decisions based on mutual recognition.[49] Many scholars see the *Spasić* judgment as inconsistent with the previous jurisprudence of the CJEU, throwing the new light on the role of mutual trust as foundation of the AFSJ.[50]

The reason why the *Kossowsk*i judgment further dilutes mutual trust lies in the fact that the earlier premise, expressed in several judgments of the CJEU, including the case of M, was that if a member state considers an internal decision on the merits as final, other member states must trust that assessment and accept it.[51]

In the *Kossowski* case, however, the notion of the merits has been significantly stretched. Unlike in the case of *Miraglia*, in which the decision to terminate pro-

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46 Par. 52

47 Judgment of the Court (Grand Chamber) of 27 May 2014Spasic case, C-129/14 PPU

48 Mitsilegas, *op. cit*. note 32, p. 90. For a similar account of Spasić Case see Marletta, A., *The CJEU and the Spasić case: Recasting Mutual Trust in the Area of Freedom, Security and Justice?,* European Law Blog [http://europeanlawblog.eu/?p=2655] Accessed 16. April 2018

49 In par. 70. the CJEU stated that: "although Framework Decision 2008/909 envisages the execution of a custodial sentence in a Member State other than that in which the court which imposed the sentence is located, it must be pointed out that, under Article 4 thereof, that option arises only where the sentenced person has consented and the sentencing State has satisfied itself that the execution of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. It follows that the main aim of the system established by that framework decision is not to prevent the impunity of persons definitively convicted and sentenced in the European Union and it is not capable of ensuring the full realization of that aim."

50 Mitsilegas, *op. cit*. note 32, p. 90; Marletta, *op.cit*. note 48

51 Simonato, *op. cit.* note 33

ceedings was of purely procedural nature,[52] it cannot be denied that the decision of the Polish prosecutor in the case against Piotr Kossowski was based on assessment of evidence (though on the basis of insufficient available information) and, hence, constituted a decision on the merits.[53] It seems that the decision of the CJEU in this case recognized the notion of positive obligations of states to conduct efficient investigation, as developed in the case law of the ECtHR.[54] This means that the previous request that the final decision must include assessment of the facts relating to the merits of the case, has been supplemented with the request that the assessment of fact during the investigation must be detailed and efficient, which is subject to review by another member state. In order words, this judgment implies the possibility to challenge the investigations conducted in other member states. This judgment will surely have far reaching consequences on the protective function of the *ne bis in idem* as well as on the interpretation of the notion of mutual trust on which the *ne bis in idem* rule rests.

Based on all of the above, it can be concluded that instead of relying on the *ne bis in idem* to solve conflicts of jurisdiction, the better way forward would be prevention of conflicts through allocating jurisdiction to the most adequate one in a case at hand. There is no guarantee that the prosecuting authorities of the state which were first in the position to decide on the merits is best placed to pronounce on the guilt of the defendant.[55] Therefore, even leaving aside all the above sketched problems surrounding the application of *ne bis in idem*, this mechanism cannot serve as the main, and let alone the only mechanism to solve positive conflicts of jurisdiction.[56] As the advocate general Sharpston, sensibly observed in her opinion on M.: "There is clearly an underlying issue, worthy of serious consideration, about the 'race to prosecute' and possible conflicts of jurisdiction in criminal matters. At present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction. The application of the *ne bis in idem* principle resolves the problem in

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52 The Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. See Judgment of 10 March 2005, Case C-469/03

53 Evidence is nothing short of the merits of the case. Simonato, M., *Ne bis in idem in the EU: Two important questions for the CJEU (opinion of the AG in C-486/14 Kussowski*), European Law Blog, [http://europeanlawblog.eu/?p=3071] Accessed 16 April 2018

54 Similarly Gutschy, *op. cit.* note 34, pp. 21-22

55 *Ibid*., p. 6

56 On the contrary, preventing conflicts of jurisdiction in a principled manner would have the effect of reducing the problems associated with the *ne bis idem* and its infringement. See the Preamble of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, par. 3

a limited, sometimes an arbitrary, way. It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria." [57]

4. A WAY FORWARD – SOME POSSIBLE SOLUTIONS

Bearing in mind the soft law nature of the existing EU instruments dealing with the conflict of jurisdiction and the shortcomings of the *ne bis in idem* rule as an only tool for resolving conflicts of jurisdiction,[58] it is unsurprising that some initiatives for the new legislative instrument in this field have already emerged. Perhaps the most elaborated one is the European Law Institute's "Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union".[59]

Within this project, three possible legislative models for the EU have been developed. As it has been explained by the authors, "[t]he three legislative models reflect different levels of approximation and thereby three distinct policy options, leaving the choice open to the EU legislator."[60] According to the so-called horizontal mechanism, conflicts of jurisdiction should be solved between the national criminal justice authorities of the concerned Member States. This model seems to be the closest to the current state of affairs, by relying on cooperation and coordination between national criminal justice authorities. Coordination is of course impossible without the duty of national authorities to share information and notify each other about parallel proceedings in order to prevent and settle conflicts of jurisdiction. The starting point for deciding between the competing jurisdictional claims would be slightly restructured criteria expressed in 2003 Guidelines, coupled with a negative list of factors, which may not be taken into consideration. The proposal is equivocal as to the possibility of judicial review by the national judge.

The vertical mechanism, on the other hand, relies on a supranational decision (of Eurojust) in cases where coordination between the national criminal justice authorities has failed. The proposal offers two options regarding the possibility of

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57 Opinion of AG Eleanor Sharpston of 6 February 2014 in the case C−398/12 Procura della Repubblica v. M., par. 51

58 It cannot ensure the non-arbitrary choice of jurisdiction, avoid parallel prosecutions, or guarantee that the best suited jurisdiction will have primacy, etc.

59 European Law Institute, Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union
[https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf] Accessed 16 June 2018

60 *Ibid*, p. 17

judicial review. In case the decision of Eurojust would not be binding, there would be no judicial review, as it would not change the position of the affected person. If, in contrast the decision of Eurojust would be binding, there could be a limited review of the CJEU based on Article 263 of the TFEU. Under this scenario, the CJEU could annul the decision if taken arbitrarily, but it could not reassess the facts of the case and decide itself on the competent jurisdiction.[61]

The third mechanism according to the proposal is the so-called mechanism for the location of criminal jurisdiction in the AFSJ. Under this most ambitious model, which assumes strong harmonization, conflicts of jurisdiction would be prevented by establishing uniform European rules on the allocation of the exercise of criminal jurisdiction in the AFSJ. The aim of this model is to prevent conflicts of jurisdiction from the outset. This would be achieved by essentially eliminating extraterritorial jurisdiction within the AFSJ and by strong reliance on the principle of territoriality. [62] In other words, under this model, territoriality would be the only recognized jurisdictional ground within the EU, but as simple as it may sound at first, this raises further questions as to how would precisely territoriality be defined,[63] and which jurisdiction would prevail in case when the offence is perpetrated on the territory of more than one state. Under this model judicial review would also be possible, in case of a biased decision of a territorial jurisdiction as well as based on request of a dissenting national authority.[64]

Having in mind the obvious decline in the mutual trust between the states in the recent years evident from the above analyzed recent case law of the CJEU,[65] it is hard to believe that the third model, which assumes strong mutual trust between the member states, would be accepted in near future. It seems that the first model, if any, is the most feasible solution. This model, however, although more transparent, would not significantly change the existing framework, whereas the second model, by entailing a supranational binding decision would bring a more noteworthy added value. Whether any of these models will be adopted by the EU remains to be seen.

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61 *Ibid*., p. 25

62 *Ibid*, p. 26

63 According to the principle of ubiquity or in a narrower fashion, only where the conduct took place or where the consequence occurred

64 *Op. cit.* note 59, p. 27

65 On this phenomenon foremost in the context of European Arrest Warrant, see Marguery, T., *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'exceptional' enough?,* European Papers vol 1, no. 3, pp. 943-963

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RE-ASSESSING THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON POLICE INTERROGATION - CASE OF *IBRAHIM AND OTHERS V. THE UNITED KINGDOM*[*]

ABSTRACT

The article gives an analysis of the judgment of the Grand Chamber of the European Court of Human Rights in the case Ibrahim and others v. the United Kingdom. The analysis is put in the context of standards that the Court established in its Salduz judgment and further developed in its post-Salduz jurisprudence. The author presents and analysis the way in which the Court interpreted the Salduz standards in the instant case, focusing on the standard of "compelling reasons" and the relationship between the use of the statements given in the absence of a lawyer and the fairness of the proceedings as a whole. The central part of the article is dedicated to the critique of the way in which the Court applied these standards to the circumstances of this particular case. The author offers counter-arguments to Court's findings both in relation to the question whether compelling reasons to restrict the right of access to a lawyer existed in this case, as well as the question of the fairness of the trial as a whole.

Keywords: *European Court of Human Rights, police interrogation, access to a lawyer, compelling reasons, fairness of the trial as a whole*

1. INTRODUCTION - THE IMPORTANCE OF THE CASE

Grand Chamber judgment in the case of Ibrahim and others v. the United Kingdom[1] has probably been the most controversial decision of the European Court for Human Rights in the post-Salduz era. In this case, the Court was given an opportunity to clarify two crucial aspects of the Salduz doctrine. First, it was given an opportunity to clarify the concept of compelling reasons which may exceptionally justify denial of access to a lawyer and second, it was given an opportunity to

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[1] Grand Chamber, Judgment of 13 September 2016, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09

clarify whether the use for a conviction of incriminating statements made during police interrogation without access to a lawyer may nevertheless leave the right to a fair trial unharmed. The answers that the Court gave to these two questions have left many lawyers and human rights defenders in Europe disappointed. Before we engage in the analysis of the legal reasoning offered by the Court, let us first take a quick look at the circumstances of the case.

2. FACTUAL BACKGROUND

The case evolves around a group of men suspected of involvement in terrorist activities which took place in London in July 2005. Two weeks after the terrorist attack on London public transportation system of 7 July 2005 which resulted in fifty-two people killed and hundreds more injured,[2] several further suicide bombers attacks were attempted, but all of them failed.[3] The bombs were detonated, but in each case the main charge failed to explode, due to inadequate concentration of hydrogen peroxide.[4] All the bombers fled the scenes of attempted attacks but their images where captured on close-circuit television cameras and instantly publicly broadcasted.[5] Several days thereafter the bombers were arrested, first three applicants in the case were among them.[6] The fourth applicant became involved in the case primarily as a potential witness, helping police investigation of the case, but got arrested during the process under suspicion of giving shelter to one of the bombers (who was not among the first three applicants) and helping his escape from the country.[7]

The situation with regard to the first three applicants is more or less the same. After being arrested and informed about their rights, they were taken to the police station where they requested to exercise their right of access to a lawyer.[8] But, they were denied this right on two grounds. First, that granting it would lead to delaying the interview, and "delaying the interview would involve an immediate risk of harm to persons or damage to property" and second, that "legal advice would lead to the alerting of other people suspected of having committed offences but

2 *Ibid.*, § 14

3 *Ibid.*, § 15

4 *Ibid.*, § 16

5 *Ibid.*, § 17

6 *Ibid.*

7 *Ibid.*, § 18

8 With regard to the first applicant, see *ibid.*, § 21-22; with regard to the second applicant, see *ibid.*, § 39-41; with regard to the third applicant, see *ibid.*, § 49-50

not yet arrested".[9] The interviews that needed to be undertaken were the so-called "safety interviews" which can be undertaken without the right of access to a lawyer being granted. These are urgent interviews conducted "for the purpose of protecting life and preventing serious damage to property".[10] Due to the need to prevent further terrorist attacks, all three applicants were denied the right of access to a lawyer for several hours[11] and were, during that period, subjected to several safety interviews. In the safety interviews, all of them denied any connection with terrorist activities and any knowledge of other persons involved in such activities or their whereabouts.[12]

All three were charged with conspiracy to murder.[13] During the trial, their defences had been based on a claim that "their actions had not been intended to kill but had been merely an elaborate hoax designed as a protest against the war in Iraq".[14] The result of the trial came down to the question whether the failure of the bombs to explode was intended by the applicants or it was a result of an unintentional design-flaw. In order to undermine the defence that the applicants offered, the prosecution wanted to rely on the statements that they gave during the safety interviews.[15] The defence opposed the use of the statements, claiming that their use would have an "adverse effect on the fairness of the proceedings".[16] After conducting a *voir dire* procedure, the trial judge decided that statements deriving from the safety interviews could be admitted.[17] In July 2007 all the three

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9 With regard to the first applicant, see *ibid*., § 28; with regard to the second applicant, see *ibid*., § 43; with regard to the third applicant, see *ibid*., § 51. The possibility to delay the right of access to a lawyer was, at the material time, foreseen in the Terrorism Act 2000, in paragraph 8 of its Schedule 8. The exercise of the right could be delayed up to 48 hours. See *ibid*., § 186-198

10 *Ibid*., § 23. The possibility to conduct such interviews was, at the material time, foreseen by paragraph 6.6 of Section 6 of Code C. See *ibid*., § 191-198

11 In the case of the first applicant, it was a little over 8 hours, in the case of the second applicant around 7 hours, and in the case of the third applicant about 4 hours, see *Joint partly dissenting, partly concurring opinion of judges Sajó and Laffranque*, § 23

12 With regard to the first applicant, see *op. cit.* (note 1), § 36; with regard to the second applicant, see *ibid*., § 45; with regard to the third applicant, see *ibid*., § 54

13 *Ibid*., § 58

14 *Ibid*., § 62

15 *Ibid*., § 63

16 *Ibid*., § 64

17 *Ibid*., § 65-95. There are two main provisions of the Police and Criminal Evidence Act (PACE) which regulate the question of the admissibility of evidence. First of them is section 76(2) which foresees that a confession may be considered inadmissible where it was obtained by oppression of the person who made it or where it was obtained in consequence of anything which was likely to render it unreliable. Second is section 78(1) which foresees that the court may refuse to allow evidence if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it", see *ibid*., § 199-201

were convicted of conspiracy to murder and sentenced to life imprisonment with a minimum term of forty years' imprisonment.[18] All three sought leave to appeal against their convictions, contending primarily the admissibility of the statements given during the safety interviews, but the Court of Appeal refused leave to appeal against the conviction.[19]

The situation with the fourth applicant differs. After being approached by two police officers who sought his assistance as a potential witness in police investigation into the failed attacks of 21 July, he agreed to assist them and accompanied them to the police station.[20] After he arrived to the police station, his interview as a witness soon began. However, soon after the start of the interview, the police officers conducting it concluded that the applicant is in fact giving self-incriminating statements and should therefore be treated not as a witness, but as a suspect – should be cautioned and informed of his right to legal advice. However, senior police officers they addressed with the issue, told them they should continue interviewing the applicant as a witness, and not as a suspect. The interview resumed and the applicant gave a witness statement.[21] After he gave the witness statement, the applicant was arrested and cautioned and, after receiving legal advice, interviewed as a suspect in the presence of a lawyer. In his statement as a suspect he basically confirmed everything he said in the witness statement.[22] He was charged of assisting one of the bombers and of not disclosing information concerning the other bombers.[23] One of the central questions of the fourth applicant's trial was the admissibility of his witness statement. He claimed the statement should be excluded from the evidence, but the prosecution opposed his claim.[24] After conducting a *voir dire*, the judge did not accept that the witness statement should be excluded from the evidence.[25] The applicant also applied to have the proceedings

18 *Ibid*., § 119-120

19 *Ibid*., § 121-136

20 *Ibid*., § 137-139

21 *Ibid*., § 140-146; Continuing the interview with the applicant without giving him a caution and informing him about the right to access a lawyer was contrary to the relevant code of practice which instructed the police officers to suspend the interview and caution the applicant and inform him about his rights. Relevant provisions are contained in paragraph 10.1 of section 10 of Code C. See *ibid*., § 181

22 *Ibid*., § 147-152

23 *Ibid*., § 153

24 His claim was based on four reasons: police officers acted against the relevant code of practice when they decided not to caution him, after realizing he became a suspect; their misconduct was deliberate; his statement has been induced on a false pretence that he would go home after the statement was completed; he was tired when giving the statement, since it was given in the early hours of morning. *Ibid*., § 155-156

25 *Ibid*., § 157-161

stayed on the grounds that the prosecution was an abuse of process, due to the fact that he was "tricked into giving his witness statement" by the police officers, who told him he would not be prosecuted. This application was also refused by the judge.[26] At the end of the trial, the applicant was convicted and sentenced to a total of 10 years imprisonment.[27] He appealed the conviction arguing, among other, that the trial judge had been wrong in admitting the witness statement. The Court of Appeal dismissed the appeal thereby supporting the reasoning of the first instance court.[28]

3. LEGAL QUESTIONS

Applicants, all four of them, addressed the European Court because they considered that circumstances surrounding their police interrogation and the use of the statements they gave in the course of those interviews as evidence at trial, amounted to a breach of their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention. With regard to their interrogation by the police, they claimed that the main problem was that they were denied access to a lawyer.[29] By addressing the Court with this argumentation they relied primarily on the standards that the Court established in its famous judgment in *Salduz* case and affirmed in its post-*Salduz* jurisprudence.

3.1. Salduz case and post-Salduz jurisprudence

Salduz standards can be very briefly summarised in the following quote from the judgment:

"[…] Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 […]. The rights of the defence will in principle be irretrievably prejudiced when incriminating state-

[26] *Ibid*., § 163-165
[27] *Ibid*., § 173
[28] *Ibid*., § 174-180
[29] *Ibid*., § 234

ments made during police interrogation without access to a lawyer are used for a conviction."[30]

If we compare previously established standard with regard to police interrogation and right of access to a lawyer with the *Salduz* standard, a following conclusion can be made with regard to the latter: it emphasized the exceptional nature of the restrictions to the right of access to a layer, and introduced a presumption that the proceedings as a whole shall be considered unfair whenever incriminating statements made by the accused are used for a conviction.

In the jurisprudence that followed, the Court consistently held the approach adopted in *Salduz* and, even to a certain extent, developed the standard further in the direction of more protection to the rights of the accused. This can be seen from two developments with regard to: the moment from which the accused has the right of access to a lawyer and the relationship between the absence of a lawyer and the fairness of the proceedings as a whole. In relation to the first development, the Court emphasised that the accused has the right of access to a lawyer not only from the moment of his or her first interrogation by the police, but already from the moment of his or her deprivation of liberty.[31] In relation to the second development, the Court clarified that the fairness of the proceedings as a whole may be violated not only by the use of incriminating statements made during police inter-

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30 Before *Salduz*, the standard applied in the jurisprudence of the Court was a more lenient one. It was the following standard: "[…] Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing" (see, among others, *John Murray v. the United Kingdom*, Judgment of 8 February 1996, application no. 18731/91, § 63; *Brennan v. the United Kingdom*, Judgment of 16 October 2001, application no. 39846/98, § 45). *Cf.* Valković, L., Burić, Z., *Primjena izabranih elemenata prava na formalnu obranu iz prakse Europskog suda za ljudska prava u hrvatskom kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, no. 2/2011, p. 526-527

31 That such a restrictive interpretation of Salduz is possible, namely, such where the right of access to a lawyer is granted to the accused only from the moment of police interrogation, was warned already at the moment of the adoption of the judgment, by judges Zagrebelsky, Casadevall and Türmen, in their concurring opinion attached to the judgment (see *Concurring opinion of judge Zagrebelsky, joined by judges Casadevall and T*ürmen). However, in its jurisprudence the Court soon clarified that accused has the right of access to a lawyer already from the moment of deprivation of liberty, see *Dayanan v. Turkey*, Judgment of 13 October 2009, application no. 7377/03, § 31-32; *Mađer v. Croatia*, Judgment of 21 June 2001, application no. 56185/07, § 153. *Cf.* Hodgson, J., *The French Garde* À *Vue Declared Unconstitutional*, Warwick School of Law Research Paper Forthcoming. Available at SSRN: [https://ssrn.com/abstract=1669915] Accessed 15 February 2018, p. 3; Valković, Burić, *op. cit.* note 30, p. 529, Costa Ramos, V., *The Rights of the Defence according to the ECtHR - An Illustration in the Light of A.T. v. Luxembourg and the Right to Legal Assistance*, New Journal of European Criminal Law, Vol. 7, Issue 4, 2016, p. 405

rogation without access to a lawyer for a conviction, but also when other evidence obtained in the absence of a lawyer is used for a conviction.[32]

Very strong observation about the Court's consistency in applying the *Salduz* standard has been brought forwards by *Fair Trials International* in its intervention in case of *Ibrahim and others*. This NGO submitted that "when a person is denied access to a lawyer, the Court is clear that the use of incriminating statements for a conviction will infringe Article 6", and, as an example, listed 14 cases where the Court did exactly that.[33] However, the specificity of the case of *Ibrahim and others* was that it was a first case in post-*Salduz* period in which there was a reasonable expectation that the Court would find the existence of compelling reasons that, in particular circumstances of that case, have justified a derogation on access to a lawyer. And the Court has still not been in a position, in the post-*Salduz* period, to answer the question whether the use of incriminating statements for a conviction which were made in the absence of a lawyer in a situation of a lawful derogation may not infringe Article 6.[34] It follows from that that there were two main legal questions that the Grand Chamber had to give an answer to in its judgment: whether there were compelling reasons which justified temporary denial of access to a lawyer and whether the proceedings as a whole were fair, although the statements made in the absence of a lawyer were used for a conviction.

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[32] *Mehmet* Şerif Öner *v. Turkey*, Judgment of 13 September 2011, application no. 50356/98, § 21: "[…] the Court observes that although the applicant did not have access to a lawyer during his police custody, he repeatedly denied the charges against him during his interrogation by the police, the public prosecutor and the investigating judge respectively. Consequently, he did not make any self-incriminating statements. However, the Court finds it important to recall once again that the investigation stage is of crucial importance in criminal proceedings as the evidence obtained at this stage determines the framework in which the offence charged will be considered […]. In this regard, the Court observes that when the applicant was in police custody, he took part in an identification parade and was identified by the intervening parties as the person who had taken part in the respective armed robberies which had occurred in 1993. The Court further notes that in convicting the applicant the trial court relied heavily on the result of this identification parade. Thus, the applicant was undoubtedly affected by the restrictions on his access to a lawyer during the preliminary investigation. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the applicant's custody period." *Cf.* Valković, Burić, *op. cit.* note 30, p. 527

[33] *Ibrahim and others v. United Kingdom (Apps. Nos 50541 and others), Third Party Intervention of Fair Trials*, p. 9 and notes 42 and 3

[34] *Ibid*., p. 9

3.2. Compelling reasons

In its judgment, the Chamber accepted that there were compelling reasons in case of all four applicants.[35] What compelled the police to temporarily restrict the right of applicants to access a lawyer was an "exceptionally serious and imminent threat to public safety".[36] Besides public safety, the reason was also collusion "because the police had been concerned that access to legal advice would lead to the alerting of other suspects".[37]

The Grand Chamber started its analysis by reminding that the criterion of compelling reasons is a stringent one, the consequence of that being that "restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case".[38] Grand Chamber rejected the finding of the Chamber that collusion, namely a general risk that lawyers might reveal information from the investigation thereby making it more difficult to arrest those suspected of terrorist activities, but not yet arrested, might qualify as s compelling reason, by stating that "a non-specific claim of a risk of leaks cannot constitute a compelling reason so as to justify a restriction on access to a lawyer".[39] Grand Chamber further clarified that the absence of compelling reasons does not automatically lead to a violation of Article 6 rights and that it is always necessary to undertake to overall fairness test in order to decide on the violation of Article 6 rights.[40] However, the Grand Chamber also found that the existence or non-existence of compelling reasons has an impact on the overall fairness test. In the case where the Court should find that there were no compelling reasons to restrict the right of access to a lawyer, "the Court must apply a very strict scrutiny to its fairness assessment".[41]

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35 *Ibrahim and others v. the United Kingdom,* Judgment of 16 December 2014, application nos. 50541/08, 50571/08, 50573/08 and 40351/09

36 *Op. cit.* (note 1), § 235

37 *Ibid.*

38 *Ibid*., § 65. *Cf.* Valković, Burić, *op. cit.* note 30, p. 526-527, Costa Ramos, *op. cit.* note 31, p. 407

39 *Op. cit.* (note 1), § 259

40 *Ibid*., § 260-262. In this regard, the judgment also raises some important issues with regard to the internal structure of Article 6 and the relationship between Article 6 (1) and Article 6 (3) of the Convention. More on this issue see in Goss, R., *Out of Many, One? Strasbourg's* Ibrahim *decision on Article 6*, The Modern Law Review (2017)80(6), p. 1137-1163

41 *Ibid*., § 265. The Grand Chamber continued its reasoning by stating that „[t]he failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c) […]. The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice."

The Court separately analysed the issue of existence of compelling reasons in the situation of the first three applicants and in the situation of the fourth applicant.

In relation to the first three applicants, the Court found that there were compelling reasons to temporarily restrict their right to legal advice. The Court accepted that there was "an urgent need to avert serious adverse consequences for life, liberty or physical integrity"[42] and that the overriding priority of the police was "quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot".[43] Additionally, the restriction also fulfilled additional needed factors in that it had a basis in domestic law, it was based on an individual assessment of the particular circumstances of the case and it was temporary in nature.[44]

It is very difficult not to agree with the finding of the Court that, at the time when the right to legal advice was restricted and when the safety interviews were conducted, the need to prevent further terrorist attacks was an overriding priority. However, what is missing from the reasoning of the Court is the establishment of a link between that need and the need to restrict right to legal advice. What was it in the restriction of this right that made the achievement of the overriding priority more plausible? Or, in other words why was granting an access to a lawyer for the first three applicants in the view of the police seen as an obstacle in the achievement of this security objective? This is a question that the Grand Chamber did not touch upon in its reasoning and it is an issue which definitely merited attention. There are two reasons why the police could have had an interest, in the circumstances of the case, to restrict access to legal advice for the applicants. One of them is the possibility of delay in conducting the safety interviews if applicants were given an opportunity to consult a lawyer before the interview. This is a reason which the London police did primarily emphasize in the reasoning of its decisions on restriction. However, it is also possible to imagine other reasons. The police could have had an interest to restrict access to a lawyer because it believed that the

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42 It is probably the text of Article 3 § 6 of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6. 11. 2013, p. 1) which has inspired the Court to adopt this standard. More on this provision, see in Ivičević Karas, E., Burić, Z., Bonačić, M., *Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: Pogled kroz prizmu europskih pravnih standarda*, Hrvatski ljetopis za kazneno pravo i praksu 1, 2016, p. 51-53

43 *Ibid*., § 276

44 *Ibid*., § 277. For an analysis of this part of the judgment, see Ivičević Karas, E., Valković, L., *Pravo na branitelja u policiji – Pravna i stvarna ograničenja*, Hrvatski ljetopis za kazneno pravo i praksu 2, 2017, p. 421-423

applicants would be more open to cooperation with the police without the help of a lawyer. In other words, they could have believed that the presence of a lawyer before and during the safety interviews might make it more difficult for the police to achieve its preventive objectives.

This issue was also addressed by judges Sajó and Laffranque in their separate opinion in which they stated that "[t]he fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives".[45] The circumstances of the case gave a lot of room to the Court to address this question. Namely, as already mentioned judges point put in their separate opinion, in the case of the first applicant, access to legal advice was delayed for a little over 8 hours, during which time he was questioned for a total of about 3 hours. In the case of second applicant the ratio was 7 hours of delay, half an hour of questioning, and with the third applicant 4 hours of delay, 18 minutes of questioning.[46] Taking all these facts into account, it is very difficult not to question oneself weather there was a danger in delay in conducting safety interviews due to the need to allow consultation with a lawyer before the interview. In our opinion, this is a question that the Grand Chamber should have answered and it should have used the possibility to express a clear standard that denying access to legal advice is only permissible where such access would, due to time constraints, cause a delay in the achievement of a safety objective.

In the case of the fourth applicant, the Court decided to proceed in the same manner as in the case of the first three applicants by deciding "whether there were compelling reasons for the restriction of the fourth applicant's access to legal advice".[47] We find it very difficult to agree with this approach. Namely, the situation of the fourth applicant significantly differs from the situation of the first three applicants. The latter were cautioned and informed about their right to legal advice, but this right was temporarily restricted. The former was not cautioned at all and not informed about his right to legal advice. He was denied knowledge about the change in his procedural position, from being a potential witness to becoming a suspect.

The way that the Court proceeded runs contrary to the standard that it previously established in the same judgment when it said that "[i]n the light of the nature of the privilege against self-incrimination and the right to silence, the Court considers that in principle there can be no justification for a failure to notify a suspect

45 *Op. cit.* (note 11), § 21

46 *Ibid.*, § 23

47 *Op. cit.* (note 1), § 297

of these rights".[48] What the Court did was logically wrong. It applied the same standard to two situations which are fundamentally different. With this approach, the fact that the fourth applicant was "mislead as to his procedural rights", as the Court put it, was pushed into the background, by being taken into consideration as only one of the factors that the Court considered when deciding whether there were compelling reasons for the restriction of the fourth applicant's right to legal advice. This issue, rather than being considered among other factors, should have been put in the foreground of the Court's analysis.

True, in the end the Court found that there were no compelling reasons in the case of the fourth applicant. The Court accepted that in his case, like in the case of the first three applicants, there existed "an urgent need to avert serious adverse consequences for life, liberty or physical integrity". But, other factors that the Court requires in order to establish the existence of compelling reasons, and which existed in the case of the first three applicants, did not exist, the Court found, in the case of the fourth applicant. Primarily, there was complete absence of any legal framework regulating the conduct of the police in the case of the fourth applicant.[49] Namely, there was no possibility in the domestic law to proceed the way that the police proceeded in the fourth applicant's case.

3.3. The fairness of the proceedings as a whole

As already mentioned The Grand Chamber clarified that the *Salduz*-test is always a two stage test. This means that establishment of non-existence of compelling reasons is never for itself enough to establish a violation of Article 6 rights. Compelling reasons found or not found, it is always necessary for the Court to conduct an assessment of the fairness of the trial as a whole in order to decide about a violation of Article 6 rights.[50] However, the existence or non-existence of compelling reasons plays an important role in the overall fairness test (see *supra* 3. 2.). Besides existence or absence of compelling reasons, the Court, as the Grand Chamber stressed, will take into account a whole range of other factors when conducting the overall fairness test. Among others, the quality of the evidence, the use to which the evidence was put, and the weight of the public interest in the investigation and punishment of the offence in issue.[51]

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48 *Ibid*., § 273

49 *Ibid*., § 299-300

50 *Ibid*., § 257, 260-262

51 For the full, but non-exhaustive list, see *ibid*., § 274. *Cf.* Costa Ramos, *op. cit.* note 31, p. 410

The Chamber found that in the case of all four applicants "no undue prejudice has been caused by the admission of the statements at trial having regard in particular to the counterbalancing safeguards contained in the legislative framework, to the trial judge's rulings and directions to the jury and to the strength of other evidence in their case".[52] The Grand Chamber came to the same conclusion in the case of the first three applicants. However, it reached a different conclusion in the case of the fourth applicant. We shall now analyse the arguments that the Grand Chamber offered for these findings.

In reaching the conclusion that the proceedings in relation to first three applicants were overall fair and that therefore there has not occurred a violation of their Article 6 rights, the Grand Chamber relied on a number of factors. It particularly took into consideration that the police "adhered strictly to the legislative framework which regulated how they had to conduct their investigation",[53] that applicants had the opportunity to challenge the authenticity of the evidence and oppose its use,[54] the quality of the evidence and its lawfulness under domestic law,[55] the fact that "the statements were merely one element of a substantial prosecution case against the applicants",[56] the quality of directions which the trial judge gave to the jury,[57] and lastly the strength of the public interest in the investigation and punishment of the offences in question.[58]

It is noteworthy that the Grand Chamber invested a lot of effort in giving reasons for the conclusion it reached. However, what is striking from the reasoning given by the Grand Chamber is the absence of analysis of purpose for which the safety interviews were conducted and the impact of this factor on the fairness of the proceedings as a whole. Namely, safety interviews were conducted for preventive purposes, in order to help the police to prevent potential further terrorist attacks and identify, locate and arrest all those involved in their preparation and cover-up. In order to achieve that goal, access to one of the minimum Article 6 § 3 rights for the applicants was denied. And so far it seems like a fair bargain. However, the use

52 *Ibid*., § 235

53 *Ibid*., § 281

54 *Ibid*., § 282-284

55 *Ibid*., § 285-287

56 *Ibid*., § 288-291

57 *Ibid*., § 292

58 *Ibid*., § 293. When analysing this issue, the Grand Chamber stated that "[t]he public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily duties, is of the most compelling nature". Generally on the question of exclusion of evidence and its relationship with the seriousness of the crime prosecuted, see Thommen, M., Samadi, M., *The Bigger the Crime, the Smaller the Chance of a Fair Trial*, European Journal of Crime, Criminal Law and Criminal Justice 24, 2016, p. 65-86

of the statements obtained for preventive purposes for an investigative goal does not seem fair. If the State considered it necessary to restrict some minimum rights in order to achieve a preventive objective, how fair is it to use the results of such a restriction in the punishment of those whose rights were restricted for preventive purposes?[59] To us, this seems inherently unfair and therefore we find it difficult to agree with the conclusion of the Grand Chamber that the proceedings, as a whole, with regard to the first three applicants was fair.

With regard to the fourth applicant, the Grand Chamber again, as was the case with compelling reasons, proceeded in the same way as it did in the case of the first three applicants. However, the Court, at the outset, reminded that the situation with the fourth applicant is different, in that "in the absence of compelling reasons for the restriction of the […] right to legal advice, the burden of proof shifts to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice".[60] We agree that the Court's attitude towards the case of the fourth applicant should be different than its attitude towards the situation of the first three applicants, but we do not agree on the reasons. In our opinion, it is not the absence of compelling reasons to restrict the right of access to legal advice, but the fact that the forth applicant was induced by the police, who misled him as to his procedural rights, to give a self-incriminating statement. He was induced, true, for preventive purposes, but that does not change the fact that in the context of the criminal proceedings against him it is a self-incriminating statement.

The Grand Chamber proceeded by analysing extensively all the circumstances surrounding the criminal proceedings against the fourth applicant. It analysed, basically, all the factors that have been analysed in the case of the first three applicants (whether the police adhered to the legislative framework which regulated how they had to conduct their investigation, whether there was a possibility for the fourth applicant to challenge the use of his witness statement, quality of the statement, its importance for the prosecution case, direction given by the trial judge to the jury, and nature of the offence). In analysing all these factors, the Grand Chamber found a number of shortcomings: the decision to continue to question

[59] Same concern is voiced by judges Sajó and Laffranque in their separate opinion: "When it comes to preventing attacks, the aim of the safety interviews can be a different matter (up to a point) and we do not rule out the possibility of restricting access to a lawyer for preventive purposes (if it is demanded by an imminent threat). What we cannot understand is why an instrument that is necessary for the prevention and protection of life and limb is accepted for the purposes of punishment (which serves the desire of justice, understood as retribution)?", *op. cit.* (note 11), § 31

[60] *Op. cit.* (note 1), § 301

the fourth applicant as a witness had no basis in national law, trial court did not hear oral evidence on reasons why this decision was rendered and the decision itself was note made in writing and was not reasoned, the judge left the jury with excessive discretion as to the manner in which the witness statement was to be taken into account.[61]

However, the most important issue, in our mind, in the case of the fourth applicant is the use to which the witness statement was put. The Grand Chamber correctly noted that the statement "clearly formed an important part of the prosecution case", that there is "no doubt that these admissions were central to the charges laid against him", that it "provided a narrative of what had occurred during the critical period, and it was the content of the statement itself which first provided the grounds upon which the police suspected the fourth applicant of involvement in a criminal offence ", that "it provided the police with a framework around which they subsequently build their case and the focus of their search for corroborative evidence", and that it, for all these reasons "formed an integral and significant part of the probative evidence upon which the conviction was based".[62] This, in our opinion, is *per se*, taking into account the circumstances in which the statement was obtained, namely in a situation where the applicant was induced by the police to give a self-incriminating statement by false presentation of his procedural position and kept in ignorance about his procedural rights, enough to find the proceedings against the fourth applicant as a whole unfair. Having the circumstances under which his witness statement was obtained and its central position in the prosecution's case against him in mind, it is, in our mind, impossible to imagine any subsequent procedural safeguards or mechanisms which might make the proceedings against him fair.

4. CONCLUSION

The case of *Ibrahim and Others v. the United Kingdom* indicates a step back in the in the development of the protection of the rights of access to a lawyer in the jurisprudence of the European Court for Human Rights. This can be seen in the general standards that the Court established in its judgment in this case, as well as in the application of these standards to the specific circumstances of this case.

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61 *Ibid*., § 303-311. With regard to the strength of the public interest in the investigation and punishment of the offences in question, the Grand Chamber noted that the "offences for which he was indicted were not of the magnitude of the offences committed by the first three applicants", *ibid*., § 311

62 *Ibid*., § 307-309

With regard to the general standards, the Court established that the absence of compelling reasons to restrict the right of access to a lawyer does not itself present a violation of Article 6 rights. Further, it also established that the use of incriminating statements which were obtained in the absence of a lawyer, does not automatically lead to a violation of Article 6 rights, in other words, it is always necessary to undertake an overall fairness test. Accepting both of these standards can be seen as watering down the level of protection of the right of access to a lawyer which was established in the *Salduz* case and confirmed in the post-*Salduz* jurisprudence.[63]

The way that the Court applied those standards to the specific circumstances of the case is also difficult to accept. First of all, the Court did not establish a clear connection between the restriction of the right of access to a lawyer and the preventive goal pursued by the police. The Court should have made it clear that the restriction of the right of access to a lawyer is legitimate only if such an access, due to time or other factual constraints, would be in contradiction with the achievement of an overriding preventive objective. Furthermore, it is disappointing that the Court viewed two fundamentally different situations through the same lenses. Namely, the situation of the first three applicants, on the one side, and the situation of the fourth applicant, on the other. By doing this, the Court missed an opportunity to address appropriately the issue of police misconduct with regard to the fourth applicant. The way that the Court resolved the issue of fairness of the proceedings as a whole in this case is also disappointing. The Court failed to address the issue of relationship between police actions undertaken for preventive purposes and the use of results of these actions for investigative and punishing purposes.

The Grand Chamber judgment in this case can also be seen in the broader context, by not looking at the right of access to a lawyer solely, rather by looking at the new tendencies in the Strasbourg jurisprudence, with regard, for example, to the application of *ne bis in idem* principle. In this broader context, this judgment can be viewed as an indicator in the shift of attitude of Strasbourg judges to the question of human rights protection in general. It seems that the Court in Strasbourg has entered a period where standards of human rights protection will be sacrificed to other important social interests, security and effective prosecution of criminal offences being among them.

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63 *Pivaty* states that „*Salduz* and *Dayanan* judgments interpreted together, when contrasted with *Ibrahim* and *Simeonovi*, present two very different, and arguably incompatible, views of the scope and content of the right to custodial legal assistance". See Pivaty, A., *The Right to Custodial Legal Assistance in Europe: In Search for the Rationales*, European Journal of Crime, Criminal Law and Criminal Justice 26, 2018, p. 68

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THE IMPACT OF THE EU DIRECTIVE 2014/42/ EU ON FREEZING AND CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CRIME TO THE MACEDONIAN CRIMINAL JUSTICE SYSTEM

ABSTRACT

Republic of Macedonia is the candidate-member state of the EU and has started its High Level Accession Dialogue (HLAD), therefore it is of essential interest to harmonize its national criminal legal system to the EU law. In this article the author elaborates the impact of the EU's Directive 2014/42/EU considering the European framework for freezing and confiscation of instrumentalities and proceeds of crime in the European Union to the Macedonian criminal justice system.

The level of transposition and harmonization of this EU Directive into Macedonian legal system is evaluated through the steps from the ongoing reform of the Macedonian criminal justice system. Hence, the author will examine the current Macedonian legal framework together with the Macedonian courts' practice regarding the implementation of the existing legal provisions for freezing, confiscation and recovery of the assets, together with the elaboration of the possible limitations and reasons for infrequent use of these measures by the Macedonian courts. In this fashion the author will detect the most common problems particularly with the question of the impact of the time limitation of the freezing of the assets during the criminal procedure, and will provide possible solutions for improvement of the national legal framework.

Keywords: *freezing and confiscation of assets, criminal procedure, EU Directive 2014/42/ EU, Macedonia*

1. GENERAL REMARKS

The EU's integration process of the Republic of Macedonia is having its own *sui generis* pace due to the specific political milieu in which Macedonian society is wedged within the past several years[1]. Due to this, instead of commencing the

[1] See the issues determined in so-called "Priebe Report for Macedonia" in 2015 and 2017: The former Yugoslav Republic of Macedonia: Assessment and Recommendations of the Senior Experts' Group on

regular procedure for accessing to the EU, Republic of Macedonia has started specific High Level Accession Dialogue (HLAD) with the EU.[2] Within this process Macedonian criminal justice system is in perpetual reform in order to reach EU's standards and to adapt to the EU *aquis communitaire,* but above all to increase its level of efficiency, democracy, protection of the human rights and its overall just and fairness.[3]

In this sense, confiscation of the proceeds and instrumentalities from the crime is seen as one of the tools which can be useful in reaching of the above mentioned goals by the Macedonian criminal justice system.[4]

Macedonian criminal justice system, recognizing the outmost importance of the confiscation, as previously determined in several international legal documents, has introduced several improvements within the Criminal Code and Criminal Procedure Code. One of the biggest reform in the field of substantive criminal law were the Amendments to the Criminal Code in 2009[5], while in the field of the criminal procedure law was enactment of the completely new with strong adversarial elements Criminal Procedure Code of 2010.[6]

Although the confiscation of the proceeds and instrumentalities from crime or simply "confiscation" – was familiar to most criminal justice systems, it was almost completely abandoned for two hundreds years and rediscovered only in the

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Systemic Rule of Law Issues 2017, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf] Accessed 15 February 2018

2 See: [https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/former-yugoslav-republic-of-macedonia_e] Accessed 15 February 2018 or Karadjoski, M. The High Level Accession Dialogue for Macedonia: Advantages and Disadvantages, *Journal of Liberty and International Affairs*, Vol. 1, No. 1, 2015 available at: [www.e-jlia.com]

3 See the latest Strategy for Reform of the Judiciary, from 2017, available at: [http://www.pravda.gov.mk/documents/%D1%F2%F0%E0%F2%E5%E3%E8%BC%E0%20%E7%E0%20%F0%E5%F4%EE%F0%EC%E0%20%ED%E0%20%EF%F0%E0%E2%EE%F1%F3%E4%ED%E8%EE%F2%20%F1%E5%EA%F2%EE%F0%202017-2022.pdf] Accessed 15 February 2018

4 *Ibid*, page 5-9; Also see the goals set up by the European Commission in its Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, COM(2018) 65 from 6.2.2018

5 See: Official Gazette, No. 114/2009 from 14.09.2009, available at: [http://www.slvesnik.com.mk/Issues/2A2D5314C418A34EA5D597CC923695D2.pdf] Accessed 15 February 2018

6 See: Official Gazette, No. 150/2010 from 18.11.2010, available at: [http://www.slvesnik.com.mk/Issues/BDBF29F810D5E9468FC65FA542B857B3.pdf] Accessed 15 February 2018

last quarter of the twentieth century.[7] Today it is seen as one of the most effective tools for etablishing the principle that "crime does not pay", meaning permanent deprivation, by order of a court, of any property derived or obtained, directly or indirectly, through the commission of a crime.[8]

As a reaction to widespread concern about the flow of illegal drugs and of the increased financial power of organised crime, as Gallant[9] states in the 80's began the so called "age of proceeds". The traditional approach to crime control – based on arrest and imprisonment – was deemed inadequate to combat illicit behaviours intended to produce and accumulate exorbitant wealth.[10] Due to this confiscation of the proceeds and instrumentalities of the cime is seen as a key element in any modern strategy to fight organised crime.

The importance of the confiscation can be seen in several closely related principles. One of the most important principle is based upon the fact the confiscation satisfies the retributive principles that "crime does not pay" and that "no-one should profit from an illegal act". Another principle is that confiscation can serve as an effective tool for protection of the damaged party, whose elementary right is to be indemnified for the damage sufered from the crime.[11] Furthermore, effective confiscation reduces the attractiveness of crime by decreasing its expected monetary benefits and finally on a longer terms limits the criminal organisations by removing their working capital for investment in further criminal activities and infiltration of the legitimate economy.[12]

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7 See: Pieth, M., ed., *Financing Terrorism*, 2002 Springer, Netherlands, p.118

8 See: Albrecht, H., *„Money Laundering and the Confiscation of the Proceeds of Crime - A Comparative View on Different Models of the Control of Money Laundering and Confiscation"*, in Watkin, T. G. (ed.), The Europeanisation of Law. United Kingdom Comparative Law Series, 18, Oxford, Alden Press, 1998, pp. 166-207; or Hawkins, C. W., Payne, T. E. *'Civil forfeiture in law enforcement: an effective tool or cash register justice?'*, in Sewell, J.D., (ed.) Controversial Issues in Policing. Boston, MA: Allyn and Bacon, 1999

9 See: Gallant, M., *"Money Laundering, Criminal Assets and the 1998 Proposed Reforms"*, Journal of Financial Crime, Vol. 6 Issue: 4, 1999, pp.325-332 or Goldsmith, M., Linderman, M. J., *Asset forfeiture and third party rights: The need for further law reform*, Duke Law Journal 39, 1253–1301. Greenburg, J. C., 1995

10 See: Vettori, B., *Tough on Criminal Wealth, Exploring the Practice of Proceeds from Crime Confiscation in the EU*, Springer, 2005, pp. 2-5

11 See: Kambovski, V., *Organiziran criminal*, 2-ri Avgust, Shtip, 2005 (in Macedonian), or Lajic, O., *Comparative Review of the Investigation and Confiscation of Criminal Assets*, 46 Zbornik Radova 207, 2012; or Levi, M., Osofsky, L., *Investigating, Seizing and Confiscating the Proceeds of Crime, Crime Detection & Prevention Series*, Paper 61, London, Home Office Police Research Group, 1995

12 See: Vettori, B., Kambovski, V., Misoski, B., *Practitioners guide: Implementing Confiscation of the Proceeds from Crime in the Aftermath of the 2009 Criminal Code Reform*, OSCE, 2011

The importance of these principles has been also recognized by the EU' Parliament and Council, who has developed several legal documents related to foster the use of the confiscation as useful tool in protection of the EU financial interest and as a support to the fight against the corruption and other serious crimes within the EU member states. Latest development of the law in this field has moved one step forward with the enactment of the EU's Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.[13]

Having on mind Macedonian utmost political and societal interest – joining the EU and sharing same values regarding the fight against the crime, it is important to evaluate how far have Macedonian criminal justice system reached in addressing this Directive as part of its EU law harmonization process.

The following text will evaluate the level of harmonization of this Directive with Macedonian criminal justice system and will portray the current situation with the implementation of the confiscation of the proceeds and instrumentalities of the crime within the Macedonian criminal justice system. Finally, this article will detect several week points of the national legislation due to which the courts do not or rarely use this measure in the effective fight against the crime in Republic of Macedonia.

At the beginning of this text we will evaluate the current post of the Macedonian criminal justice system considering the confiscation of the proceeds and instrumentalities of the crime, following with the analysis of the EU Directive's provisions and finish with determining the reasons for such poor implementation in practice of this measure by the Macedonian Courts.

2. REGULATION OF THE CONFISCATION OF THE PROCEEDS AND INSTRUMENTALITIES FROM CRIME IN MACEDONIAN CRIMINAL CODE AND CRIMINAL PROCEDURE CODE

Confiscation of the proceeds and instrumentalities from crime in Republic of Macedonia, as regulated in the first Criminal Code in Republic of Macedonia from 1996, has had diverse character. The confiscation of the proceeds from crime has been treated as special criminal law measure, while the confiscation or more

[13] See: Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, OJ of the EU L127/39-50. Cosidering the EU experince, see also: Tofangsaz, H., *Confiscation of Terrorist Funds: Can the EU Be a Useful Model for ASEAN*, 34 UCLA Pac. Basin L.J. 149, 2017

appropriate "seizure" of the instrumentalities from crime has been regulated as a security measure.[14]

Within the Novelties of the Criminal Code from 2004, these two measures were regulated as separate criminal law measures, differing from the criminal law system of sanctions as defined within the Criminal Code. This meant that these measures were not treated as sanctions merely respecting the principle that no right can be derived from a crime. This legislative framework has appeared to be inefficient and it was necessary to be improved. In addition, following the international trends, together with the requirements contained in international conventions and EU standards the Novelties of the Criminal Code from 2009 have included extensive changes in the legal regime for confiscation. These changes of the Criminal Code from 2009 have included improvement of legal framework for confiscation of the proceeds from the crime, with additional definition of direct and indirect property gain obtained from crime, introduction of the extended confiscation and establishment of a specific crime related to the Illicit enrichment and concealment of property.[15]

These changes of the Criminal Code rested upon the principles set in the several international Conventions and EU Framework decisions. On international level the provisions from these Conventions have obliged the Macedonian legislator to promulgate Criminal code provisions regarding the use of confiscation as an effective tool in the fight against organized crime and fight against drug related crimes.[16]

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14 See: Kambovski, V., *Criminal Law, General Part*, Kultura, Skopje, 2005 (in Macedonian)

15 See: Kambovski, V., *Commentary to the Criminal Code*, 2-nd ed., Matica, Skopje, 2016 (in Macedonian)

16 These principles were set in the following international documents ratified by the Macedonian Parliament: The UN's "Vienna" Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed by Republic of Macedonia on 13 October 1993; The Council of Europe's "Strasbourg" Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed by Republic of Macedonia on 19 May 2000; The UN's "Palermo" Convention against Transnational Organized Crime, signed by Republic of Macedonia on 12 January 2005; The UN's Convention against Corruption, signed by Republic of Macedonia on 13 April 2007 and The Council of Europe's "Warsaw" Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed and ratified by Republic of Macedonia on 27 May 2009. While, the following European Union's Framework decisions were motivation to Republic of Macedonia to enact criminal law provisions regarding the confiscation as determined in: the Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of the Instruments of and the Proceeds from Crime; Framework Decision of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence; Framework Decision of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and Framework Decision of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders. See: Vettori, Kambovski, Misoski, *op. cit*. note 12, pp.10-25

However, the latest EU Directive regarding the confiscation of the proceeds and instrumentalities from the crime have moved the legislative base on a higher level in regard to the regulation of the confiscation, clarity of the legal provisions together with the procedural aspects of these measures. Due to this we think that it is necessary to provide a transposition type of analysis of this directive in the Macedonian Criminal Justice system in order to determine whether the Macedonian provisions are up to date to this EU directive or whether there are significant changes which should be undertaken by the Macedonian legislator in order to accept this EU directive into the national law.

3. ANALYSIS OF THE PROVISIONS OF THE DIRECTIVE 2014/42/EU OF 3 APRIL 2014 ON THE FREEZING AND CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CRIME IN THE EUROPEAN UNION

This article-to-article transposition analysis will be performed by direct correlation of the provisions of the Directive 2014/42/EU with the provisions of the Macedonian Criminal Code and Criminal Procedure Code.

3.1. Legal definitions

At the beginning of the analysis we will evaluate the level of harmonization between the legal definitions set up in the Directive 2014/42/EU and in the Macedonian Criminal Code. Considering the legal definitions in the Article 2 of the Directive 2014/42/EU we can conclude that Macedonian Criminal Code is up to date to the legal definitions for "proceeds", "property" and "instrumentalities", since Macedonian Criminal Code is having the same or similar definitions for these legal terms.

Hence, Macedonian legislator has defined within the Article 122 paragraph 16 of the Criminal Code[17] that the proceeds from crime shall imply to any property or benefit obtained directly or indirectly by committing the crime. This also includes proceeds of crime committed abroad, under the condition that at the time when the crime was committed, it was considered a crime under the laws of the country where it was committed and a crime under the laws of the Republic of Macedonia.

Unfortunately, Macedonian Criminal Code does not have clear definition regarding the proceeds for subsequent reinvestment or transformation of the direct proceeds from the crime, and this part is covered within the Article 97-a where the

[17] Official Gazette, No. 114/2009, *op. cit.* note 5

indirect confiscation is regulated. Due to this we think that Macedonian definition of "proceed" should be amended to the provision of the Directive of the Article 2, paragraph 2. In this fashion the legal definition would be more precise and distinct.

Macedonian legislator, has defined "property" more broadly, where unlike to the Directive's definition, Macedonian solution is as follows: "The term "property" shall mean money or other instruments for payment, securities, deposits, other property of any kind, tangible or non-tangible, movable or immovable, other rights to items, claims, as well as public documents and legal documents for ownership and operational assets in written or electronic form, or instruments which prove the right to ownership or interest in such property".[18] Since Macedonian definition is broader, we do not think that there is necessity for additional amendments to the Criminal Code regarding the acceptance of the legal definition from the Directive.

Finally, the "instrumentalities" of the crime are defined as: The term "instrumentalities" shall mean movable or immovable items, which are fully or partially used or intended to be used or resulted from committing a crime[19]. Difference from the legal definition of the Directive is in the part where Macedonian legislator uses the same word "instrumentalities" for the items which are result from the crime. Macedonian definition might deliver a dose of inconsistencies due to the fact that the items which have resulted of the crime might be considered as proceeds of the crime. Due to this we deem that this part of the Macedonian legal definition is obsolete and should be deleted.

3.2. Scope of confiscation

Considering the Scope of the Directive as regulated in the Article 3 it is expectable to have limited scope while the national provisions for confiscation have extended reach upon any increase in the property as result from a crime such as: stolen objects, money obtained from selling drugs, award for committed crime, received bribe, etc, together with the perpetrator's property, which has not been reduced because of the committed crime (tax evasion, forged documents for acceptance of debt, etc.), as well as illegally acquired rights and factual possibilities for realization of the proceeds of the crime.[20]

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18 See Article 122, paragraph 38, Criminal Code, Official Gazette, No. 114/2009, with latest amendments from 2017, Official Gazette 97/2017 from 31.07.2017. The Criminal Code from its enactment in 1996 has been amended more than 20 times

19 See: *Ibid*, Article 122, paragraph 39

20 See: Article 98 of the Criminal Code, *op. cit.* note 18

However, Macedonian Legislator, upon accession to the EU should take additional legislative action regarding the crimes of counterfeiting in connection with the introduction of the Euro as regulated within the Council Framework Decision 2000/383/JHA of 29 of May, 2000 or Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment. Together with this, Macedonian legislator should provide additional training to the public officials in exercising the confiscation related to the crimes which are already existing in the Criminal Code, in relation to the Council Framework Decisions: 2001/500/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; 2002/475/JHA on combating terrorism; 2003/568/JHA on combating corruption in the private sector; 2004/757/JHA on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; 2008/841/JHA on the fight against organized crime; and Directives of the European Parliament and of the Council: 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography; 2013/40/EU on attacks against information systems.[21]

3.3. Type of confiscation

Considering the types of the confiscation the Directive has more legally advanced solution where within the legal definitions the types of confiscation are explained. Namely direct, indirect and value confiscation are explained within the Article 2 of this Directive, while Macedonian legislator, besides providing the legal definition of these types of confiscation within the Article 122 of the Criminal Code, provides extensive explanation of this types of confiscation are regulated with the Articles 97 and 97-a of the Criminal Code.[22]

This is understandable, since these provisions are older than the provisions from the Directive and they contain vast explanation in order to serve as a commentary to the Macedonian courts for proper legal implementation of the confiscation. Hence, considering the Macedonian level of legal culture, we do not deem that these types of explanatory provisions within the Criminal code are redundant. With regard to this, we can distinct two types of confiscation.

[21] See: Article 3 of the Directive, *op. cit.* note 13, p. 45-46

[22] See: Criminal Code, *op. cit.* note 18

First type is property confiscation as elementary form of confiscation[23], where the Criminal Code's provision regulates the confiscation in general. While the second type is covered with a new provision,[24] which was introduced with the Law on changes and amendments to the Criminal Code from 2009,[25] and this type is practically the confiscation of indirect property gain which implies the property in which the indirect proceeds has been transformed, as well as the proceeds mixed with the lawfully obtained property and any other proceeds from the transformed or mixed asset.

In this sense similarly to the provisions of the Article 4 of the Directive, Macedonian legislator has regulated that the subject of confiscation can be both: property, proceeds or instrumentalities and value of these assets when the confiscation can't be conducted in a natural sense.[26] Value confiscation should be implemented in the cases when the actual property which is the true gain from the crime can't be confiscated (for instance, the perpetrator spent the stolen items or sold them, or even gave them as a gift, and the confiscation cannot be made from a third party!), but the appropriate value for this property can serve as and sufficient replace of this property.[27]

Theoretically this means that both types of confiscation are covered within the Macedonian Criminal Code, similarly to the provisions of the Directive: natural or so called property confiscation and value confiscation.

However, within the Article 97 of the Macedonian Criminal Code[28], Macedonian legislator has omitted to regulate the possibility for confiscation in the cases of trial in absentia, as regulated within the Article 4 paragraph 1 of the Directive. While within the Article 97, paragraph 3, same as the paragraph 2 of the Article 4 of the Directive, Macedonian Criminal Code covers the possibility for confiscation in cases when it is impossible to commence the criminal procedure.

This means that Macedonian Criminal Code should be amended in order to accept the possibilities to use the confiscation in cases when the defendant is tried in absentia.

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23 See: Article 97 of the Criminal Code, *op. cit.* note 18

24 See: *Ibid.*, Article 97-a

25 See: Official Gazette, No. 114/2009, *op. cit.* note 5

26 See: Article 98 of the Criminal Code, *op. cit.* note 18

27 See: Vettori, Kambovski, Misoski, *op. cit.* note 12, pp. 27-30

28 See: Official Gazette, No. 114/2009, *op. cit.* note 5

3.4. Confiscation from a third party

Macedonian Legislator has legal provisions which are regulating the confiscation from the third party. As regulated within the Article 98, paragraph 2 of the Criminal Code,[29] the property can be confiscated not only from the perpetrator, but also from third persons to whom the property was transferred without appropriate compensation. Within this paragraph the conditions for confiscation from a third party are set in manner where the confiscation is carried out for indirect and direct property or proceeds or instrumentalities, realized for a third party or are transferred to family members or third parties, if these people do not prove that they have provided adequate counter-value for the value of property gain/use.

In fact these provisions are in correlation with the provisions of the Article 6 of the Directive.

In addition, Macedonian legislator has provided one additional paragraph 4 of the Article 98 where it is stipulated that objects, which have been proclaimed to be cultural inheritance and natural rarity, as well as objects to which the damaged party has personal connection, are confiscated regardless if the third party had provided adequate counter-value.

Through these provisions, Macedonian legislator has introduced the transfer of the burden of proof[30] to the third parties in order to prove that they were in *bona fide* relationship with the perpetrator of the crime/seller of the assets. Furthermore, considering the paragraph 2 of the Article 6 from the Directive, Macedonian Criminal Code has the same legal solution, which states that in bona fide relationship only the value confiscation will be applied to the property of the defendant/seller while the bona fide parties can and will acquire the right to proprietorship to these assets. Due to this, we can conclude that considering the confiscation from a third party provisions from the Macedonian Criminal Code are fully compatible with the provisions of the Directive.

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[29] *Ibid.*

[30] See: Kambovski, *op. cit.* note 14, pp. 570. Also on the concept of the reversal or transfer of the burden of proof to the defendant in the cases of confiscation or extended confiscation as particularly complex theoretical concept see: Pasca, V., *Extended Confiscation Theory and Case* Law, Analele Universitatii din Bucuresti: Seria Drept 78 2014, or Levi, M., *Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey*, available at: [https://www.coe.int/t/dg1/legalcooperation/economiccrime/specialfiles/BestPractice2E.pdf] Accessed 15 February 2018 or - Simonato, M., *Confiscation and fundamental rights across criminal and non-criminal domains* Published online: 19 September 2017, ERA Forum (2017) 18:365–379 DOI 10.1007/s12027-017-0485-0, available at: [https://link.springer.com/content/pdf/10.1007%2Fs12027-017-0485-0.pdf] Accessed 15 February 2018

3.5. EXTENDED CONFISCATION

One of the most important novelties in the Criminal Code from 2009 introduced by Macedonian legislator has been the extended confiscation.[31] As regulated within the Article 98-a of the Criminal Code extended confiscation is applied only for several categories of crimes as regulated within the Criminal Code. First category is consisted of crimes committed as part of a criminal enterprise which is subject to imprisonment of at least 4 years. Second category is consisted of crimes related to terrorism and punishable with sentence of at least 5 years of imprisonment. The third category is consisted of crimes related to money laundering punishable with sentence of at least 4 years of imprisonment.

Additional condition for implementation of the extended confiscation is that the court must be convinced, in accordance to the specific circumstances and the evidence of the crime, that the asset is a result from the criminal activity and a criminal lifestyle of the defendant and is disproportional to the defendant's legal income. Subject of the extended confiscation is the property for which the perpetrator can't prove its legal origin and if it was acquired within a certain period of time before the court's conviction, but not longer than 5 years before committing the crime.

This Macedonian legal solution is on line with the older legal solutions, where the reversal of the burden of proof of the defendant was connected to specific time[32] line prior to the committed crime.[33] Instead of this, the Directive contains only the standard that the court is convinced based upon the facts and available evidence from the case that the property is disproportionate to the lawful income of the convicted person, together with the assertion that this disproportion is based upon the defendant's criminal conduct.[34] It is needless to mention that this legal provision is more precise and diminish the need for additional legal information about the standards of proof, reversal of the burden of proof to the defendant and similar problems that might rise with the practical implementation of this Directive into the member states national legal systems.

Due to the fact that the concept of the reversal of the burden of proof is already established into the Macedonian criminal justice system with these amendments to the Criminal Code of 2009, we do not think that there should be additional

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31 See: Article 98-a, Criminal Code, *op. cit.* note 18

32 See further readings at: Boucht, J., *Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: On Striking a Balance between Efficiency, Fairness and Legal Certainty*, 21 Eur. J. Crime Crim. L. & Crim. Just. 127, 2013

33 See: Vettori, Kambovski, Misoski, *op. cit*. note 12, pp. 35-38

34 See: Article 5, paragraph 1 of the Directive, *op. cit.* note 13

amendments to the Criminal Code in order to accept the exact legal wording from the Directive. However, we think that the period of 5 years should be reevaluated in the spirit of the Directive's provisions, since sometimes it is really difficult to establish the exact time frame when the crime has been committed, particularly in the cases when the defendant has a criminal lifestyle. In addition, this period might be problematic in some cases considering the stand point of the Macedonian legal culture and legal mentality particularly regarding the acquisition of the assets and the frequent nonbank payments.

Furthermore, Macedonian Criminal Code should update the list of the crimes for which extended confiscation is possible in coordination to the crimes listed within the paragraph 2, specifically lines (a) to (d) of the Article 5 of the Directive.

3.6. Freezing

Freezing of the property in Macedonian Criminal Justice system is generally considered as a procedural measure. This measure is regulated within the Criminal Procedure Code.

Freezing of the property is regulated within the measures for preserving the property during the criminal procedure within the Articles 194 till 204.[35] Particularly important article in this part is the Article 202 in connection with the Article 535 of the Criminal Procedure Code[36] which directly regulates the freezing of the property during the criminal procedure in order to secure the property for any subsequent confiscation. Macedonian Criminal Procedure Code has provided sufficient guarantees regarding the protection of the assets itself[37] and the defendant's rights regarding the protection of the assets together with sufficient guarantees regarding the third parties if the confiscation is from a third party[38] and in accordance to the safeguards provided in the Article 8 of the Directive. This is due to the fact that Macedonian Criminal Procedure Code has been enacted in 2010, and consist several improvements, particularly addressed to the EU Directives for protection of the defendants' rights.[39]

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35 See: Criminal Procedure Code, Official Gazette, No 150/2010

36 *Ibid.*

37 See particularly provisions of the Article 194 and subsequent articles from Criminal Procedure Code, *op. cit*. note 35

38 See Articles 525 till 541 of the Criminal Procedure Code, in coordination to the paragraph 2 of the Article 7, *Ibid*.

39 See: such as Directive 2010/64/EU on the Right to Interpretation and Translation; Directive 2012/13/EU on the Right to Information in Criminal Proceedings and Directive 2013/48/EU on the Right of Access to a Lawyer

Henceforward, Macedonian Criminal Procedure Code has additional amendments which are in final legal drafting procedure, which would provide addition improvements to these legal provisions, particularly to the provisions from the Article 194 of the Criminal Procedure Code[40] considering the improvement of the role of the specific state body for dealing with frozen assets. The legal position and the jurisdiction of the State Agency for Management of the Frozen Assets, at least on a legislative level, are compliant with the provisions of the Article 10 of the Directive.

4. PRACTICAL IMPLEMENTATION OF THE CONFISCATION AND FREEZING OF THE PROPERTY, PROCEEDS AND INSTRUMENTALITIES FROM CRIME IN REPUBLIC OF MACEDONIA

When analyzing the practical implementation of the confiscation and freezing of the property, proceeds and instrumentalities which have derived from crimes in Republic of Macedonia one must bear on mind that there are insufficient data and no available statistics which will depict the implementation of these measures into the criminal justice system.

Due to this fact in most cases the conclusions are questionable and not consistent with the actual situation. For example in some high profile cases, the courts provides press release that the court in the concrete case has confiscated assets from the defendants in net worth more than 9 million euros[41], and on the other hand there is no available data to confirm this information through the State Statistical Bureau, nor through the Agency for managing of the confiscated assets.[42] Furthermore we do not have any available statistical information regarding whether this confiscated assets were partly used for the indemnification requests by the damaged parties or they are simply confiscated and considered as an income to

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40 See: Criminal Procedure Code, *op. cit.* note 35

41 See for example the press release for the confiscation for 1 million euros in assets from only one of several co-defendants in the high-profile case "Bachilo": [https://faktor.mk/archives/18424?utm_source=rss&utm_medium=rss&utm_campaign=%25d1%2581%25d0%25bb%25d1%2583%25d1%2587%25d0%25b0%25d1%2598-%25d0%25b1%25d0%25b0%25d1%2587%25d0%25b8%25d0%25bb%25d0%25be-%25d1%259c%25d0%25b5-%25d1%2581%25d0%25b5-%25d0%25bf%25d1%2580%25d0%25be%25d0%25b4%25d0%25b0%25d0%25b2%25d0%25b0-%25d0%25b8%25d0%25bc%25d0%25be%25d1%2582%25d0%25be%25d1%2582] Accessed 15 February 2018

42 See: Annual reports from these state bodies available on: [www.stat.gov.mk] and [www.odzemenimot.gov.mk]

the state budget. Since there are no statistical data from the courts,[43] or from the other state agencies, we can only guess the number of cases where the confiscation has been used.

In this fashion it is interesting to note that on the web site of the Agency for managing of the confiscated asset, which by the provisions of the Law on Management of the Confiscated Assets[44] is obliged to manage this asset, to sell it and to provide revenue for the State, there no official data, or Annual Reports for the work performance of this Agency. Furthermore in one publicly available document – called Strategy for the period 2014-2016 there is information that the Agency has provided income to the State budget for over 2 million euros.[45] However in the subsequent document – Strategy for the period 2018-2020 there is no information regarding the previous period, similar to the previous report.[46]

From the overall impressions of the judges, we can conclude that that the confiscation is not a very popular measure, since most of the judges when answering why doesn't use confiscation more frequently provide several similar answers, such as: they do not have sufficient information regarding the defendant's assets, do not know the epilogue of the confiscated asset and/or they are not sure who is the real owner of the asset which should be confiscated.[47]

Due to these circumstances, in most of the cases judges use confiscation only in cases when the facts are undisputed that the asset is product from a crime, while they rarely use the provisions for extended confiscation or confiscation from a third parties. This means that the confiscation is usually present in cases when for the court it is obvious or without any hardship easy to determine the property, pro-

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43 See: Annual report of the biggest criminal Court in Republic of Macedonia, Basic Court Skopje 1, available at:
[http://www.vsrm.mk/wps/portal/osskopje1/] Accessed 15 February 2018

44 See: Law on management with confiscated property, property gain and seized objects in criminal and misdemeanour procedure, Official Gazette, No. 98/2008 of 4.8.2008, available at:
[http://www.slvesnik.com.mk/Issues/BE79420C2BA6AF4DA6B3A9F3E3DDC87F.pdf] Accessed 15 February 2018

45 See on the web page of the Agency:
[http://www.odzemenimot.gov.mk/VPP/Documents/%D0%A1%D1%82%D1%80%D0%B0%D1%82%D0%B5%D0%B3%D0%B8%D1%81%D0%BA%D0%B8%20%D0%BF%D0%BB%D0%B0%D0%BD%20%D0%BD%D0%B0%20%D0%90%D0%A3%D0%9E%D0%98%202012-2014.pdf] Accessed 15 February 2018

46 See: [http://www.odzemenimot.gov.mk/str%D0%B0t%D0%B5gii.aspx] Accessed 15 February 2018

47 Detected problems were raised by the Focus Groups consisted of judges and prosecutors for Evaluation and Presentation of the Toolkit for the Practitioners, Vettori, Kambovski, Misoski, *op. cit.* note 12, also see: Misoski, B., Petrovska, N., *Implementation of the Fair Trial Standards*, "Coalition All for Fair Trials", Skopje, Macedonia, 2017, pp. 34-36

ceeds or instrumentalities and that the concrete asset is in possession of the defendant. Reason for this is that in these cases judges do not enter into the complicated schemes of determining the proceeds of crime if they are mixed or transformed with the legally obtained asset, since they do not have proper evidence provided from the state institutions (or they are missing) such as extensive financial expert's opinions regarding these circumstances of the case. Furthermore the elaborate financial investigations are not very common in the court cases, and courts do not often deal with the determination of the property in these fraudulent crimes cases.[48] This conclusion can indirectly be drawn from the available statistical data for the cases which were adjudicated in front of the Macedonian courts available both from the State Statistical Bureau[49] and Court's Annual Reports[50].

Considering the epilogue of the confiscated asset, judges often use confiscation of asset which is easily transformed or given to the state institutions for further use, such as instrumentalities of the crime (particularly vehicles) which can be transferred and used *pro futuro* by the state bodies, while they are not very keen on use the confiscation in cases of real estate, due to the fact that in most of the cases it is not easy to establish the real value of the estate, and upon this to execute value confiscation. In some cases this situation is improved with the work of the State agency for Management of the Confiscated Asset, which usually sells these properties on public auctions.[51]

And finally, in many cases reason for infrequent use of confiscation is the determination of the ownership of the assets. In some cases judges do not have sufficient information regarding the real owner of the asset which should be confiscated. This is due to the fact that in some cases there are mortgages, multiple owners or other relations between the defendant and third parties which overburdens the possibility for confiscation of the asset by the court. In addition to these cases,

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48 However, in several high profile cases undertaken by the Prosecution for Organized Crime and Corruption, several multimillion assets were confiscated. See informational PPT from Macedonian Ministry of Justice:
[www.pravda.gov.mk/documents/konfiskacija_nova_0209010_2.ppt] Accessed 15 February 2018

49 See: [http://www.stat.gov.mk/PrikaziSoopstenie.aspx?rbrtxt=14] Accessed 15 February 2018

50 See: [http://www.vsrm.mk/wps/portal/osskopje1/sud/izvestai/svi/!ut/p/z1/pVJBbsIwEHxLDz4GLyWxnd4CpagQVImCSH1BieOElBCHxEDb19dQLpWKhdS97WpmZzxezHGEeRUfijzWhari0vRvnKx8eCTd_gDClwllEEwXw3Axeh6HnouXZwBcqQAwt_Dn3oVPRq4LbAIhe531IRgCZXM_ABjS2_gWAL_F_xV9Rsn_9I0At8czPgMs7zc_ULzvdjzAXKhKyw-No3qflIVYbTcI2n2KoFZC6ipGcJCtLhCkWer5wqWOK6HnuMQnTsxo5nhdQTORycRPyWnxfTMdTHPM61ivnaLKFI5uoi4xt9kePcEFYLsL24ZT8CaZvFTJzxEGVdJjxmkjM9nIprNvzHitdd0-IEBwPB47uVJ5KTtCbRH8RVmr1kT3G4nr7cJU9BXKpbOZsc9emd99A7r7MFE!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?uri=nm%3Aoid%3AZ6_90D61BC0LOK780AMUELUGIJL54] Accessed 15 February 2018

51 See: [http://www.odzemenimot.gov.mk/%D0%BEgl%D0%B0si.aspx] Accessed 15 February 2018

when there is request for indemnification from the damaged party from the confiscated asset, then this asset is rarely used for indemnification for the damaged party and instead to this the damaged party is instructed to exercise his/hers right in a civil litigation procedure[52].

Additional problems within the practical implementation of the Criminal Code's provisions for confiscation can be based upon the normative clarity of the legal provisions. In this fashion it is highly notable the standards of grounded belief that the property was obtained from crime in the case of extended confiscation used in the Criminal Code. This is due to the fact that "grounded belief" is not common standard of suspicion or proof used in Macedonian Criminal Code and Criminal Procedure Code which operates with the standards: "grounds for suspicion", "grounded suspicion" and proof "beyond reasonable doubt"[53].

Bearing on mind the above mentioned reasons and problematic experience regarding the implementation of the confiscation it is of essential importance to introduce into the national criminal justice system the last set of the provisions of the Directive. This means that in order to increase not only the implementation of the confiscation by the Macedonian courts but also to increase its visibility by the public it is necessary to establish proper rules for statistical evaluation of these measures by the Macedonian courts.

Besides gathering of these statistical data it is also important to provide higher visibility of the work of the Agency for Management of the Confiscated Assets in order to show to the public that the crime does not pay and that the Macedonian law enforcement agencies are effective and efficient in cutting or eliminating financial profits derived from crime to criminals. This means that in the next period Macedonian legal system must introduce strict rules regarding the implementation or transposition of the Article 11 of the Directive.

However even if we establish effective tools for statistical reporting and data gathering regarding the implementation of the confiscation, these legislative changes will not provide immediate result, but will improve the overall perception by the public regarding the effectiveness and fairness of the Macedonian criminal justice system on longer stages. Hence, these tools on longer terms, comparatively speaking, should provide multilateral benefit to Macedonian society.

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52 See further readings at: Kalajdizev, G., Misoski, B., Ilikj, D., *Effective Defence in Criminal Proceedings in the Republic of Macedonia*, Foundation Open Society – Macedonia, 2014

53 See: Kalajdizev G., Buzarovska G., Misoski B., Ilikj, D., *Criminal Procedure Law*, Faculty of Law Iustinianus Primus, Skopje, 2015

On one hand these tools will increase the efficiency of the criminal justice system, due to the fact that actors in the criminal justice process, particularly judges, will have clear vision where the confiscated asset has finished and what is the societal benefit from their work. This fact should endow judges and other law enforcement agencies to put additional effort in investigating the proceeds from crime and ultimately to use the confiscation more frequently. While, the second benefit would be through the fact that the message will be sent to the criminals that in most of the cases crime will not pay, which might be detrimental for undertaking their future criminal activities.

Finally, in most of the cases if the criminal assets is discovered during the criminal procedure and later on confiscated from the defendants, from this asset, property of proceeds from the crime is also possible to indemnify the damaged persons from the crimes. In this sense these persons would increase their trust into the criminal justice system and consider it as just, effective and efficient.

5. CONCLUSION

As a candidate-member state to the EU Republic of Macedonia is in ongoing process of harmonization and adaptation of the national legal system to the EU law. In this process, one of the essential stapes is building strong democratic capacities and institutions and structural and organized reaction to the fight against the crime and its prevention. Confiscation of the instrumentalities and assets derived from a crime has shown to be one of the most effective tools in reaching the above mention goals. Even more, these benefits from the confiscation has been recognized by the EU, through enactment of several legal texts, of which, the latest and most important one is the Directive 2014/42/EU for establishment of the European Framework for Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.

As we have analyzed in the text, this Directive is partially implemented into the Macedonian criminal justice system. In order to reach its goals, Macedonian legislator needs to provide several amendments to the Criminal Code, particularly addressing to the scope of the Directive. Furthermore, Macedonian Criminal Code should be amended in order to accept the possibilities to use the confiscation in cases when the defendant is tried in absentia, together with the update of the list of the crimes for which extended confiscation is possible in coordination to the crimes listed within the paragraph 2, specifically lines (a) to (d) of the Article 5 of the Directive.

From the practical stand point of the implementation of the confiscation into the Macedonian criminal justice system we can conclude that there are insufficient or improper legal provisions considering the data gathering for the implementation of this measure by the courts. Furthermore, due to poor data gathering and reporting process for the future use of the confiscated assets or proceeds or instrumentalities from the crimes we can't conclude whether this measure is efficient. Henceforward we can't provide proper assumptions for the effects of the implementation of this measure by the courts, how frequently they use this measure, or whether the implementation is properly conveyed.

Hence, we deem that is of utmost importance to improve both legal framework and the operational capacity of the Agency for dealing with confiscated assets. Addressing to these issues, Macedonian criminal justice system will not only accept the provisions from the Directive, but also should increase the implementation of the confiscation by the courts, and by this, ultimately, will increase the effectiveness and efficiency of the criminal justice process and would improve its determination towards reaching the standard that "crime does not pay" which should provide detrimental effects to the perpetrators of the crimes while considering undertaking specific criminal activity.

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CHALLENGES IN CROSS-BORDER TRANSFER OF PRISONERS: EU FRAMEWORK AND CROATIAN PERSPECTIVE[1]

ABSTRACT

Framework Decision 2008/909/JHA on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty is an EU instrument intended to facilitate the transfer of prisoners between the EU members, allowing at the same time the possibility of the transfer without the prisoner`s consent. Even though the purpose of this instrument, as stated in recital 9, is to facilitate the social rehabilitation, its application can raise questions regarding the fulfilment of this goal and regarding the protection of the fundamental rights in the transfer proceedings. That has been recognised on the EU level, hence research and analysis of the implementation of FD 909 have recently been conducted, especially concerning the detention conditions across the EU and limits to the mutual trust presumption in the light of the CJEU judgement Aranyosi/ Căldăraru.

The paper analyses some key issues regarding the application of the principle of mutual recognition in this area: possibilities of social rehabilitation of the sentenced person, procedural rights in the transfer proceedings, possible violations of the prohibition of torture, inhuman and degrading treatment due to inadequate detention conditions in the executing member state. The paper also analyses the connection between this Framework decision and the Framework decision on the European arrest warrant. The special attention is given to the relevant jurisprudence of the Court of Justice of the EU. Along with the EU framework, the paper provides an overview of the Croatian legislation and jurisprudence regarding the mentioned subject.

Keywords: *European arrest warrant, mutual recognition, social rehabilitation, transfer of prisoners*

1. INTRODUCTION

Within the framework of the third pillar, the EU undertook more intensified legislative activities relating the area of detention in 2008 with the adoption of the instrument of mutual recognition of custodial sentences and measures involv-

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ing the deprivation of liberty. This was preceded by the adoption of the first and most important instrument of mutual co-operation in criminal matters between the EU member states: the Framework Decision on the European Arrest Warrant in 2002.[2] After FDEAW, a package of coherent and complementary framework decisions was adopted in 2008:[3] Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to the judgments imposing custodial sentences or measures involving the deprivation of liberty,[4] Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition of probation decisions and alternative sanctions,[5] Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to the decisions on supervision measures as an alternative to provisional detention.[6] The application and functioning of these instruments, especially of the European Arrest Warrant, raised the question of relationship between the principle of mutual trust and the protection of fundamental human rights of persons concerned, especially the rights guaranteed under Article 4 of the Charter of Fundamental Rights of the European Union (CFREU).[7] This issue has been emphasised and discussed as a result of the situation in the prison systems in some EU member states (MS) which led to the systematic violations of Art. 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) established in the jurisprudence of the European Court of Human Rights (ECtHR).

Focus of this paper is on the Framework decision on the transfer of prisoners. Although almost 10 years have passed since it was adopted, given the implementation deadline and the practical experience of the MSs, the effects of its application can be seen and analysed only up until recently. Furthermore, the Court of Justice

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2 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190 (FDEAW)

3 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM(2014) 57 final, Brussels, 5.2.2014 p. 5 [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52014DC0057] Accessed 10 April 2018

4 Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty [2008] OJ L 327 (FD on transfer of prisoners)

5 Council Framework Decision 2008/947/JHAon the application of the principle of mutual recognition of probation decisions and alternative sanctions [2008] OJ L 337

6 Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294

7 Charter of Fundamental Rights of the European Union [2012] OJ C 326 (CFREU)

of the European Union (CJEU) in 2106 delivered the first judgement relating to the interpretation of FD on the transfer of prisoners in *Ognyanov* case[8] (regarding the law governing the enforcement of the sentence) and two more judgements in 2017, *Grundza*[9] (interpretation of the condition of double criminality) and *van Vemde*[10] (interpretation of the concept of 'issue of the final judgment' under the transitional provision).

2. TRANSFER OF PRISONERS WITHIN EU

2.1. Key issues regarding the Framework decision on the transfer of prisoners and its implementation

Framework Decision on transfer of prisoners is an EU instrument intended to facilitate the transfer of prisoners between the EU member states superseding other international legal instruments in this area.[11] The most arguable issue under this document in relation to earlier legislation is the introduction and extension of the possibilities of the transfer without the prisoner`s consent.

This FD should have been implemented by 5 December 2011, but only five MSs have transposed it into national legislation by that date, and in 2014, two years after the implementation date, 10 MSs still did not transpose it. Today, the implementation of this instrument is still ongoing in Bulgaria, whereas all other MSs have transposed it.[12]

The principle of mutual recognition, *inter alia*, aims to enhance the protection of individual rights and to facilitate the process of rehabilitating offenders, and this FD purports both of these tendencies by declaring social rehabilitation as a main purpose of this instrument (Article 3(1)) and by observing the obligation to

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8 C-554/14, *Atanas Ognyanov* [2016] ECLI:EU:C:2016:835

9 C289/15, *Jozef Grundza* [2017] ECLI:EU:C:2017:4

10 C582/15, *Gerrit van Vemde* [2017] ECLI:EU:C:2017:37

11 It replaces the European Convention on the transfer of sentenced persons of 1983 and the Additional Protocol thereto 1997; the European Convention on the International Validity of Criminal Judgements of 1970; Title III, Chapter 5 of the Convention of 1990 implementing the Schengen Convention of 1985 on the gradual abolition of checks at common borders; and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 1991. Working Group Report, 9 May 2016, Brussels, Belgium, EuroPris FD 909 Expert Group, p. 5, [http://www.europris.org/file/europris-framework-decision-909-expert-group/] Accessed 29 March 2018

12 European Judicial Network, Status of implementation of Council Framework Decision 2008/909/JHA of 27 November 2008, [https://www.ejn-crimjust.europa.eu/ejn/EJN_library_statusOfImpByCat.aspx?CategoryId=36] Accessed 29 March 2018

respect the fundamental rights (Article 3 (4)). Nevertheless, in some situations, the unreserved application of the principle of mutual recognition to custodial sentences and measures involving the deprivation of liberty can raise problems in relation to these two tendencies, *i.e.*, it can hinder social rehabilitation and the protection of fundamental rights. The report of the Commission on the implementation of FDs related to detention, ECtHR and CJEU case law, as well as some research studies revealed and highlighted some problematic issues in that direction, regarding the problems of non-consenting transfer, material detention conditions and violation of Article 4 CFREU, sentence execution modalities and implementation modalities.[13] In view of the above, some of the detected issues in the implementation of this FD will be analysed in the following chapters.

2.2. Overview of the Croatian legislation on the transfer of prisoners

FD on the transfer of prisoners was transposed into the legal order of the Republic of Croatia through the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (hereinafter: Act on Judicial Cooperation) in 2013.[14] Title VII of the Act regulates the recognition and enforcement of judgments imposing custodial sentences or measures involving the deprivation of liberty.

County courts are deemed competent authorities for the transfer decisions. The county court covering the territory where the person concerned resides or is domiciled, or alternatively, where the family of the sentenced person resides or is domiciled, is competent and responsible for receiving the decisions of foreign judicial authorities**.** The county courts are also competent for forwarding a judgment in the case of decisions issued by the same court and those issued by municipal courts within their territorial jurisdiction.

Article 89 requires that for the recognition of a judgement imposing a custodial sentence condition of double criminality be met for all criminal offences.[15] The Republic of Croatia notified the General Secretariat that it would not apply Article 7 (1) of FD which enables the recognition of a judgement without the verifica-

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13 Meysman, M., *Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems*, Academy of European Law –Improving conditions related to detention The role of the ECHR, the Strasbourg court and national courts, 25-26 February 2016, Strasbourg, ERA, p. 4, [https://biblio.ugent.be/publication/7136169] Accessed 26 April 2018

14 Act on Judicial Cooperation in Criminal Matters with Member States of the European Union, Official Gazette 91/10, 81/13, 124/13, 26/15, 102/17

15 Cf. Garačić, A., *Zakon o pravosudnoj suradnji u kaznenim stvarima s državama* članicama *Europske unije u sudskoj praksi*, Rijeka, 2015, p. 333

tion of double criminality for the catalogue of 32 criminal offences.[16] Nonetheless, when deciding on the recognition of a judgement, the courts refer to Art. 10 of the Act as a general provision which excludes the verification of double criminality for the catalogue of 32 criminal offences.[17]

The Croatian legislator implemented the possibility of transfer without the consent of the sentenced person in accordance with the provisions of FD. However, in terms of the grounds for the refusal of recognition, the Act on Judicial Cooperation distinguishes mandatory and optional grounds despite the fact that FD on the transfer of prisoners, unlike FDEAW, introduces only optional grounds for non-recognition and non-enforcement of the decision.[18]

The amendment to the Act of 2015 prescribed the obligatory detention of the person located within the territory of the Republic of Croatia when deciding on the recognition of a foreign judgement imposing a custodial sentence of five years or a more severe punishment, and thus resolved the doubts that existed in the practice regarding the application of Art. 123 (2) of the Criminal Procedure Act.[19]

Some specific issues regarding the national legislation and practice on the transfer of prisoners will be analysed further in the paper.

3. SOCIAL REHABILITATION IN THE FOCUS OF FD 909

3.1. Social rehabilitation as the main purpose of FD 909?

Social rehabilitation of the sentenced person is placed into focus of FD 909 as its main goal and the leading principle.[20] However, this instrument of judicial coop-

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16 Notification by Croatia on the implementation of the Framework Decision on Transfer of prisoners, 12335/14, Brussels, 17 September 2014, [https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=1386] Accessed 26 April 2018

17 Krbec, I., *Priznanje i izvršenje stranih odluka prema Zakonu o pravosudnoj suradnji u kaznenim stvarima s državama* **članicama** *Europske unije*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 21, broj 2/2014, p. 417. In case *Grundza* CJEU stated that the condition of double criminality must be considered to be met, in a situation where the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State. *Grundza*, par. 55

18 See Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, 2017, p. 290

19 Criminal Procedure Act, Official Gazette 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017. Cf. Krbec, *op. cit.* note 18, p. 434

20 Number of the FD's provisions invoke this aim (Recital 9, Articles 3, 4(2), 4(4))

eration, as some authors emphasised, contains some elements that are contrary to the philosophy of reintegration.[21]

Firstly, the transfer under this FD is by its nature a quasi-automatic instrument, *i.e.,* not dependent on anything else but the decision of the initiating member state (MS).[22] Both the executing state and the sentenced person can request the initiation of the transfer proceedings but it does not impose any kind of obligation on the issuing state to initiate the procedure and forward the judgement to the executing state (Art. 4(5)). Some researches pointed to the inconsistencies in the national legislations even in relation to the possibility of initiating the procedure.[23] Although the issuing state, before it decides to forward the judgement, should be satisfied that the transfer will serve the purpose of facilitating social rehabilitation, there is no mechanism of control over the assessment of the issuing state as to whether the transfer would actually serve this purpose. The executing state may, during consultations with the issuing state, present the competent authority of the issuing state with a reasoned opinion that the enforcement of the sentence in the executing state would not serve aforementioned purpose. This opinion can be a reason for the withdrawal of the certificate by the issuing state but, as it is explicitly stated (recital 10), it does not constitute the grounds for the refusal of social rehabilitation.

More disputable issue regarding the aim of facilitating the social rehabilitation is the fact that FD provides for the possibility of the transfer without consent of the sentenced person.[24] According to Art. 6, non-consenting transfer is possible to the state of nationality in which the sentenced person resides, to the state to which he or she will be deported when released upon the enforcement of the sentence and to the state to which he or she has fled or otherwise returned.

It is argued that the interest of the member states in reducing the costs is the main reason behind the rhetoric of this FD on providing the best possible opportuni-

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21 De Wree, E., Vander Beken, T., Vermeulen, G., *The transfer of sentenced persons in Europe: Much ado about reintegration*, Punishment Society, 2009, 11, p. 124

22 De Bondt, W., Suominen, A., *State Responsibility When Transferring Non-consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from the Asylum Case Law*, European Criminal Law Review, 5(3) 2016, p. 357

23 Marguery, T., *Part VI Conclusions and Recommendations*, in Marguery, T. (ed), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU, Transfer of Judgments of Conviction in the European Union and the Respect for Individual's Fundamental Rights*, 2018, p. 8, [https://euprisoners.eu/wp-content/uploads/sites/153/2017/11/EUPrisoners-Part-VI-Conclusions-and-recommendations.pdf] Accessed 26 April 2018

24 Additional Protocol to Convention on transfer of Sentenced Persons provided for the non consenting transfer in limited circumstances but it was not ratified by all EU MS. See Klimek, *op. cit.* note 20, p. 278

ties for social reintegration of the sentenced person. The efforts for resocialisation which take place against the will of the individual have only minor prospects for success[25] According to a research study, the prisoners perceive transfer as beneficial only if it contributes to the reduction of their incarceration time, and family relations (as a relevant element for the enhancement of social rehabilitation) are listed as a second argument for transfer.[26] The problem of achieving this aim is even greater if considered in the context of inadequate detention conditions in some EU MSs which can lead to the violation of Article 4 CFREU.[27]

Art. 103 (2) of the Croatian Act on Judicial Cooperation defines social rehabilitation as the main purpose but it does not set forward any specific criteria on the factors relevant for the assessment of this purpose when deciding on forwarding the judgement.[28] However, it prescribes the elements that should be taken into consideration by the Ministry of Judiciary in cases when the consent of the Ministry for the recognition of the judgment is required: if the sentenced person or members of his or her family have domicile/residence in the Republic of Croatia, if he or she owns any intangible property in the Republic of Croatia, and any other personal and social circumstances that link the sentenced person to the Republic of Croatia.

3.2. Enforcement of the sentence

One of the most important issues of the transfer of prisoners is the question of law applicable to the enforcement of the sentence. The modalities of the enforcement of the sentence, *i.e.* the possibilities of the remission of the sentence depend on these rules, and this can be a decisive element for the issuing state when deciding on forwarding the judgement. These elements, especially the rules on early and conditional release, are the key factors in assessing the benefits of the prisoner`s

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25 Ambrož, M., *Transfer zapornikov znotraj EU - res v imenu socialne reintegracije?* Revija za kriminalistiko in kriminologijo, Ljubljana, 63, 2012, issue 3, p. 197

26 Durnescu, I., Montero Perez de Tudela, E., Ravagnani, L., *Prisoner transfer and the importance of 'release effect'*, Criminology & Criminal Justice Vol 17, Issue 4, pp. 450 – 467, [http://www.cep-probation.org/paper-prisoner-transfer-and-the-importance-of-release-effect/] Accessed 26 April 2018

27 *Infra* 5.1.

28 See European Union Agency for Fundamental Rights, *Country study for the project on Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial - Croatia*, May 2015, p. 15, [http://fra.europa.eu/sites/default/files/fra_uploads/criminal-detention-country_hr.pdf] Accessed 26 April 2018

transfer. Therefore, they should be fully informed on the legal consequences of the transfer.[29]

European Commission recognised the difference between MSs' laws on the enforcement of custodial sentences as a potential obstacle for the successful functioning of the Framework Decision.[30] The problem may occur when the executing MS has a more lenient system of enforcement of sentence, especially the system of early release, than the issuing MS.[31]

FD on the transfer of prisoners in Art. 17 specifies that the procedures for the enforcement of the sentence including the grounds for early or conditional release are governed by the law of the executing State. This raises the question of the division of competences between the issuing and the executing MS.[32]

CJEU had the opportunity to interpret this provision for the first time in *Ognyanov* case.[33] The referring court asked CJEU whether this article permits the executing state to grant the sentenced person remission of his sentence on account of work he has done while being held in detention in the issuing state although the competent authorities of the issuing State did not, in accordance with the law of that state, grant such a reduction of the sentence.[34] CJEU concluded that "the law of the executing state can apply only to the part of the sentence that remains to be served by that person, after that transfer, on the territory of the executing State."[35]According to the Advocate General Bot's opinion, the executing state cannot substitute its own laws on the enforcement of sentences with those of the issu-

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29 Cf. Ddamulira Mujuzi, J., *The Transfer of Offenders between European Countries and Remission of Sentences: A Comment on the Grand Chamber of the Court of Justice of the European Union's Judgment in Criminal Proceedings against Atanas Ognyanov of 8 November 2016 Dealing with Article 17 of Council Framework Decision 2008/909/JHA*, European Criminal Law Review, Volume 7 (2017), p. 301

30 European Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, Brussels, 14.6.2011, p. 6, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0327] Accessed 26 April 2018

31 *Ibid.*

32 Case C-554/14, *Atanas Ognyanov, Opinion of Advocate General Bot* [2016] ECLI:EU:C:2016:319, par. 143 – 150. See Montaldo, S., *Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov*, European Papers, Vol. 2, 2017, N0 2, p. 712 [http://www.europeanpapers.eu/en/europeanforum/judicial-cooperation-transfer-of-prisoners-offenders-rehabilitation-comment-on-ognyanov] Accessed 26 April 2018

33 *Ognyanov case*, par. 54-70

34 *Ibid*., par. 30

35 *Ibid*., par. 40

ing state, even if its own legislation is more favourable to the person concerned.[36] Despite the fact that this FD has not been implemented in the national law, it supersedes the national law even if the national law is more lenient towards the offender.[37]

Some authors argue that the decision not to take into account the time spent working in the issuing MS, and therefore, not to consider the law of the executing MS, could be interpreted as contrary to Art. 17(1).[38] But, in the context of this case one must not overlook the fact that the authorities of the issuing MS expressly stated that their law did not permit the reduction of sentence on those grounds.[39] Reducing the sentence in situation like this could deter MSs from transferring the prisoners to some other MSs and thereby defeat the objective of prisoner transfer.[40] AG Bot stressed that the focus on the remission of sentence at issue should not obscure the fact that Mr Ognyanov's transfer is in itself intended to be more favourable to him, in terms of his social rehabilitation.[41] Even though AG correctly stated that serving the sentence within the prisoner`s own social environment favours social rehabilitation, we must not ignore the fact that, in the prisoner`s perspective, the real duration of sentence is a very important element as well. In regard to the transfer without consent and without taking into account the prisoner`s opinion, the achievement of the aim to enhance social rehabilitation in case of the "forced transfer" of the prisoner to the executing state with a more stringent system of enforcement of sentence (early release) is indeed questionable.

According to Art. 17(3), the issuing state must be informed, upon its own request, about the applicable provisions on a possible early or conditional release, and if it does not agree with these provisions, it may withdraw the certificate. If the issuing state does not request to be informed, it can be assumed that it accepts the modalities of the enforcement of the sentence in the executing state. On the other hand, the absence of the request can raise the question over the real reasons behind the issuing state's decision to forward the judgement and certificate.[42] In fact, the issu-

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36 *Ognyanov case*, *Opinion of AG Bot*, par. 150

37 Ddamulira Mujuzi, *op. cit.* note 31, p. 302

38 Munoz de Morales Romero, M., *The role of the European Court of Justice in the execution of sentence*, in: Bernardi, A., *Prison overcrowding and alternatives to detention, European sources and national legal systems*, Napoli, 2016, p. 107

39 *Ognyanov case*, par. 22

40 Cf. Ddamulira Mujuzi, *op. cit.* note 29, p. 302

41 *Ognyanov case*, *Opinion of AG Bot*, par. 140

42 Munoz de Morales Romero, *op. cit*. note 38, p. 108

ing state could use transfer as a tool for reducing the number of foreign prisoners by routinely sending them back to their country of origin.[43]

The fact that some MSs have not properly implemented the obligation to provide information upon request before the transfer,[44] makes the issuing state`s decision on forwarding the judgement more difficult, and it can eventually lead to ineffectiveness of this instrument. FD strives to raise effectiveness of the transfer by providing the possibility that MSs, in deciding on early and conditional release, take into account the relevant provisions of the issuing state.

4. PROCEDURAL RIGHTS IN TRANSFER PROCEEDINGS

Another relevant issue regarding the transfer of sentence is the scope of the guaranteed procedural rights and the possibility of their realisation in transfer proceedings. These rights include the right to information on the transfer procedure, the right to interpretation and translation, the right to legal assistance in the issuing and the executing state, the rights concerning the procedure of obtaining the consent or opinion of the person concerned and the right to revoke consent.[45]

The directives adopted under the Stockholm Programme which guarantee procedural rights for the suspects and the accused do not apply to the transfer proceedings under this FD. Even though several proposals to the Directive 2010/64 on the right to interpretation and translation[46] aimed at ensuring translation of the prison rules, they were not adopted by the Council with the explanation that the rights guaranteed under Art. 6(3) ECHR do not apply per se to the enforcement of a sentence.[47] Since this Directive, together with the Directive 2012/13 on the right to information[48] and the Directive 2013/48 on the right to access to a lawyer[49] do not exclude explicitly the surrender for execution of the sentence from

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43 Cf. Klimek, *op. cit.* note 18, p. 267

44 Report on implementation, *op. cit*. note 3, p. 9

45 See European Union Agency for Fundamental Rights, *Criminal detention and alternatives: fundamental rights aspects in EU crossborder transfers,* Luxembourg, 2016, pp. 83 – 98 (Hereinafter: FRA Study) [http://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border] Accessed 26 April 2018

46 Directive 2010/64/EU of the European Parliament and of the Council of 22 May 2012 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1

47 Cras, S., De Matteis, L., *The Directive on the Right to Interpretation and Translation in Criminal Proceedings Genesis and Description*, Eucrim 4/2010, p. 158

48 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2010] OJ L 142/1

49 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on

their scope, it may be assumed that they apply to both prosecution and enforcement EAWs.[50] The situation is different with the Directive 2016/1919 on legal aid for the suspects and the accused which explicitly states that the provisions of the Directive regarding legal aid in the issuing State do not apply to EAWs issued for the purpose of the execution of a sentence.[51] This is explained by the fact that the requested persons have already had the benefit of access to a lawyer and possibly legal aid during the trial that led to the sentence concerned.[52]

FD on the transfer of prisoners does not address the right of the sentenced person to the interpretation assistance or the translation of proceedings.[53] Furthermore, it does not provide for a right to legal assistance in the issuing state, and, as far as the executing state is concerned, this right is guaranteed only for the situation when the sentenced person renounces the entitlement to the specialty rule. FD does not address the question of the procedure of obtaining informed consent or opinion or withdrawal of consent, either. Hence, it is on the national law to determine whether it will provide these procedural rights or not in transfer proceedings.[54] From the recent study it follows that MSs are still in the process of establishing the rules on transferring prisoners and that further safeguards are needed to ensure the overall fairness of the transfer process. In that sense, the procedural Directives could be used as a guidance in establishing the minimum rules for the procedural rights in the transfer proceedings.[55]

Under the Croatian Act on Judicial Cooperation there is no formally established procedure to inform the sentenced person of the option to transfer the judgement and to obtain the informed consent before forwarding the judgement. Informa-

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the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1

50 Marguery, T., van den Brink, T., Simonato, M., *Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947*, in, Marguery, *op. cit.* note 23, p. 15, p. 19 [https://euprisoners.eu/wp-content/uploads/sites/153/2017/11/EUPrisoners-Part-III-limitations-to-MR.pdf] Accessed 26 April 2018

51 Art. 5 Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1

52 Cras, S., *The Directive on the Right to Legal Aid in Criminal and EAW Proceedings Genesis and description of the Sixth instrument of the 2009 Roadmap*, Eucrim, 2017/1, p. 41-42

53 It only imposes an obligation on the issuing state to inform sentenced persons, in a language they understand, that it has been decided to forward the judgment together with the certificate (Art 6 (4)) and that certificate shall be translated into the official language of the executing sate

54 FRA Study, *op. cit.* note 45, p. 89

55 *Ibid.*, 98

tion is provided upon an individual request from the Ministry of Judiciary.[56] The Act itself does not prescribe the right to legal aid, the right to the assistance of an interpreter and translation. However, the provisions of the subsidiary legislation which provide for these rights (primarily the Criminal Procedure Act) *mutatis mutandis* apply. The Act does not mention the possibility to revoke the consent, either. According to *Krapac,* since the consent of the sentenced person represents his own action directly affecting the purpose of the transfer proceedings, in analogy with the relevant provisions of the CPA, valid consent cannot be revoked.[57] However, concerning the purpose of social rehabilitation, the possibility of withdrawal of consent under certain circumstances should be granted.[58]

In its case law, the Supreme Court referred to procedural rights in the transfer proceedings. It thus emphasised that the provisions of the Act do not foresee the possibility of holding a hearing in the presence of the defence counsel of sentenced person when deciding on the recognition of judgement nor is this procedural action envisaged in the subsidiary law.[59] Furthermore, the procedural rules of the issuing state law on the basis of which the judgment is rendered are not relevant for the decision on the recognition of a foreign judgment (unless in the event of a trial *in absentia*) and the domestic court is not authorised to examine such a judgment according to the procedural rules of the Croatian law.[60]

5. MATERIAL DETENTION CONDITIONS AS OBSTACLE FOR TRANSFER OF PRISONER

5.1. Article 4 CFREU/Article 3 ECHR and principle of mutual trust

One of the open issues in the application of judicial cooperation instruments, particularly in the application of the European Arrest Warrant, is the relationship between the principle of mutual trust and the protection of fundamental human rights,[61] especially the rights guaranteed in Art. 4 CFREU and Art. 3 ECHR, *i.e.* the prohibition of torture, and inhuman and degrading treatment. Inadequate detention conditions and overcrowding in some EU member states can undermine

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56 Country study - Croatia, *op. cit.* note 28, pp. 7-8

57 Krapac, D., *Međunarodna kaznenopravna pomoć*, Zagreb, 2006, p. 139. For opposite view of the Supreme Court see *ibid.*

58 Cf. FRA Study, *op. cit.* note 45, p. 98

59 Supreme Court of Republic of Croatia, Kž-eun 15/16-8, 22 March 2016

60 Supreme Court of Republic of Croatia, I Kž 186/14-6, 23 April 2014

61 Cf. Pleić, M., *Pritvor u pravu Europske unije,* Zbornik radova s međunarodnog znanstvenog savjetovanja "Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija", Split, 2017, p. 277

the principle of mutual trust and the effective judicial cooperation between MSs.[62] It should also be taken into consideration that FD on the transfer of prisoners could cause considerable challenges to the prevention of ill-treatment.[63]

Existing instruments of the third pillar related to the issues of detention do not include the general fundamental rights` non-execution ground for the executing MS,[64] but nonetheless, several MSs introduced these grounds for non-execution into their implemented legislation.[65] In the recent years, jurisprudence of CJEU has been showing signs of moving towards the recognition of the grounds for non-execution on the basis of a breach of the requested person's fundamental rights in the issuing MS. A turning point was made firstly in the area of the common asylum system (*N.S.*)[66], with the rejection on the part of CJEU of the conclusive presumption of fundamental rights` compliance by the EU MSs,[67] after which *AG Sharpstone* in its opinion in *Radu* case reached the same conclusion in relation to the Area of Freedom, Security and Justice.[68] Finally, the end of automaticity in judicial cooperation in the criminal matters was confirmed by the CJEU ruling in joint cases *Aranyosi* and *Căldăraru.*[69] The CJEU breakthrough ruling confirmed that mutual trust does not imply blind trust,[70] thus inserting a subjective element

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62 In the last few years ECtHR identified structural problems in prison systems of several EU MSs, Bulgaria, Romania, Hungary and delivered pilot-judgements. See *Neshkov and Others v. Bulgaria* (2015) App. No. 36925/10, *Varga and Others v. Hungary* (2015) App. No. 14097/12, *Rezmiveș and Others v. Romania* (2017) App. No. 61467/12

63 Tomkin, J., Zach, G., Crittin, T., Birk, M., *The future of mutual trust and the prvention of ill-treatment, Judicial cooperation and the engagement of national preventive mechanisms*, Ludwig Boltzman Institute of Human Rights, 2017, p. 45 [http://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/final_version_the_future_of_mutual_trust_and_the_prevention_of_ill-treatment_1.pdf] Accessed 6 April 2018

64 Cf. Commission Notice — Handbook on how to issue and execute a European arrest warrant [2017] OJ C 335/01, p. 33. Based on the EAW experience, Directive on European Investigation Order introduced a fundamental rights non-recognition ground. See Erbežnik, A., *Mutual Recognition in EU Criminal Law and Fundemental Rights – The Necessity for a Sensitive Approach,* in: Brière, C., Weyembergh, A. (eds), The Needed Balances in EU Criminal Law, Past, Present and Future, Hart Publishing, Oxford and Portland, Oregon, 2018, p. 198

65 Marguery et al., *op. cit*. note 50, p. 10

66 Joined Cases C411/10 and C493/10, *N.S. and Others*, [2011] ECLI:EU:C:2011:865

67 Mitsilegas, V., *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, Yearbook of European Law, Vol. 31, No. 1 (2012), p. 358

68 Case C396/11, *Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:39. Cf. Pleić, *op. cit*., note 61, p. 280

69 Joined Cases C404/15 and C659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru***,** [2016] **EU:C:2016:198**

70 van der Mei, A. P., *The European Arrest Warrant system: Recent developments in the case law of the Court of Justice*, Maastricht Journal of European and Comparative Law 2017, Vol. 24(6), p. 899 [http://journals.sagepub.com/doi/pdf/10.1177/1023263X17745804] Accessed 6 April 2018

in the surrender procedure.[71] Nevertheless, the rebuttal of mutual trust can only take place in very exceptional circumstances and under strict conditions.[72] CJEU established two-tier test for the executing state to determine whether the surrender to the issuing state would lead to the violation of rights guaranteed in Art. 4 CFREU and to decide whether to refuse the execution of EAW. When there is evidence which demonstrates that there are deficiencies with respect to detention conditions in the issuing MS, the executing judicial authority should determine whether there are substantial grounds to believe that the individual will be exposed to a real risk of inhuman or degrading treatment, and should postpone its decision on the surrender of the individual concerned until it obtains the information that allows it to discount the existence of such a risk.[73]

5.2. Application of *Aranyosi/Căldăraru* criteria on transfer proceedings

In the context of FD on the transfer of prisoners, the concept of mutual trust implies, on the one hand, that the issuing country should have confidence in the the system in force in the executing state before it decides to forward the judgement, and, on the other hand, that the executing state should, unless there are grounds for refusal, recognise the judgement of the issuing state and enforce the custodial sentence.[74] The European Commission recognised a potential problem with the application of this principle regarding the fact that this FD allows for the transfer without the prisoner`s consent of which "may be used to ease overcrowding in one Member State, possibly exacerbating overcrowding in another".[75] In the opinion provided in *Aranyosi/Căldăraru* case, AG Bot concluded that if the existence of a systemic deficiency of detention conditions constitutes ground for the non-execution of EAW, it would also constitute grounds for the non-transfer under FD 2008/909.[76] Hence, the criteria established in *Aranyosi/Căldăraru* case are applicable on the transfer proceedings under FD 2008/909 when there is a real risk of inhuman or degrading treatment in the executing MS. But unlike the executing state in EAW, the issuing state in the transfer proceedings has no obligation to transfer, so the tensions between the compliance with the principle of mu-

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71 Anagnostaras, G., *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru*, Case law, Common Market Law Review, 53, 2016, p 1703

72 *Ibid.*, p. 1703

73 *Aranyosi/Căldăraru*, par. 104

74 Cf. Marguery et al., *op. cit*. note 50, p. 12

75 Green Paper on detention, *op. cit*. note 30, p. 6

76 Joined Cases C404/15 and C659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru, Opinion of Advocate General Bot* [2016] ECLI:EU:C:2016:140, par. 128

tual recognition and the respect for human rights will be less pronounced.[77] The major responsibility regarding the assessment of possible infringement of human rights is on the issuing authority which should, before deciding on forwarding the judgement, conduct a two-step analysis,[78] and very carefully assess the detention conditions and all other potential risk factors that may cause the violation of Article 3 ECHR/4 CFREU. The prisoner`s opinion and the consultations with the executing MS play a very important role here, but, notwithstanding their opinion, the issuing MS itself should investigate all relevant elements by using available sources (reports from the European Committee for the prevention of torture, ECtHR jurisprudence, jurisprudence of national courts).[79] The problem may occur if the issuing MS also has problems with overcrowding and uses the transfer of prisoners as a mechanism to ease the situation in its own prison system. In these circumstances it is questionable whether the issuing MS will undertake this analysis "specifically and precisely" as CJEU requires.

The other issue is related to the position of the executing MS. The question is whether there is a possibility for the executing MS to refuse the recognition of the judgement if it faces systematic deficiencies of the prison system. According to *Aranyosi/Căldăraru* judgement, the answer is affirmative, but the other question is if it would be in the interest of ES to do so because by referring to inadequate conditions in its prison system, it would imply that it admits the violation of an absolute human right.

We can analyse this situation from the prisoner's position also, *i.e.* his opportunities to invoke the violation of Article 3 ECHR. Here, the question is whether the prisoner has an opportunity to state his complaints regarding the possible violation of Article 3 ECHR and whether it will have actual effect. Considering the fact that the prisoner's consent, as well as his opinion are not in all situations required for the transfer, and also that FD 2008/909 does not provide for the right to appeal the forwarding decision in the issuing state, it is obvious that the prisoner will not have in all cases the opportunity to file a complaint concerning the inadequate conditions of detention in the executing state.

5.3. Detention conditions in Croatian prison system – small step forward

Inadequate detention conditions and overcrowding have been encumbering the prison system of Republic of Croatia for a long time, but recently, for about last four

[77] Marguery, *op. cit.* note 23, p. 5

[78] Cf. Munoz de Morales Romero, *op. cit*. note 38, p. 98

[79] *Aranyosi/Căldăraru case*, par. 104

years, the situation has been improving.[80] Over the past ten years, the Croatian penitentiary law has been developing mostly under the influence of the jurisprudence of the European Court of Human Rights, and the Constitutional Court of Republic of Croatia.[81] ECtHR has so far found the violation of Art. 3 ECHR due to inadequate detention conditions in the Croatian prison system in seven judgements,[82] and the most recent was delivered in 2016 in the case *Muršić v Croatia.*[83]

Unlike in some other EU countries, the problem of prison overcrowding in Croatia was not enhanced by the number of foreign prisoners (especially the number of EU prisoners) which is relatively insignificant and does not raise the question over the possible hidden agenda behind the transfer.[84]

In terms of the criteria set up in *Aranyosi/Căldăraru* case, Croatia should not have an issue with systematic deficiencies of the prison system, but the deficiencies in specific penitentiary institutions should, nevertheless, be considered. Even though overcrowding has been diminishing in the recent years, the situation in the prison system is far from desirable. There is a big difference in the prison occupancy rate in high security, semi-security and minimum security penitentiary institutions,[85] and this kind of information should be made available to the issuing state authority (upon its request) when deciding on forwarding the certificate to the Republic of Croatia.

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80 From 2008 to 2013, the prison population rate of overcrowding was recorded, and since 2014 there has been a significant and constant decrease in the prison population rates. Aebi, M. F., Tiago, M. M., Burkhardt, C., *SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015*. Strasbourg: Council of Europe, 2016, [http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf] Accessed 27 April 2018

81 See Ivičević Karas, E., *Ljudska prava i temeljne slobode u hrvatskom penitencijarnom pravu,* in: Krapac, D. (ed), *Profili hrvatskog kaznenog zakonodavstva*, Zagreb, 2014, p. 180

82 For detailed analysis of these judgements see Pleić, M., *Zabrana mučenja u praksi Europskog suda za ljudska prava s posebnim osvrtom na presude protiv Republike Hrvatske i praksu Ustavnog suda RH, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb)*, vol. 23, broj 2/2016, pp. 261-265

83 *Muršić v Croatia* (2016) App. No. 7334/13. The Court found that notwithstanding the conditions in Bjelovar Prison were generally appropriate, that there had been a violation of Art. 3 for the consecutive period of 27 days during which applicant had been confined in less than 3 m2 of personal space. *Muršić*, par. 172

84 On 31 December 2016 there were 228 persons in the prison system (216 men and 12 women) who were not Croatian citizens. Out of the total number of foreign prisoners (228), only 37 were EU citizens

85 The occupancy level on the 31 December 2016 was 93,91% in high security conditions, 57,1% in semi-security and 38,95% in minimum security conditions. Vlada Republike Hrvatske, *Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2016. godinu*, Zagreb, 2017, p. 13 [https://pravosudje.gov.hr/pristup-informacijama-6341/strategije-planovi-i-izvjesca/izvjesce-o-stanju-i-radu-kaznionica-zatvora-i-odgojnih-zavoda/6720] Accessed 27 April 2018

When it comes to the decision of our judicial authorities to forward the certificate to another MS, the Act on Judicial Cooperation does not take into consideration the implications of the decision on the fundamental rights. Nevertheless, the court should take under consideration the prison conditions in the executing state prior to forwarding a judgement,[86] in accordance with CJEU case law. In view of the above, it is necessary that all relevant information (regarding the situation in the prison system and the jurisprudence of national courts) is available, updated, reliable and precise in accordance with *Aranyosi/Căldăraru* criteria, and that all competent authorities are familiar with the established procedure and coordinated in their work. This particularly applies to the cooperation of competent courts with the Prison administration.

6. LINK BETWEEN FD ON TRANSFER OF PRISONERS AND FDEAW

FDEAW and FD on the transfer of prisoners have different functions and purpose but they interplay with each other, notably in the part in which FD EAW can involve the transfer of the sentenced person.[87] FD EAW includes the provisions (Art. 4(6) and 5(3)) that enable the execution of a sentence in the place where the requested person resides instead in the issuing MS which conducted the trial. As CJEU emphasised, these provisions have "the objective of enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society."[88] According to Art. 25 of FD 2008/909, this FD applies *mutatis mutandis* to the enforcement of sentences in the cases under Art. 4(6) and 5(3) of FDEAW to the extent that they are compatible with the provisions under FDEAW.[89]

The transfer of prisoners under FD 2008/909 can be used in relation to EAW in two different ways: as a substitute mechanism for EAW (replacing the issuance of EAW or, once it has been issued, replacing the execution of EAW) and as a complementary mechanism to the EAW (precondition for the execution of EAW).

6.1. Articles 4(6) and 5(3) of FD EAW and CJEU case law

FD on the transfer of prisoners as a substitute mechanism is used for the purpose of serving the sentence in the place where the sentenced person resides instead of

86 Country study - Croatia, *op. cit.* note 28, p. 15

87 Cf. Marguery et al., *op. cit*. note 50, p. 6

88 Case C-306/09, *I.B.*, [2010] ECLI:EU:C:2010:626, par. 52

89 But not all MSs implemented this provision. See Report on the implementation, *op. cit.* note 3, p. 11

the surrender of the person to the MS where the sentence was handed down.[90] Instead of issuing EAW for the purposes of executing a custodial sentence, the issuing MS can, under FD 2008/909, initiate the transfer of a person who resides in the executing MS, on its own initiative or on the initiative of the executing member state or the sentenced person.

In the situations when the issuing MS has already issued EAW and the requested person is staying in, or is a national or a resident of the executing member state, FDEAW allows for the executing MS to undertake the execution of the sentence in accordance with its domestic law (Article 4(6)). In this situation, it is on the executing MS to decide whether it will undertake the execution of the sentence according to FD on the transfer of prisoners or surrender the requested person to the issuing MS.[91]

The transfer of prisoners under FD 2008/909 can also be used as a complementary mechanism to EAW for returning the nationals and residents to serve their sentence in their home country once the criminal procedure has been completed in the issuing MS. In this case, the transfer of the requested person to the executing MS is a precondition for the execution of EAW issued for the purposes of prosecuting a national or a resident of the executing MS. The idea behind this guarantee is not only to safeguard the sovereignty of the executing State over its nationals and residents but to favour their resocialisation after the sentence has been served.[92]

CJEU had the opportunity to decide on the interpretation of Art. 4(6) and 5(3) in several cases (*Kozlowski,*[93] *Wolzenburg*,[94] *Lopes da Silva Jorge,*[95] *I.B.)* and most recently in *Poplawski* case.[96] In its rulings, CJEU has over time made a step forward from the focus on the efficacy in cooperation, and placed the principle of reintegration behind the perspective of the protection of human rights.[97]

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90 Handbook on EAW, *op. cit*. note 64, p. 16

91 *Ibid*., p. 31

92 Klimek, L., *European Arrest Warrant*, Springer, 2015, p. 167

93 Case C-66/08, *Szymon Kozłowski* [2008] ECLI:EU:C:2008:437

94 Case C123/08, *Dominic Wolzenburg* [2009] ECLI:EU:C:2009:616

95 Case C42/11, *João Pedro Lopes Da Silva Jorge*, [2012] ECLI:EU:C:2012:517

96 C579/15, *Daniel Adam Popławski* [2017] ECLI:EU:C:2017:503

97 See Munoz de Morales Romero, *op. cit*. note 38, p. 78. In *Kozłowski* the CJEU gave somewhat strict interpretation of terms 'resident' and 'staying' under Article 4(6) and in *Wolzenburg* concluded that indefinite residence permit cannot be requirement for the possibility to refuse execution of EAW but allowed for the national law to subject the refusal to the condition that that person has lawfully resided for a continuous period of five years in that MS of execution. From *Lopes da Silva Jorge* case follows that MS cannot automatically and absolutely exclude from the scope of the Art. 4(6) the nationals of other

The link between the refusal of execution of EAW and the transfer of a sentence can give rise to practical problems, considering that these two instruments are not fully compatible. Certain grounds for refusal from FD 2008/909 could potentially lead to the impossibility to take over the sentence in the executing state.[98] The problem could also arise if the executing MS, having given the guarantee, would no longer be willing to receive the person.[99] The problem of this kind was addressed recently in *Poplawski* case. CJEU stated that the mere fact that the executing MS declares itself willing to execute the sentence does not suffice for the refusal of execution of EAW but it must examine whether it is actually possible to execute the sentence. Also, the important thing is that the authorities of the executing state have a certain margin of discretion when deciding on the refusal under Art. 4(3) FDEAW.[100]

6.2 Implementation of Articles 4(6) and 5(3) of FD EAW in Croatian law

Article 22 of the Act on Judicial Cooperation laid down special conditions for the execution of EAW by implementing Articles 4(6) and 5(3) of FDEAW. Before the amendments to the Act of 2015, these conditions were prescribed in Article 22a but only with respect to the Croatian citizens who reside in the Republic of Croatia. In order to align with the CJEU case law, the Croatian legislator extended the scope of application of Article 22 onto Croatian nationals regardless of their residence, and to non-nationals who reside in or who are domiciled in the Republic of Croatia.[101] Furthermore, the specific provision relating to the surrender of a person sentenced *in absentia* is added. The application of Article 22 (22a) revealed some disputable moments, particularly regarding the question how to proceed in cases where the competent authority of the issuing state refuses to provide the required documentation or when there is no interest of that authority to forward the certificate to the competent court of the Republic of Croatia.[102] The Supreme

MS staying or resident in its territory irrespective of their connections with it. According to ruling in *I.B. case* condition contained in Art. 5(3) is applicable in the situation of a person who was sentenced *in absentia* and to whom it is still open to apply for a retrial. *I.B.,* par. 56–57

98 Klimek, *op. cit.*, note 18, p. 288

99 *Ibid.*

100 van der Mei, *op. cit.* note 70, p. 895. *Poplawski case,* par. 23. Furthermore, CJEU stated that Article 4(6) of FD EAW does not authorise a MS to refuse to execute an EAW on the sole ground that that Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced. *Ibid.*, par. 49

101 See Vlada Republike Hrvatske, *Konačni prijedlog Zakona o izmjenama i dopunama Zakona o pravosudnoj suradnji u kaznenim stvarima s državama* članicama *Europske unije*, Zagreb, 2015, p. 28, [https://vlada.gov.hr/UserDocsImages//Sjednice/2015/206%20sjednica%20Vlade//206%20-%202.pdf] Accessed 27 April 2018

102 Krbec, *op. cit*. note 17, p. 419

Court confirmed that in this kind of situation the first instance court could refuse the execution of EAW irrespective of the fact that the execution of a foreign judgement has not been carried out.[103] It is important to underline that the requested person has to be informed about his or her right to have the sentence served in the Republic of Croatia, otherwise his or her consent for surrender will be invalid.[104]

7. CONCLUDING REMARKS

The Framework decision on the transfer of prisoners is an instrument intended to extend the principle of mutual recognition to judgements that impose custodial sentences, but this objective has not been fully achieved.[105] Slow implementation of this FD and of other complementary FDs, as well as little practical experience in their application point to the level of concern for the detention issues and prisoners` rights in the EU member states.

Even though social rehabilitation is inherent to the principle of mutual recognition, these two principles, as we could see, may collide. The question of consent of the sentenced person to the transfer is the focal issue of the scientific and expert discussions over the objectives and operation of this instrument. The possibility of transfer without the consent enables an effective and rapid application of the principle of mutual recognition of judgements imposing custodial sentences, but at the same time it reduces the possibilities of pursuing the aim of social rehabilitation of the sentenced person in circumstances of such forced transfer.

Non-consenting transfer becomes even more arguable when the protection of fundamental rights, such as the prohibition of inhuman and degrading treatment comes into question. In circumstances where consent and opinion of the sentenced person are not required, the risk of violation of this right is much greater.

CJEU ruling in *Aranyosi/Căldăraru* case, which confirmed that mutual trust is not blind trust, has far-reaching implications for the functioning of not only EAW but also of the other instruments of judicial cooperation in ASFJ. In the transfer proceedings, the issuing authority is primarily responsible for the assessment of social rehabilitation and for the assessment of possible violations of fundamental rights in accordance with *Aranyosi/Căldăraru* criteria.

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103 Supreme Court of Republic of Croatia, Kž eun 41/2014-4, 23 September 2014

104 The requested person must be "fully aware of all consequences" of consent and one of the consequences of consent under article 22(4) is her right to serve the sentence in Republic of Croatia. Supreme Court of Republic of Croatia, Kž-eun 28/2016-4, 6 June 2016

105 See Klimek, *op. cit.* note 18, p. 295

Furthermore, it is important to emphasise the connection between the operation of FD on the transfer of prisoners and FDEAW, *i.e.* possibilities of the enforcement of the sentence following EAW which purports social rehabilitation. Even though the CJEU case law in this issue moved from the functionalist towards the perspective of protection of human rights, the effectiveness of the principle of mutual recognition still prevails over the tendency to facilitate social rehabilitation.

Analysis and comparison of national legislation and practice with the EU legislation and case law is a necessary precondition for the improvement of the Croatian judicial cooperation in criminal matters with the EU members. The presented analysis of some arguable issues regarding FD on the transfer of prisoners and the recent and relevant case law of CJEU shows that the Croatian legislator in general pursues the objectives of the EU law, but not without practical problems. In that sense, the focus should be on the research that indicates the need to establish firm and fair procedural guarantees and the recent ECJEU case law which imposes strict requirements for the competent national authorities in relation to the procedure, gathering information, cooperation with other competent authorities on the national and EU level.

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PRIVACY RIGHTS AND POLICING UNDER THE INFLUENCE OF MODERN DATA TECHNOLOGIES[1]

ABSTRACT

The author analyses the relation between privacy and the powers to collect evidence in the digital environment. With the aim to identify main problems of police powers, the author analysed the Supreme Court, ECHR and ECJ case-law on degrees of intrusion. The lowest degree refers to the collection of general data that does not include collection of the content of communications. According to the results of the research, such a degree of intrusion in Croatian case-law is not considered to be a serious one. For these powers, the retention of data is necessary, and according to the ECJ and ECHR decisions, it must be appropriately regulated.

More stringent measures imply surveillance of communications content. The research results show that such measures are prescribed with considerably stricter standards. In addition, information that are available on social networks or similar sources may also be used in criminal investigation. The concept of total internet memory includes both positive and negative events, producing digital image of users. The development of new rights in this area, just as in the aforementioned, shows that the new standards are necessary in the digital domain.

***Keywords**: police, privacy, surveillance*

1. INTRODUCTION

Modern computer technologies integrate many types of activities that citizens frequently use. The communication allows data sharing but also leaves a lot of information about contact. Part of such data can be very useful for crime detection. Some contemporary forms of crime that pose a significant threat to the community are being prepared primarily by using such communication techniques. If a person publishes his intentions of committing criminal offenses on particular social networks, access to such data may be very useful for police. There is a similar situation with the video recordings of the offenses, or many other types of communication. For the purpose of criminal investigation, it is very important to col-

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lect such data. With this aim, a part of the legal regulation has been created which seeks to ensure the gathering of useful data.

This is particularly apparent in cybercrime, terrorism and similar criminal forms. In contemporary society, there are very striking aspirations to find and retain such data in order to increase security. Computer technologies are becoming an integral part of various types of criminal offenses and there is a need to accommodate modern development.[2] Such goals of criminal investigation need to be brought in line with the protection of fundamental rights of citizens. Collecting and analysing data is part of a proactive police approach, as well as intelligence-led policing. Models of predictive police work are adopting new technologies based on crime analysis.

2. COMMUNICATION CONTACT CHECKING

2.1. General remarks

Particular measure that police can use to collect digital communication data refers to general information about the contacts that have been made, but without insight into theirs content. This action relates to telecommunication data, device labels, and other ancillary features such as the approximate location. This kind of data is commonly referred to as Metadata. Apart from mobile phones, it may also apply to other forms of computer communication such as e-mails. The gathering is aided by the fact that a number of communication capabilities are connected in only one device. In Croatia, such action to collect data is prescribed in Article 68 of the Police Affairs and Authorities Act (PAA),[3] and in Article 339.a of the Criminal Procedure Act (CPA).[4] According to the Croatian system, insight into communication data only does not represent an intense interference with citizens' rights. For that reason, the way of prescribing is also significantly different from the special evidentiary measures that can use intrusive surveillance into the whole content of communication.

Article 68 of the PAA contains substantial (material) prerequisites (danger, search, criminal offenses) and procedural conditions required for a measure (approval in the police hierarchy, fact-finding needs). This provision also sets out the principle of subsidiarity. The Electronic Communications Act (ECA) prohibits network

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2 Loideain, N., *EU Law and Mass Internet Metadata Surveillance in the Post-Snowden Era,* Media and Communication, vol. 3, no. 2, 2015, pp. 53-62

3 Police Affairs and Authorities Act, Official Gazette No. 76/2009, 92/2014

4 Criminal Procedure Act, Official Gazette No. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017

operators from monitoring the content of communication, rather than retaining general communications information only (Article 109, Para 3).[5]

2.2. Croatian case-law

Our case-law has been holding the view that this is not a major restriction imposed on the constitutional rights of citizens.[6] Case-law has estimated that this type of action does not affect the secrecy of communication as a constitutional category. An example is a decision in which the Supreme Court ruled that "how much a person is using a telephone in no way can influence the judgment of her dignity, honour and reputation, nor undermine the secrecy of her private communication".[7] Such a low level of restriction does not involve the content of communication. Therefore, legal conditions for this action are less formalized. Such action does not need to have special judicial oversight, court orders, deletion clauses, or any special safeguards. Such guarantees are the same as in Article 339.a of the CPA, as opposed to some special evidence actions in the Article 332 CPA, which represents the restriction of the rights contained in Article 36 of the Constitution.[8]

When this action was introduced for the first time in the CPA in 2002, it was emphasized in the explanatory notes that it "checks the establishment of a connection in a given period. This action does not give the possibility of knowing the content of telecommunication messages or their surveillance".[9] The same was confirmed by the case law, for instance "here is only the list of telephone calls in terms of determining the frequency of a call to a certain phone number" with the conclusion that the police "have the right to request verification from telecommunication services about the identity of telecommunication addresses".[10]

Case-law has allowed additional processing of the collected data by analytical software, which are also not a serious restriction. An analysis of the relationship between a person, a time or a location in the form of an analytical report is an

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5 Electronic Communications Act, Official Gazette No. 73/2008, 90/2011, 133/2012, 80/2013, 71/2014, 72/2017

6 Karas. Ž., *Coherence of the Supreme court's case-law on admissibility of evidence from police inquiries*. Police and Security, vol. 17, no. 1, 2008, pp. 1-15; Case VSRH, I Kž-4/00

7 Case VSRH, I Kž-502/01

8 The Constitution of the Republic of Croatia, Official Gazette No. NN 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014

9 Government of the Republic of Croatia, *Final Draft of Act on Amandements of Criminal Procedure Act*, Zagreb, 2002

10 Case VSRH, I Kž 1162/04

auxiliary means, for example "drawn telephone locations are based solely on listings without having to involve their content".[11] Knowing frequency of telephone calls does not constitute a violation of the rights of the defendant but is lawful within this action.[12]

2.3. The ECtHR case-law

There wasn't many cases before the European Court of Human Rights (ECtHR) that refer to general data checks without having access to the content of communication.[13] Such police actions were not considered intrusive for Convention rights. In the case of Roman Zakharov v. Russia,[14] the applicant considered that it was not legal for network operators to install equipment that would allow operational searches without any guarantees. The ECtHR has verified compliance in an abstract manner and found a violation of Article 8 as there was no effective remedy.

There were issues on data type that could be gathered by this action. Collection of non-public data was the subject of decision in the case of Uzun v. Germany.[15] Determination of a person's location was carried out by exploiting GPS device. In this case, it was concluded that such gathering does not represent an overall surveillance of the kind similar to audio-visual one. It is not considered to be an intrusion into privacy rights. The GPS does not directly show any particular information about a person's behaviour, private opinions, or intimate feelings. The ECtHR did not consider that conduction without a court order has to constitute a violation of the Convention. The case was about the surveillance of the suspect involved in several attempted murders. A vehicle of his friend that he was occasionally using was monitored. The ECtHR concluded that action was fully justified because it lasted for a short period of three months, and person was not subjected to full surveillance, but only partially and only when he was in the vehicle.

3. SURVEILLANCE OF THE COMMUNICATION

3.1. General remarks

Part of the data can only be collected for criminal investigation by monitoring the complete content of communication between targeted subjects. Because of

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11 Case VSRH, I Kž 598/12

12 Case VSRH, I Kž-Us 21/13

13 Breyer, P., *Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR*, European Law Journal, vol. 11, no. 3, 2005, pp. 365-375

14 Judgment *Roman Zakharov v. Russia*, no. 47143/06, 4 December 2015

15 Judgment *Uzun v. Germany*, no. 35623/05, 2 September 2010

surveillance, such actions are considered as intrusive to fundamental rights. In Croatian system, there are approved forms of restriction of constitutional rights.[16] Therefore, these actions are very detailed in the CPA. They cannot be initiated based solely on police legislation. There has been set minimal standards for such surveillance activities (Malone v. UK).[17] Very strict safeguards must be adhered when it comes to surveillance, such as defining the type of action, scope of supervision, duration of measure, basis for determining and many others (according to Kennedy v. UK).[18] The violation of Article 8 of the Convention was established for legislation in Hungary which provided the surveillance in order to counter terrorist activities, but failed to provide adequate procedural guarantees (Szabó and Vissy v. Hungary).[19] In this field of intrusive measures, there is subsequent obligation for the persons under surveillance to be notified, or there could exist a breach of arbitrariness under Article 10 ECHR.[20]

For such restrictions, it is irrelevant whether they are carried out by the police or by some other official body. In any case, detailed legal regulation is necessary. There were violations when surveillance was performed by employers too. In the case of Halford v. UK,[21] the highest ranked policewoman reported that her superiors monitored her communication to prevent promotion in higher rank. There has been a violation of Article 8 of the Convention because office phones fall into the concept of private life and correspondence too. A similar question was raised in the case of Bărbulescu v. Romania,[22] in which the employer not only monitored the general data of employee, but also the content of the conversation. The employee was not warned, and there was not established if there existed legal basis for the measure to be applied.

3.2. Collecting private data

Measures that do not represent surveillance can be intrusive restrictions in the privacy rights. The sensitive data can be affected, regardless of the type of data collection activity. For instance, a violation was found in the case of Trabajo Rueda v. Spain in which the police seized the computer without prior judicial authori-

16 Case VSRH, I Kž Us 23/09; Case VSRH, I Kž-144/05

17 Judgment *Malone v. UK*, no. 8691/79, 2 August 1984

18 Judgment *Kennedy v. UK*, no. 26839/05, 18 May 2010

19 Judgment *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016

20 Judgment *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013

21 Judgment *Halford v. UK*, no. 20605/92, 25 June 1997

22 Judgment *Bărbulescu v. Romania*, no. 61496/08, 5 September 2017

sation for the purpose of detecting child pornography images.[23] The computer was already in the hands of the police and prior authorisation could have been obtained quickly. In the case of Aycaguer v. France, the violation was established with respect to the obligation to give the DNA sample, but there was no proportionality.[24]

A violation was established for copying the whole content of the laptop because it was based on regulations that did not allow such powers focused on a journalist.[25] When the employer searched the employee's computer for the purpose of finding counterfeit railway certificates, there hasn't been a violation in the case of Libert v. France.[26] The ECtHR ruled that action was not contrary to the Convention when a person was supervised on the job, in a limited time and space only around the cash register.[27] Violation of Article 8 was established when the supervised subjects were not informed about the hidden surveillance in accordance to domestic regulation.[28] The case of Alice Ross v. UK refers to information that is otherwise protected as a professional secret.[29] A person who was engaged in research journalism initiated a procedure because of monitoring the content of internet traffic.

In the case of Copeland v UK, there were discussions about telephone, internet and electronic mail monitored in the office.[30] The institution where the person was employed was overseeing how often she calls particular phone numbers, which web pages she visits, and to whom and when she sends e-mails. The goal was to determine whether or not she uses business facilities for private gains. The ECtHR found that the institution did not have a legal regulation that would proscribe this area and it was not known to the person that such controls would be possible. The ECtHR has determined that this is a matter of privacy. The Court concluded that it was not important at all whether the information was used against applicant in some form of proceedings. Just storing of data was already interfering with her private life. The ECtHR emphasized that there is a possibility that such a measure may be allowed and necessary in a democratic society, but only in certain situations and if prescribed by a law. In this particular case, there weren't regulations

23 Judgment *Trabajo Rueda v. Spain*, no. 32600/12, 30 May 2017
24 Judgment *Aycaguer v. France*, no. 8806/12, 22 June 2017
25 Judgment *Ivashchenko v. Russia*, no. 61064/10, 13 February 2018
26 Judgment *Libert v. France*, no. 588/13, 22 February 2018
27 Judgment *Köpke v. Germany*, no. 420/07, 5 October 2010
28 Judgment *López Ribalda v. Spain*, no. 1874/13, 9 January 2018
29 Judgment *Bureau of Investigative Journalism and Alice Ross v. UK*, no. 62322/14, 9 February 2016
30 Judgment *Copeland v UK*, no. 62617/00, 3 April 2007

that would allow such an action. In England, legislation was subsequently passed to allow such actions.[31]

3.3. Other intrusive forms on privacy

Violations may also be committed by public disclosure of sensitive personal data.[32] It is the principle that Article 8 protects data that individuals can reasonably expect not to be published without their consent.[33] If the police are carrying out the actions for disclosing such information to the public, this could be a violation. This fundamental right encompasses the privacy of communication, which means the content of e-mail, ordinary mail, telephone and all other forms of communication.[34] The concept of private life also includes the right of the person to his image, photographs or videos containing his character. That also falls under Article 8 of the Convention, according to Sciacca v. Italy.[35] In the case of Khmel v. Russia,[36] the footage that was created in the police premises was then publicly released. In the Uzun v. Germany case,[37] it was found that surveillance over the GPS system and processing of the data also represents interference with private life.

In several pending cases, main problems were the issues of collecting user identity. The case of Benedik v. Slovenia refers to a file in which the police collected data on computer IP addresses without a court order.[38] The police, based on these data, revealed his identity using service provider. Similar pending case is Ringler v. Austria in which the identity of the person was also established using the data from internet service provider.[39]

4. RETENTION OF DATA

4.1. General remarks about retaining data

Part of the information on communication could be unavailable until the criminal investigation starts. Loss of data may be the result of some attempts by the perpetrators themselves, or it may be a consequence of the absence of a system that

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31 Telecommunications (Lawful Business Practice) Regulations 2000

32 Case VSRH, I Kž-562/1996

33 Judgment *Flinkkilä and Others v. Finland*, no. 25576/04, 6 April 2010, par. 75

34 Judgment *Copeland v UK*, no. 62617/00, 3 April 2007

35 Judgment *Sciacca v. Italy*, no. 50774/99, 11 January 2005

36 Judgment *Khmel v. Russia*, no. 20383/04, 12 December 2013

37 Judgment *Uzun v. Germany*, no. 35623/05, 2 September 2010

38 Pending case *Benedik v. Slovenia*, no. 62357/14

39 Pending case *Ringler v. Austria*, no. 2309/10

would retain such data. After the insight into the way of preparing and communicating between the terrorists, agencies came up with ideas about increasing the possibility of retaining data. It was established that terrorists often used the Internet for communications, propaganda or funding.[40] On the European level, there has been adopted the relevant Directive on data retention (DRD).[41] In Article 14 of the DRD, it was stipulated that States may initiate their retention programmes.

Although the DRD has roots in aftermath of Madrid attacks, and in the Declaration on Combating the Terrorism, this disputed regulation has come to criticism from the beginning. After the introduction by the four states, the European Parliament has refused to enforce such rules. The blocking was based on the view that such measures represent an effect that hasn't been fair balanced. Contemporary profiling capabilities could link insight into various privacy areas. Some critics elaborate that about half a year of retention of data, collects approximately 35,000 entries per person.[42]

4.2. Investigative needs for data retention

Data retention allows finding the data of perpetrators who were not suspicious nor detectable at the time of communication. Technologies are giving opportunity of very good covering of perpetrators. Sometimes devices that are not linked to suspicious subjects are used. Perpetrators can easily change a mobile device or identifying features. One example is purchasing mobile phones that are only used for one crime. An example may be opening new e-mail address or new connection that is not linked to the IP addresses of the earlier perpetrator's link. Such examples already appeared in the police practice so far.

Collecting data only focused on known former suspects' communications would not have a positive result. Compared to some of the classic investigative measures, it would be like search of the apartment used by the perpetrator during his last known criminal offense. As a perpetrator constantly changes apartments, similarly is with communication devices. Perpetrators that are the most difficult to detect are constantly adjusting to the investigative methods used by the police force.

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40 Brown, I., Korff, D., *Terrorism and the proportionality of Internet surveillance*, European Journal of Criminology, vol. 6, no. 2, 2009, pp. 119-134

41 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ L 105 (DRD)

42 Loideain, *op. cit.* note 2

In assessing how much this kind of collecting restricts the fundamental rights of citizens, it is not easy to reach a definite conclusion. Namely, although some critics point out very extensive features of profiling people online,[43] part of this is exaggeration and part this does not stem from data retention, but rather from social networks. These powers do not allow the police or some other agency to use the entire retention data permanently. Critics nevertheless state that the aggregation of such data is revealing many personal details to the authorities.[44] However, they ignore that the police or other agency may have access to such data only when it is in accordance with the legal provisions.

Data collected on retention policies do not restrict the privacy area at a level comparable to the one that could be gathered from the content of communication. Contact metadata does not give the meaning of communication. For example, if a police collects data that two entities have communicated over a given period, it is not known what their relationship was. It may be perhaps one of the subjects is trying to avoid such communication. They might be talking about a crime, or maybe about some purely legal deal. The data being retained gives only a superficial description.

By using other actions such are home search or surveillance of telecommunications, much more data can be discovered. Searching a computer or a cell phone may give more private information than data retention. Furthermore, citizens leave more data themselves on social networks. From such data it is possible to profile persons in a more reliable way than it would be ever possible using retention. This is shown recently in notorious examples of exploitation of some social networks by analytical companies.

According to types of criminal offenses for which retention data was used, only 6% of cases were used for investigating terrorism. About 30% were used to investigate property crimes, about 25% for murder investigations, and about 11% for child pornography.[45] In publication it is written that 82 cases were resolved based on historical data in retention. The only terrorist investigation on the basis of these data was a bombing in London, when five perpetrators were arrested.[46]

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43 Schneier, B., *Data and Goliath,* Norton, New York, 2015

44 Solove, D., *The Digital Person: Technology and Privacy in the Information Age*, NYU Press, New York, 2004

45 Communication from the Commission to the European Parliament, The European Council and the Council, *Ninth progress report towards an effective and genuine Security Union*, COM(2017)407

46 Duport, Y., *A Case Study of the Security-Privacy Shift in the EU Data Retention Directive*, Faculty of Social and Behavioral Sciences, Leiden, 2015

4.3. The ECtHR case-law on retention of data

The ECtHR has dealt with retention of data in some other cases. It was not about general retention but about personal data and police databases. The ECtHR considers part of the privacy as to how certain personal data is kept in police databases and is a person able to initiate the procedure for their erasure. The ECtHR takes the view that any retention, analysis or storage may constitute a breach of privacy rights. In several French cases, persons considered that their privacy was violated when data were entered into a national base of sexual offenders, although the base was founded years after they had been convicted. Cases B.B. v. France and Gardel v. France concerned the retention of data on sexual offenses, and the ECtHR concluded that retention periods were from 20 to 30 years, but depending on the seriousness of the criminal offense.[47] There was no violation since they could have requested the deletion. In case of Brunet v. France data have been retained for more than 20 years, although the criminal proceedings were suspended.[48] In the case of Khelili v. Switzerland, there were retained data about suspicion on prostitution, irrespective of lack of judicial verdict.[49] The case of Dalea v. France considered that rights were violated because data entered in the Schengen Information System was obstacle to obtain a visa in certain countries.[50] In the M.M. v. UK, the person objected to retention of data in police bases concerning a reported crime of kidnapping.[51] The ECtHR concluded that the system should have safeguards against the disclosure of sensitive personal data in public.

The retention of certain data in police bases regarding the identification of persons was also observed. In the Kinnunen v. Finland case, retention was related to photos of suspects and theirs fingerprints taken after arrests.[52] In the case Van der Velden v. Netherlands, the Court had given conclusion that storing of the DNA profile was not like storing some neutral features but content that was intrusive to personal life.[53] Key decision in this field was S. and Marper v. UK.[54] In that case, retention is observed in relation to law which proscribed securing the DNA profile of a person on indefinite term, irrespective of the seriousness of the criminal offense. The Court concluded that it is the disproportionate interference of

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47 Judgment *Gardel v. France*, no 16428/05, 17 December 2009; Judgment *B.B. v. France*, no. 5335/06, 17 December 2009

48 Judgment *Brunet v. France*, no. 21010/10, 18 September 2014

49 Judgment *Khelili v. Switzerland*, no. 16188/07, 18 October 2011

50 Judgment *Dalea v. France*, no. 964/07, 2 February 2010

51 Judgment *M.M. v. UK*, no. 24029/07, 13 November 2012

52 Commission decision *Kinnunen v. Finland*, no. 24950/94, 15 May 1996

53 Judgment *Van der Velden v. Netherlands*, no. 29514/05, 7 December 2006

54 Judgment *S. and Marper v. UK*, [GC] Nos. 30562/04 and 30566/04, 4 December 2008

the authorities with the rights of privacy. For this area, valuable decision is MK v. France about retaining of the fingerprint samples during suspicion of theft, but person was never charged for the crime. The ECtHR concluded that there hadn't been fair balance.[55]

4.4. The ECJ's position on retention of data

The European Court of Justice has established that there is a violation of privacy in the DRD provisions because the grounds for retention of data were not specified (C-594/12, C-293/12).[56] The development in this area shows that legal regulation in many systems still requires appropriate standardization in the design, conditions for implementation, and usability of results. The ECJ found that the DRD covers all persons and all forms of electronic communication without any differentiation, limitation and exceptions. This applies also to persons for whom there is no evidence of a link with serious crime.

It also covers persons who are otherwise protected under domestic law, such as examples of subjects who have a duty to keep a professional secret (medics, lawyers etc.). The ECJ has complained that the DRD is not related to any period or geographical zone, or to some of the persons contributing to the crime. A further objection is that the DRD does not contain any substantive or procedural conditions as to how the domestic police or other authorities access the data. There is no requirement for the subjects that would have access to data, or whether it is necessary to impose control by an independent body, judicial monitoring or any other. The DRD provides collecting data for a period of at least 6 to a maximum of 24 months, but without criteria to determine the length in particular circumstances. The ECJ found that the DRD does not have precise rules on interference in the fundamental rights of the Charter. The innocent citizens could be stigmatized, because they are treated the same as the perpetrators.[57]

Several factors contributed to this ECJ decision. It has certainly been inspired by the findings of some former members of the intelligence services on levels of overall communication surveillance.[58] Part of the reason is also in the change of

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55 Judgment *M.K. v. France*, no. 19522/09, 18 April 2013

56 ECJ, Joined Cases C−293/12 and C−594/12, Digital Rights Ireland Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others, and Seitlinger and others v Kärntner Landesregierung, Judgment of the Court (Grand Chamber), 8 April 2014

57 Boehm, F., Cole, M., *Data Retention after the Judgement of the Court of Justice of the European Union*, University of Münster, Münster, 2014

58 Loideain, *op. cit.* note 2

the TFEU whose Article 16 introduced new views on privacy,[59] as opposed to the former Article 286 of the TEC.[60] At a time when the ECJ made a decision, several more lawsuits were under way. Because of the lack of proportionality, the German Constitutional Court has marked unconstitutional provisions of the Telecommunications Act in which the DRD was transposed.[61]

4.5. Digital rights in relation to public available content

4.5.1. Analysis of digital data

Part of the data on social networks is publicly available, so it can be used for police investigation without procedural restrictions. Furthermore, there is a new concept of so called Big Data. Digital development and networking enables the processing of enormous amounts of data. Some of them can be used to build a person's profile. There are estimations that the whole Internet traffic has grown over 1 ZB (zettabyte) in 2016. The zettabyte is a measurement unit that follows after terabyte (TB), petabyte (PB) and exabyte (EB). To give some comparison, the IDC estimated that all hard drives in the world had approximately 160 EB in 2009.

In the Croatian legal system, there haven't been delivered decisions on methods of working with large amounts of data. Analysis of such data can be useful in prediction and proactive systems. The importance of this area for legal regulation has been confirmed by the Council of Europe.[62] Some theories criticize the analytics of Big Data due to the extensive intrusions on privacy.[63] However, the emergence of Big Data is a consequence of technological development rather than police powers. Police must use this field to adapt to the new digital environment.

4.5.2. Development of new digital rights

Some scholars or legal systems are already proposing new digital rights. One of them is the right to delete the search listings ('the right to be forgotten'), and the proposed right to data expire.[64] Application is elaborated on the case of a teacher who posted a picture of herself getting drunk.[65] As a consequence, university de-

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59 TFEU - Treaty on the Functioning of European Union

60 TEC - Treaty Establishing the European Community

61 Bundesverfassungsgericht, BVerfG, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, 2 March 2010

62 Directorate General of Human Rights and Rule of Law, *Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data*, Strasbourg, 23 January 2017

63 Schneier, *op. cit.* note 43

64 Mayer-Schönberger, V., *Delete. The Virtue of Forgetting in the Digital Age,* Princeton, New Jersey, 2009

65 Case *Snyder v Millersville*, E.D. Pa., 2008

nied her a certificate for a teacher profession. Certain rights could be invoked by the DPD.[66] The General Data Protection Regulation will supersede the DPD from 2018. It is important that the GDPR in Article 17 prescribes the right to remove results from search engines, defined as right to oblivion.[67] The GDRP abolished the Directive with the aim of introducing higher level of protection. The application will not be absolute, there is an exception directed on the freedom of expression. Critics who were opposed to the introduction of such concept were considering that search engines will lose their neutral status. This right is not an *ex novo* right, it is complementary to previous ECJ decisions and development in legal theory. The GDPR rules were adopted one month after delivering the ECJ decision declaring the DRD invalid.[68]

The ECJ ruling C-131/12 (Google Spain) is relevant to the data listed from the internet search engine.[69] The decision partially accepts the right to be forgotten, but only in relation to the information on listing. Decision doesn't affect the original sources of data. The ECJ found that Internet search engines can be considered data controllers as they play a key role in dissemination of data. The case concerns a Spanish national who has become insolvent and therefore unable to pay the required taxes. His name was published on the public debtor's register. The person requested the deletion, but publisher refused because a list was part of the ministry's ad in journal. The applicant asked the Spanish Personal Data Protection Agency to remove the ad, but they replied that disclosure was legally justified.

Google has pointed out that they have no physical devices in Spain. Internet spiders searching for pages do not imply the use of devices in particular country. The Court found that there is an inextricably link between the headquarters and its subsidiaries. Regarding the protection of personal data, the Court has found that the right to personal data has a greater weight than the right of to access the data from the search engine. Google regularly publishes data on the number of

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66 Directive No. 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

67 Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), COM/2012/010

68 Iglezakis, I., *The Right To Be Forgotten in the Google Spain Case (Case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?*, 4th International Conference on Information Law, 2014

69 ECJ, Case C−131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of the Court (Grand Chamber), 13 May 2014

requests received to delete particular search results.[70] In some social networks it is unclear who could be considered as their controller. Some suggest the creation of a separate agency composed of representatives of government, companies and democratically elected representatives.[71]

Certain ECtHR pending cases are relevant in this area. In those cases, the perpetrators who served the sentence initiated a procedure aimed at blocking the data on the search engines. Those cases M.L. v. Germany and W.W. v. Germany are referring to famous German case of murder of an actor.[72] They intended to remove the publication of their verdict because they had served the sentence. The relationship to personal data in the German system has been governed by a famous Lebach's Case, which dates back to 1973. That case refers to the murder of German soldiers. Television intended to record a documentary with the name and the image of the perpetrator. The Federal Constitutional Court has determined that each individual can decide how much will be publicized.[73] In U.S. law it is quite different.[74] The publication of criminal records is protected by the First Amendment, which also served to refuse to delete two offenders from the known case of the Sedlmayr murder on Wikipedia.

5. CONCLUSION

Increased number of Internet data, as well as the widespread usage of mobile devices that unite various types of communication, lead to new issues regarding collection of evidence. In the past, people had rare photos of celebrations or perhaps personal diaries containing their memories, and nowadays the computer systems may register numerous events that are stored on social networks and other sources. Shaping an image of a person based on digital data, creates a new term of e-reputation, or the formation of a personal digital reflection. Data storage on computer disks works as a total memory - it does not distinguish between positive or negative events.[75] Given that people cannot influence the data memorization which is

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70 Google, *Search removals under European privacy law. Transparency Report*, 2018 [https://transparencyreport.google.com/eu-privacy/overview] Accessed 1 April 2018

71 Lee, E., *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, University of California Davis Law Review, vol 49, 2016, pp. 1017-1095

72 Pending cases *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10

73 Bundesverfassungsgericht, BVerfG, 1 BvR 536/72, 5 June 1973, Lebach I

74 Myers, C., *Digital Immortality vs. The Right to be Forgotten: A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy*, Romanian Journal of Communication and Public Relations, vol. 16, no 3, 2016, pp. 47-60

75 Terwangne, C, *The Right to be Forgotten and the Informational Autonomy in the Digital Environment*, Publications Office of the European Union, Luxembourg, 2013

published by others, such storage actually has the effect of permanent memory. That is why this area is very problematic from the perspective of privacy rights.

Perpetrators use computer capabilities for numerous types of criminal offenses and therefore police should focus on appropriate collection methods. One of methods is the retention of data of electronic communication, though most of such data will never be processed for some particular needs. Research findings show that retained data is still the most widely used for investigations of classical crimes, but not for countering terrorism. In countries where this area is not adequately regulated, proper arrangements are needed, regardless whether data do not present a serious intrusion in privacy. The emphasis should be placed on the conditions under which such data would be available to the police or other bodies.

A special challenge concerns private data that are voluntarily stored on social networks, but users do not have a full control over their further processing. In order to protect this part of the user's privacy, the social networking platforms should be regulated in more detail. Looking for solutions, it is apparent that many systems still have not found the optimal codification model because the attention was dedicated primarily to the police authorities, and not that much to private companies. This is a propulsive area where technology develops rapidly, and the law still seeks adequate responses.

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POLICE INTERROGATION OF THE SUSPECT IN CROATIA AFTER THE IMPLEMENTATION OF THE DIRECTIVE 2013/48/EU – STATE OF PLAY AND OPEN QUESTIONS*

ABSTRACT

This paper tackles the issue of the police interrogation of the suspect after implementation of the Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings. Therefore, this paper first analyses the standards of the European Convention of Human Rights and European standards aimed at strengthening the procedural position of suspects in criminal proceedings. Then it introduces new provisions regulating police inquires of criminal offenses and powers and duties of the police during the formal interrogation of the suspect. Next, the paper considers the possibility of using the results of the police interrogation of suspects as a sufficient basis for filling the indictment, and points to some solutions in comparative law. Finally, the authors critically examine first rulings of Croatian courts on the sufficiency of police interrogation of suspect for filling the indictment and issuing a penalty order and in this regard, proposes possible solutions thereto de lege ferenda.

Keywords: *Directive 2013/48/EU, right of access to a lawyer, police interrogation, suspect, police inquires, investigation*

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1. INTRODUCTION

The latest amendments to the Criminal Procedure Act (hereinafter CPA)[1], which entered into force on 1 December, 2017, made a significant step towards the further Europeanization of Croatian criminal procedural law. The latter alignment of the CPA with the acquis communautaire of the European Union (hereinafter: EU) has been implemented by transposing several important Directives.[2] Among them, the Directive on the right of access to a lawyer in criminal proceedings is particularly emphasized.[3] The implementation of the said Directive significantly reformed the traditional formal concept of the suspect and the legal nature of police informal questioning of the suspect.

In that sense, Croatia abandoned the formal concept of the suspect (person against whom the crime report has been submitted, the inquiries were made, or the urgent evidentiary action was taken), and the concept of the suspect with a substantive meaning has been accepted. According to the new provision, the suspect is a person in relation to whom there are grounds for suspicion of having committed a criminal offense and against which the police or the public prosecutor acts to clarify this suspicion (Art. 202. (2) (1) CPA). The new definition of the suspect was a prerequisite to comply with Art. 2 (3) of Directive 2013/48/EU as in accordance to that provision, the Directive also applies to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.[4] Since the Direc-

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1 The Criminal Procedure Act of 18 December 2008, Official Gazette no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

2 Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [2008] OJ L 350/60, Directive 2012/29/EU of the European Parliament and of the Council of 25 October, 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57, Directive 2014/42/EU of the European Parliament and of the Council of 3 April, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, Directive 2014/62/EU of the European Parliament and of the Council of 15 May, 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] L 151/1

3 Directive 2013/48/EU of the European Parliament and of the Council of 22 October, 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] L 294/1

4 In this way, European criminal law tries to cope with the problem of the uneven protection of defense rights in the early stage of criminal proceedings among the EU states. Đurđević, Z., *The Directive on the Right of Access to a Lawyer in Criminal Proceedings filing a human rights gap in the European Union legal order*, in Đurđević, Z., Ivičević Karas, E. (eds), European criminal procedure law in service of protection of European union financial interests: State of Play and Challenges, Zagreb, 2016, p. 20

tive explicitly covers the situation of the police questioning of the suspect and at the same time clearly delimits cases that are not considered police interrogation (preliminary questioning by the police or by another law enforcement authority for the purpose of identifying the person concerned, to verify the possession of weapons or other similar safety issues, or to determine whether an investigation should be started, for example, in the course of a road-side check or during regular random checks when a suspect or accused person has not yet been identified),[5] the Croatian legislator significantly intervened in the informal questioning that the police carried out during the inquiry of criminal offenses. This resulted in the abandonment of the traditional informal questioning of the suspect and prescribing the formal police interrogation of suspects with the obligation of the police to inform suspects of their defence rights before carrying out a formal interrogation.[6] Consequently, now, there is a clear distinction between the informal questioning of citizens and the formal interrogation of a suspect during police inquires.

Prescribing the duty of the police to inform the suspects prior to interrogation with rights of defence on the one side, and, on the other, following the strict rules for conducting the interrogation of the suspect—which includes the obligation of audio-video recording the first interrogation—was a sufficient reason for the legislator to determine that the result of such police interrogation of a suspect could be used as evidence in criminal proceedings.[7]

This significant turnaround of the law, as well as the consequences of police interrogation of suspects, has opened up many questions and doubts in Croatian jurisprudence, which has traditionally been accustomed to recognising and accepting as evidence in criminal proceedings only the examination of the defendant conducted by the public prosecutor.[8]

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5 Directive 2013/48/EU, Preamble, recital 20

6 See: Explanatory memorandum to the amendments of the Criminal procedure act, P.Z.E., no. 78, 2017, p. 7, [http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2021643] Accessed 7 May, 2018

7 However, such a request was not explicitly stated by the Directive 2013/48/EU. Nonetheless, the Croatian legislator ensured the protection of the suspect's rights to defence and, on the other hand, provided an effective control mechanism for respecting the proclaimed defence rights. This mechanism is a well-known exclusionary rule that prevents evidence collected in violation of the suspect's rights of defence from being used in a court if the interrogation is conducted in an improper way. Ivičević Karas, E., *Moving the limits of the right to a defence counsel under the influence of European criminal law*, Croatian Annual of Criminal Law and Practice, vol. 22, no. 2, 2015, p. 377

8 Exceptionally, a police investigator may conduct an interrogation of the defendant for criminal offenses under the competence of the municipal court but only upon the order of the public prosecutor (Art. 219 (3) CPA). See: Pavliček J., *The role of the investigator in the criminal procedure*, Croatian Annual of Criminal Law and Practice, vol. 16, no. 2, 2009, pp. 900–903

Therefore, this paper first analyses the standards of the European Convention of Human Rights and European standards aimed at strengthening the procedural position of suspects in criminal proceedings. Then, it introduces new provisions regulating police inquires of criminal offenses and powers and duties of the police during the formal interrogation of the suspect. The following chapter considers the possibility of using the results of the police interrogation of suspects as a sufficient basis for filling the indictment and points to some solutions in comparative law. Finally, the authors critically examine the first rulings of Croatian courts on the sufficiency of police interrogations of suspects for filling the indictment and issuing a penalty order and, in this regard, proposes possible solutions thereto *de lege ferenda*.

2. CONVENTIONAL AND EUROPEAN STANDARDS AND THEIR IMPACT ON STRENGTHENING THE POSITION OF SUSPECTS IN PRE-TRIAL PROCEEDINGS IN THE REPUBLIC OF CROATIA

2.1. Jurisprudence of European Court of Human Rights

2.1.1. Concept of a suspect in substantive terms

The criminal procedures of continental European countries are implemented in a firm and strict form of proceeding. This form, of course, is necessary in order to clearly define the prerequisites for taking action in the proceedings, the persons authorized to undertake them, and the form of these acts as well as the legal consequences for non-compliance with those cogent regulations.[9] This ensures that the criminal prosecution authorities know in advance what arsenal of weapons they have in the fight against criminality and that the citizens on the other side can be acquainted with the assumptions under which the state repressive bodies are authorized to invade their fundamental rights and freedoms.[10]

However, the overly formal prescribing of the moment of commencement, duration, and completion of a stage of criminal proceedings—as well as the formal defining and binding of terms like "suspect", "defendant", and "the accused" with certain stages of the proceedings—often lead to the undesirable phenomenon of repressive bodies, under the guise of strict formal regulation, seemingly "legally" overcoming the protective guarantees of the rights of defence. This practically leads to a situation that one and the same person at an earlier stage of preliminary

[9] Krapac, D., *Kazneno procesno pravo*, Prva knjiga: Institucije, Narodne novine, Zagreb, 2014, p. 7

[10] *Ibid*., p. 92

proceedings, just because he has the formal status of suspect, enjoys less protection of his rights and freedoms. This is despite the fact that actions and measures taken by the repressive authorities have so aggravated his position and *de facto* transformed him into the defendant, which in nature requires the imposition of additional and stronger rights of defence. However, the realization of these rights does not arise since the formal acquisition of the position of the defendant is bound to the later stage of pre-trial proceedings.

This problem was already recognized by the European Court of Human Rights (hereinafter: ECtHR), for which reason it has autonomously defined the conception of the charge for criminal offence: the moment from which it should be taken that a person has been under investigation irrespective of national legal provision defining the official opening of the investigation.[11] In this respect, the ECtHR provided a definition of the term "charge", stating that it may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, to which corresponds every action or measure that substantially affects the situation of the suspect regardless of whether there is a formal indictment of the competent authorities in the specific case.[12] This autonomous interpretation was used as an argument for extending the guarantees of the right to a fair trial of art. 6. ECHR to the earliest stages of the criminal proceedings, which ultimately led to the notion of the suspect in substantive meaning.[13] Consequently, from the aspect of practice of the ECtHR, the national legal provision on the commencement of criminal proceedings is not relevant at all, but the ECtHR evaluates the actions and measures that are taken by repressive bodies against the suspect or in connection with the suspect to see whether the suspect is substantially affected by the steps taken against him.[14] In

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[11] „…one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when the preliminary investigations were opened." Judgment *Foti v Italy* (1982) 5 EHRR 313, § 52

[12] „the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 par. 1 ECHR. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question. "The "charge" could, for the purposes of Article 6 par. 1 ECHR, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect" Judgment *Deweer v Belgium* (1980) 2 EHRR 239, § 44

[13] Stavros, S., *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, Martinus Nijhoff, Dordrecht, 1993, p. 71

[14] Harris, D., O'Boyle, M., Warbrick, C., *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014, pp. 376–377

this way, it does not allow the bodies of criminal prosecution to undergo stringent institutional guarantees during the investigation or to manipulate the length of the proceedings by raising a formal indictment in a late stage of the proceedings such as the end of the investigation.[15] Therefore, the autonomous notion of the charge shows an important criterion for securing at least the approximately equal status of the defendant through the entire criminal proceedings regardless of the formal designation of the defendant (suspect, defendant, accused) and irrespective of the national provision defining the formal commencement of the criminal proceedings (decree on investigation, filling an indictment, etc.).[16]

2.1.2. Right to the assistance of a lawyer

While the substantive concept of the defendant is now a firm standard in the jurisprudence of the ECtHR, this cannot be said for the realities of constituting this procedural position especially in the early phases of the criminal proceedings, when the police make the first contact with the suspect or the citizen that potentially could become suspected of having committed a criminal offense. Therefore, the ECtHR began to consider the reality of the procedural position of the suspect in the earliest stages of the proceedings. This was confirmed by noting that Art. 6 and, in particular, Art. 6 (3) ECHR may also be relevant before a case is sent for trial if and insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it.[17]

Taking the aforementioned into account, the ECtHR came to the idea that the application of Art. 6 ECHR should relate to the earliest stages of the criminal proceedings, particularly regarding the exercise of the right to counsel in the police interrogation as a special guarantee of the right to a fair trial. The idea was conceived in the case of Salduz v. Turkey,[18] stressing that access to a lawyer should be provided from the first interrogation of a suspect by the police unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.[19] This decision struck the foundations of the procedural rights of the suspect before the police but also raised the issue of the admissibility of the results of police interrogations when the protective guar-

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15 Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, New York, 2005, p. 138

16 „…even if the primary purpose of Article 6 ECHR, as far as criminal proceedings are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that the Article 6 has no application to pre-trial proceedings." Judgment *Imbrioscia v Switzerland* (1994) 17 EHRR 441, § 36

17 *Ibid*.

18 Judgment *Salduz v. Turkey*, no. 36391/02, 27 November 2008

19 *Ibid*., § 55

antees of the suspect's defence are not respected. This problem was evident from the point of the Croatian criminal procedural law since the police, until the last changes of the CPA, conducted informal questioning of the suspect that could not be used as evidence before the court. At first sight, there was nothing problematic about it. However, it is a controversial circumstance that the police, based on the results of such informal conversations with suspects, directed their further inquiries, which subsequently resulted in the taking of evidentiary actions by the public prosecutor on the basis of which the indictment was brought before the court, and that evidence significantly influenced the outcome of the criminal proceedings.[20] Commentators point out that the jurisprudence of the ECtHR, starting from the Salduz case, simply shifted the access to a lawyer at the earliest stages of criminal proceedings, which, as a rule, exist already from the first police interrogation of the detained person.[21] They warned that the judgment linked the right to a lawyer with the circumstance of the deprivation of liberty.[22] For this reason, there have been interpretations that the right to a lawyer does not have to be secured during the police questioning of a suspect who is not deprived of liberty.[23] Therefore, they concluded that the judgment in the Salduz case did not achieve the desired harmonization effects since the member states interpreted their obligations differently when it came to the implementation of the standards of the right to access to a lawyer developed in the jurisprudence of the Strasbourg court.[24]

Further development of the jurisprudence of the ECtHR in the area of the right to access a lawyer in the police station can be followed in the Ibrahim v. UK case.[25] In that judgment, the ECtHR tried to elaborate in detail the "compelling reasons" as a basis for the possible limitation of the right to lawyer through the so-called

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20 An obvious example is Mađer's case in which the suspect, waiting for the lawyer, was questioned by the police before his arrival, and later, the verdict was decisively based on a confession given to the police. Judgment *Mađer v. Croatia*, 21 June 2011, no. 56185/07, § 154. Likewise, in the Šebalj case, the applicant was questioned in front of the police without the presence of a defence lawyer although he did not waive his right to legal assistance during the police interview. Later on, conviction was to a significant degree based on the applicant's statements given to the police. Judgment Šebalj *v Croatia*, 28 June 2011, no. 4429/09. § 256, § 263

21 Ogorodova, A., Spronken, T., *Legal Advice in Police Custody: From Europe to a Local Police Station*, Erasmus Law Review, no. 4, 2014, p. 191

22 Ivičević Karas, E., Valković, L., *Right of access to a lawyer while at a police station: legal and real restrictions*, Croatian Annual of Criminal Law and Practice, vol. 24, no. 2, 2017, p. 415

23 *Ibid*.

24 *Ibid*.

25 Judgment *Ibrahim and the others v. the UK*, 13 September 2016, no. 50541/08, 50571/08, 50573/08 and 40351/09

"two-step test".[26] On that occasion, the court took the view that the restriction of the rights to access to lawyer could, in principle, be possible under certain conditions involving assessment as to whether there was a basis for the restriction in domestic law, whether the restriction was based on an individual assessment of the particular circumstances of the case, and whether the restriction was temporary in nature.[27] Interestingly, the court went a step further and emphasized that in the circumstance that compelling reasons criteria have not been met, it couldn't be concluded that there exists a violation of Art. 6 ECHR. Therefore, it falls to the court to examine the entirety of the criminal proceedings in respect of the first three applicants in order to determine whether, despite the delays in providing legal assistance, they were fair within the meaning of Art. 6 (1) ECHR.[28] The literature criticizes this view of the ECtHR, emphasizing that the reasoning of the court opens the possibility of such restrictions even when conditions are not met, and therefore, the Ibrahim judgment can be considered a step back in the protection of the right to a lawyer at the police station.[29]

Nevertheless, the Ibrahim judgment has another significance that is reflected in the fact that the court entered into a demanding problem of distinction between the informal questioning of a witness and the formal interrogation of a suspect. Namely, one of the applicants was questioned by the police as a witness, although, during the questioning, the suspicion of having committed a crime fell on him because he incriminated himself by his own statements. During his testimony, police officers considered that, as a result of the answers he was giving, he was in danger of incriminating himself. Even though they knew that the applicant was incriminating himself, they passed on the opportunity to caution and inform him of his right to legal advice. Therefore, the court stressed that from that moment onwards, his situation was substantially affected by the actions of the police and was accordingly subject to a "criminal charge" within the autonomous meaning of Article 6 of the Convention.[30] Consequently, the court concluded that there was a violation of Art. 6 (1) (3) c) ECHR since the government failed to convincingly demonstrate, on the basis of contemporaneous evidence, the existence of compel-

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[26] See: Soo, A., *Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings: Ibrahim and the others v. the UK (13th of September 2016)*, European Journal of Crime, Criminal Law and Criminal Justice, vol. 25, no. 4, 2017, p. 335

[27] Judgment *Ibrahim and the others v. the UK*, *op. cit.*, note 25, § 277

[28] *Ibid*., § 280

[29] Moreover, recent judgment of Simeonovi v. Bulgaria (12 May, 2017, no. 21980/04) confirmed that the absence of compelling reasons as the basis for limiting the right to a lawyer is insufficient for the court to conclude that the defendant's right to a lawyer in the police station was violated if the proceedings as a whole were fair. Ivičević Karas, Valković, *op. cit.*, note 22, pp. 423–425

[30] Judgment *Ibrahim and the others v. the UK*, *op. cit.*, note 25, § 296

ling reasons in the fourth applicant's case taking into account the complete absence of any legal framework enabling the police to act as they did; the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice; and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.[31]

However, the aforementioned explanation is not a consistent practice of the ECtHR. Specifically, in the case Kalēja v. Latvia,[32] during a seven-year investigation, the applicant was questioned on several occasions as a witness. Although the police officers who conducted the investigation considered her a suspect, they deliberately failed to caution and inform her of her right to legal advice. Despite the ECtHR's discovery that the applicant had not enjoyed the procedural rights of the defence through the entire pre-trial process, it concluded that the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance during that stage.[33] The court reached such a conclusion out of the circumstances that she had been informed of her rights as a witness throughout the investigation, including her right not to testify against herself, and that she was not held in detention during the criminal investigation; therefore, she was not prevented from receiving legal assistance before and after her questioning by the police. The applicant was also given ample opportunity to contest the evidence used against her during the pre-trial investigation and trial. She exercised her rights in that regard at all stages of the proceedings.[34]

This conclusion of the court is extremely important for the criminal proceedings in the Republic of Croatia after the amendment to the CPA of 2017. In particular, this is true in complex cases, in which the extension of the investigation often changes the procedural stance of individual defendants. In this context, the issue of defining the delineation of the police questioning of witnesses from the formal interrogation of the suspect may arise.[35]

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31 *Ibid*., § 300

32 Judgment *Kalēja v. Latvia*, 5 October 2017, no. 22059/08

33 *Ibid*., § 69

34 *Ibid*., § 68

35 Commentators point out that from the doubtful standpoint of the ECtHR should not come the erroneous conclusion that the questioning of the suspect as a witness overrides the right to counsel in accordance with the Convention rights under the sole condition that the judgment is not based on evidence so obtained. Ivičević Karas, Valković, *op. cit.*, note 22, p. 14

2.2. European criminal law

2.2.1. Directive on the right to information in criminal proceedings

These standards of practice of the ECtHR get their epilogue at the level of the criminal law of the EU foremost through the Directive 2012/13/EU on the right to information in criminal proceedings. It is clear that the Directive also accepts the substantive concept of the defendant. The right to information is not linked to a formal decision to initiate criminal proceedings; therefore, the Directive presupposes that it applies from the time persons are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence (Art. 2 (1) Directive 2012/13/EU). Thereby, it specifies that in order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.[36] As a matter of fact, police interrogations usually precede the formal initiation of the criminal proceedings. Therefore, it is obvious that the Directive's intent was to cover factual situations in which the suspect may appear and facilitate its procedural situation by prescribing the prosecution authorities to inform him or her of the rights of defence. In doing so, the scope of information goes far beyond the mere formal enumeration of the rights of the defence and includes a description of the facts, including, when known, the time and place relating to the criminal act that the persons are suspected or accused of having committed, and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.[37]

2.2.2. Directive on the right of access to a lawyer in criminal proceedings

The concept of the defendant in substantive terms gained a broader meaning in the Directive on the right of access to a lawyer. In principle, like the Directive on the right to information in criminal proceedings, the Directive on the right of access to a lawyer applies to suspects or accused persons in criminal proceedings

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[36] Directive 2012/13/EU, Recital 19. Candito points out that Art. 2(1) Directive 2012/13/EU follows the jurisprudence of the ECtHR, which in several cases noted that „any differences in the legal classification of the defence, if not the subject of an adversarial procedure, constitutes a violation of Article 6(3)(a) of the Convention" (Drassich v. Italy, no. 25575/04). Candito, G.L., *The influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures*, in: Ruggeri, S., (ed), Human Rights in European Criminal Law, Springer, 2015, p. 234

[37] Directive 2012/13/EU, Recital 28

from the time they are made aware by the competent authorities of a member state, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence (Art. 2 (1) Directive 2013/48/EU).[38] However, the Directive on the right to access to a lawyer makes an important step forward and extends its scope to persons other than suspects or accused persons who, during questioning by the police or by another law enforcement authority, become suspects or accused persons (Art. 2 (3) Directive 2013/48/EU).[39] In other words, the Directive presupposes a situation where a citizen, during the informal questioning before the police, can suddenly become a suspect of having committed a criminal offense. At that moment, the citizen *de facto* becomes a suspect in the material wording, which obliges the police to discontinue such an informal conversation and inform him of the accusation, rights of defence, and, especially, the right of access to a lawyer, which should be communicated at such a time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively (Art. 3 (1) Directive 2013/48/EU).[40] In addition, the Directive has made an important step forward in terms of guaranteeing the rights of the access to a lawyer in criminal proceedings compared with the jurisprudence of the ECtHR. The Directive requires that the right to a lawyer be guaranteed to every suspect before they are questioned regardless of whether they are deprived of liberty or have been summoned to appear before the police or another law enforcement or judicial authority (Art. 3 (2) Directive 2013/48/EU).

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38 See: Hodgson, J., *Criminal procedure in Europe's Area of Freedom, Securtiy and Justice: the rights of suspects*, in: Mitsilegas, V., Bergström M., Konstadinides T., (eds*), Research Handbook on EU Criminal Law*, Elgar, 2016, pp. 178–179

39 Symeonidou-Kastanidou points out that that provision is consistent with the ECtHR's jurisprudence pronounced in Zaichenko v. Russia (decision of 28.6.2010) according to which the right to legal assistance must always be guaranteed to all persons from the moment that their position is significantly affected even if they have not been declared suspects or accused persons. See: Symeonidou-Kastanidou, E., *The Right of Access to a Lawyer in Criminal Proceedings: The Transposition of Directive 2013/48/EU of 22 October 2013 on national law*, European Criminal Law Review, vol. 5, no. 1, 2015, p. 72

40 The moment in which a citizen acting as a witness suddenly becomes a suspect is extremely controversial. Therefore, there is no precise moment when it can be undoubtedly stated that a witness becomes a suspect. Practically, it will depend on the police officer interrogating the person to autonomously decide about the moment from when a citizen should be treated as a suspect. It is therefore proposed that, in the event of doubt as to whether the person is in the status of a suspect or not, the authorities should stop the interrogation and grant the person interrogated all the defence rights, including the right to be assisted by lawyer. Winter, L.B., *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment*, in Ruggeri, S., (ed), Human Rights in European Criminal Law, Springer, 2015, p. 114

3. THE POLICE INQUIRY OF CRIMINAL OFFENSES ACCORDING TO THE AMENDMENTS OF THE CRIMINAL PROCEDURE ACT OF 2017

3.1. New organization of police inquires pursuant to amendments of CPA in 2017

The conventional and European standards on the substantive concept of the suspect and the right to a lawyer in pre-trial proceedings have significantly influenced the recent development of the Croatian criminal procedural law. The amended definition of the suspect not only affected significantly different understandings of the concept of suspect and strengthened the procedural rights of his defence but also had a major influence on the reorganization of police inquires of criminal offences, especially when it comes to the police treatment of the suspect in the earliest phases of criminal proceedings.[41]

Until the entry into force of the amendments of the CPA in 2017, police carried out the so-called interviews with citizens.[42] In doing so, it was explicitly prescribed that the police authorities may not examine citizens in the role of defendants, witnesses, or expert witnesses (Art. 208. CPA). There0fore, the information that the police collected during the informal questioning could not be used as evidence in criminal proceedings since it was collected in an informal manner, i.e., not in the manner prescribed for conducting these actions in criminal proceedings.[43] Likewise, the police conducted informal conversations with the suspect, who in most cases was not warned of his rights of defence.[44] The information thus obtained was also treated as a result of informal (cognitive) activity and could not be used as evidence in criminal proceedings. Nevertheless, the actual scope of the informal interviews conducted with the suspect was of utmost importance. Based on such

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41 For a brief overview of the historical development of police inquires, see: Burić, Z., Karas, Ž., *A contribution to the discussion of doubts concerning the new definition of suspect and the act of interrogating the subject*, Croatian Annual of Criminal Law and Practice, vol. 24, no. 2, 2017, pp. 445–454

42 Informal conversations with the suspect were conducted in the same way as informal conversations with the citizens. Police interrogation of the suspect as a formal action was not regulated at all. Ivičević Karas, E., Burić, Z., Bonačić, M., *Strengthening the rights of the suspect and the accused in criminal proceedings: a view through the prism of European legal standards*, Croatian Annual of Criminal Law and Practice, vol. 23, no. 1, 2016, p. 47

43 This event today means that when police officers collect information from a person who, for example, perceived the commitment of crime, they do not apply the provisions of the CPA on the examination of witnesses but perform the so-called informal conversations. Therefore, the citizen with whom the police would informally speak only later during an investigation would be questioned formally as a witness by the public prosecutor, and that testimony could then be used as evidence in criminal proceedings

44 Ivičević Karas, *op. cit.*, note 7, p. 370

information, the police often directed their further inquiries, and occasionally, the findings that arose during the informal talks with the suspect were used for the later collecting of evidence by the public prosecutor in the investigation as a formal stage of pre-trial proceedings.

With the entry into force of the amendments of the CPA in 2017, significant changes were made in Art. 208. CPA. Former informal interviews with citizens (including interviews with the suspect) are now divided into three groups. Thus, Art. 208. still regulates the above-mentioned informal interviews with citizens. Art. 208.a addresses the first-time police interrogation of a suspect, whereas Art. 208.b regulates police conduct and gathering information from citizens found at the place of the commission of a criminal offence.

In a given context, exceptionally important is Art. 208.a, which, after transposition of the Directive 2013/48/EU, expressly prescribes the police interrogation of a suspect. In other words, the police can no longer conduct the informal questioning of a citizen suspected of having committed a criminal offense but must interrogate him in a formal manner as a suspect, and before getting to the first interrogation, he or she will have to be fully acquainted with the rights of the defence. It is no matter whether it is about a citizen who, in the course of questioning by the police, becomes a suspect; a suspect who has been summoned to appear before a police officer for a formal interrogation; a suspect brought into the police station by force because, although duly summoned, he failed to appear in the police station; or a suspect who is arrested. The way the police should act is uniform. The police are obliged to treat any suspect in the same way, bearing in mind that they can no longer conduct informal questioning but only formal interrogation preceded by information about the crime he is suspected of having committed and the rights of his defence. This has greatly improved the procedural position of the suspect starting from the first contact with the police that occurs in the earliest stages of criminal proceedings. Strengthening the procedural rights of the defence is reflected, on the one hand, by laying down obligations for the police to give a notification to the suspect as to why is he charged and which are the basic suspicions against him and to warn him of the procedural rights of the defence, which was not the case in the earlier practices of police. In this way, the boundaries of the right to effective defence were shifted practically to the earliest stages of the criminal proceedings. This abolished many years of the tolerated phenomenon in practice that one and the same person during the pre-trial proceedings had significantly weakened rights of defence only because the police acted against him, whereas during the investigation conducted by the public prosecutor, he benefited from the procedural rights of the defence.

3.2. Procedural safeguards for the legality of the police interrogation of suspects

An important change in the legal nature of the police interrogation of the suspect during the police inquires of criminal offenses resulted in a detailed formal standardization of the police treatment of the suspect. As previously stated, to guarantee an effective defence, before the first interrogation, the suspect is immediately granted the right to know the following: a) why is he charged and which are the basic suspicions against him, b) that he has the right to a lawyer, c) that he has a right to interpretation and translation, and d) that he has the right to leave the police premises at any time except if he has been arrested (Art. 208.a (2) CPA).

In order that the notification of rights is not merely formal and illusory, the CPA stipulates the additional duty of the police to ensure that the suspect receives a letter of rights and that he understands its contents. Therefore, the police are obliged prior to the first interrogation to determine whether the suspect received and understood the written instructions on the rights. If the suspect did not receive the instruction on the rights, the police shall deliver the instruction on the rights to the suspect. If the suspect received the instruction but did not understand it, the police shall instruct him on his rights in an appropriate way (Art. 208.a (4) CPA).

As an additional guarantee that the police will act in accordance with the legislator's intended intention, it is prescribed that the interrogation of the suspect be conducted in accordance with the provisions of the law applicable to the interrogation of the defendant during the investigation and that the interrogation must be recorded by an audio-video device. The audio-video record has to include the statement of the suspect and whether he has received and understood the letter of rights, what the rights of the suspect are, the statement of the suspect as to whether or not he wishes to undertake the services of a lawyer, and the warning that the interrogation is recorded and that the recorded statement can be used as evidence in the court proceedings (Art. 208.a (6) (7) CPA).

The aforementioned formal expression of the CPA is the result of the implementation of the convention obligations arising from the jurisprudence of the ECtHR and the transposition of the Directive on the right to information in criminal proceedings and the Directive on the right of access to a lawyer in criminal proceedings. With this new legislation, the Croatian pre-trial procedure has taken the idea of the necessity of extending the fundamental provisions of the right to a fair trial to the earliest stages of the criminal proceedings. Therefore, it can be preliminarily concluded that the legislative intervention that had been carried out largely annulled the former pronounced gap in the realization of the procedural rights of the defence that could easily be perceived by comparing the procedural position of the suspect during the police inquires of criminal offenses and the

procedural position of the defendant during the investigation as a formal phase of the criminal proceedings.

3.3. Using the statements of the suspect before the police as evidence in criminal proceedings

Determining the police interrogation of the suspect on one side and guaranteeing high protective standards of suspects' defence on other side was a sufficient reason for the legislator to specify that the outcome of a police interrogation of a suspect could be used as evidence in criminal proceedings. Although the Directive on the right to access to a lawyer did not make such a request as to the probative force of the police interrogation, it seems that the Croatian legislative solution is justified, taking into account the guaranteed procedural rights of the defence and the prescribed form of the police interrogation of the suspect. Besides, additional guarantees are also provided to control the lawfulness of the police conduct while interrogating the suspect. This is primarily evident from the police obligation to produce an audio-video record of the interrogation as well as the moment of the warning of the defendant of his rights as well as his possible waiver of the right to a lawyer. Therefore, if the police made any omissions when warning the suspect about the rights of the defence or during the formal interrogation, the evidence so obtained will be sanctioned as illegal evidence,[45] and using the "fruit of the poisonous tree" doctrine, any other evidence that derives from the illegally obtained statements of the suspect during the police interrogation would be illegal too.[46]

4. POLICE INTERROGATION OF THE SUSPECT IN THE GAP BETWEEN CONTEMPORARY TRENDS AND ARCHAIC FORMAL BACKLOGS IN CROATIAN CRIMINAL PROCEDURAL LAW

4.1. The Tradition of Croatian Criminal Procedure vs. Conventional and European Standards

Successful realization of the police interrogation of the suspect that more deeply integrates police inquiries into the reality of Croatian criminal procedure may be potentially challenged by its traditional and strictly formal organization. There are

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45 Soo, A., *How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?*, New Journal of European Criminal Law, vol. 8, no. 1, 2017, 70

46 Strictly equalizing the modality and methods used to interrogate the suspect before the police and public prosecutor demands a system of equal responsibility and the same sanctions for the equal procedural violations of the form of interrogation. Ivičević Karas, E., *op. cit.,* note 7, p. 377

three fundamental backlogs in the Croatian criminal procedure that potentially could put into question the meaning and purpose of carrying out the police interrogation of the suspect: a) the strict division of the pre-trial procedure on informal and formal phases of proceedings; b) the perception of the police as a pure body of executive authority and the public prosecutor as a judicial body; and c) further strictly formal understanding and contradistinction of the terms of "suspect" and "defendant".

A) The division of the pre-trial procedure at the stage of informal and formal proceedings

In the context of pre-trial procedure, Croatian criminal procedural law traditionally strictly formally differentiates between inquires at the informal stage of pre-trial proceedings and investigation as the formal stage thereof.[47] Inquiry is aimed at the verification of the suspicion that a crime has been committed and elucidation as to who is the perpetrator, including collecting data necessary for the initiation of criminal prosecution.[48] During inquiry, the public prosecutor and police undertake actions and measures in an informal way and gather information and data that, as a rule, cannot be used as evidence in criminal proceedings. The goal of investigation is to produce enough evidence to bring charges against the defendant or to discontinue the criminal procedure (Article 228 (1) CPA). Investigation shall commence with a public prosecutor's decree on investigation if the reasonable suspicion that a particular person has committed a crime has been ascertained and if there are no legal obstructions to the criminal prosecution of that person (Article 217 (1). Investigation represents a formal phase of the pre-trial procedure in which the public prosecutor collects evidence in a formally prescribed manner so the results of investigation can be used as evidence before the court. The strict separation of the informal and formal phase of the pre-trial proceedings has the consequence that the phase of inquires is not considered a criminal procedure *stricto sensu*, while on the other hand, the CPA explicitly provides for criminal proceedings to be initiated in investigation.[49] Such an organizational structure of the pre-trial procedure differs from the organizational structure of pre-trial procedure

47 See: Pajčić, M., *Investigation pursuant to the amendments to the Criminal Procedure Act*, Croatian Annual of Criminal Law and Practice, vol. 20, no. 2, 2013, pp. 633–645

48 Prerequisites for the initiation of criminal proceedings are prescribed by the principle of mandatory prosecution. Krapac, D., *op. cit.,* note 9, pp. 99–102

49 It follows from the aforementioned that the actions and measures taken before the formal commencement of investigation are not part of the criminal procedure. However, in a broader substantive meaning, even the inquiries may constitute criminal procedure according to the jurisprudence of the ECtHR. See: *supra*, sub-heading 2.1.1.

in some European countries whose criminal procedures are often role models for Croatian legislators undertaking major reforms of Croatian criminal procedure.[50]

B) Police as a body of executive authority and public prosecutor as a judicial body

In the presented traditional formal structure of the pre-trial procedure, the police are perceived as the body of the executive authority whose powers in the criminal proceedings are reduced to informal actions and measures that are primarily aimed at discovering the perpetrator of the criminal offence; preventing the perpetrator or accomplice from fleeing or going into hiding; discovering and securing traces of the offence and objects of evidentiary value; and gathering all information that could be useful for successfully conducting criminal proceedings (Art. 207 (1) CPA). In commencing such activities, the police collect information and data unrelated to strict legal forms, so their results cannot be used as evidence in criminal proceedings.[51] The explanation for such reasoning is that the police act before the commencement of criminal proceedings, and for undertaking those actions and measures, there are not prescribed strict legal forms. Because of that, these actions are only informal.

On the other hand, the public prosecutor is an autonomous and independent judicial body that is empowered and duty-bound to instigate the prosecution of perpetrators of criminal and other penal offences, to initiate legal measures to protect

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[50] German StPO knows only the investigation (*Ermittlungsverfahren*) as a single stage of the preliminary proceedings. Pre-trial proceedings are regulated in such a way that there is no division into an informal proceeding. stage aimed at the examination of whether a criminal offence has been committed and clarification as to who is the perpetrator and investigation as a formal proceeding stage. It is obvious that the investigation of a criminal offense represents a single phase of the proceedings of public prosecutor and police where there is no formal delimitation between clarifying the suspicion that a criminal offense has been committed and an investigation against a particular person. Kühne, H.H. *Strafprozessrecht*, Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts, C.F. Müller Verlag, Heidelberg, 2010, pp. 204-205

The same solution exists in Austria as well. Namely, it is a fundamental feature of the Austrian StPO that the investigative procedure is not divided into the stage of preliminary (informal) investigation and the stage of formal initiation of the investigative procedure. The public prosecutor does not make a special, formal decision to open an investigation; rather, investigation and criminal prosecution are deemed initiated as soon as the Police and Public Prosecutor's Office commences with investigative activities for the purpose of clarification regarding the suspicion of a crime against a known or unknown person or undertakes a coercive measure against a suspect (§ 1 (2) StPO). Bertel, C., Venier, A., *Einführung in die neue Strafprozessordnung*, Springer-Verlag, Wien, 2006, p. 6

[51] An exception are urgent evidentiary actions: search, temporary seize of objects, judicial view, taking fingerprints and prints of other body parts (Art. 212. CPA). Of course, it is about actions that are taken only when there is a danger of delay, and in circumstances where such a danger doesn't exist police cannot undertake these evidentiary actions. Ljubanović, V., *Kazneno procesno pravo*, Grafika, Osijek, 2002, pp. 245-246

the property of the Republic of Croatia and to apply legal remedies to protect the Constitution and law (Art. 125. Constitution of the Republic of Croatia). Hence, the public prosecutor, in accordance with the principle of mandatory prosecution, initiates and conducts an investigation and, during the investigation, collects evidence and other procedural materials relevant for making the decision to file an indictment or to discontinue criminal proceedings. The public prosecutor is so called "*dominus litis*—master of the pre-trial proceedings", and only he can take the formal evidence collection actions pursuant to the CPA, the results of which can be used as evidence in criminal proceedings.

Therefore, in the context of Croatian pre-trial proceedings, the activity of the police is still seen as informal. This attitude creates confusion since the police, acting through the formal interrogation of a suspect, enter the sphere of taking the formal evidentiary actions, the result of which can be used as evidence before the court. By conducting a formal interrogation of the suspect, the police emerge from the domain of informal activity, and the result is the interrogation of suspects becomes evidence and part of the criminal proceedings. Through the implementation of Directive 2013/48/EU, Croatia practically made a "mini reform" of police inquires and abandoned a more than fifty-year-old tradition of informal police interviews of suspects. This reform suddenly transferred police inquiries into the formal criminal proceedings.[52] Therefore, the present strictly formalized system, which still makes a clear line of difference between informal police inquires and formal public prosecutors' evidentiary actions, slowly but surely loses its—until recently—unquestionable conceptual background and partly gives way to the concept of criminal proceedings in the substantive term.[53]

C) Formal understanding and contradistinction of the terms of "suspect" and "defendant"

The division of pre-trial proceedings between the informal phase of police inquiries and formal investigation is followed up by different definitions of suspect

[52] In Germany, the police may conduct informal questioning only to establish „factual indicators of suspicion" that a criminal offence has been comitted. But, as soon as factual indicators of suspicion have been established, the police must turn to a formal interrogation of the person suspected of committing the crime. Schumann, S., *Germany*, in: Schumann, S., Bruckmüller, K., Soyer, R., (eds), Pre-trial Emergency Defence, Intersentia, 2012, p. 86

[53] Such a solution is well-known in Austria, where the understanding of criminal proceedings in a substantive sense derives from § 91 para 2 StPO, which states that investigation (*Ermittlung*) is every action of the criminal police, the Public Prosecution service, or of the courts, which serve for the gathering, safekeeping, evaluation, or processing of information to clarify the suspicion of a criminal offence. Kert, R., Lehner, A., *Austria*, in: Ligeti, K., (ed) Towards a Prosecutor for the European Union, Hart Publishing, 2013, p. 10

and defendant. Namely, during police inquiries, the person against whom police are conducting their actions and measures has the procedural position of suspect. Therefore, the suspect is a person in relation to whom there are grounds for the suspicion of having committed a criminal offense and against which the police or the public prosecutor take actions to clarify this suspicion (Art. 202. (2) (1) CPA). Then, during the formal phase of investigation, the suspect becomes the defendant. In that context, the defendant is the person against whom the investigation is conducted, the person against whom a private charge is preferred, and the person against whom a penalty order was issued in a judgement (Art. 202 (2) (2) CPA). Also, the term "defendant" is a general term for a person against whom the criminal proceedings are carried out (Art. 202 (4) CPA). In accordance with the aforesaid, a suspect is a person against whom criminal proceedings have not yet begun, and his procedural situation is rather viewed through the prism of police inquiries that are said to be the informal stage of the proceedings. Such an attitude still exists in the jurisprudence of Croatian courts, although the implementation of the Directive on the right to access to a lawyer puts an emphasis on the notion of the defendant in the substantive meaning. It can therefore be concluded that the notion of the defendant in the substantive meaning has not been fully established in Croatian criminal procedure since the very concepts of criminal procedure, suspect, and defendant still continue to be interpreted in the jurisprudence of Croatian courts in a strictly formal way.

4.2. Interrogation of a suspect and/or a defendant as a mandatory requirement for filling an indictment

Although from the above it follows that a police interrogation of a suspect can be used as evidence in criminal proceedings, this standard opens several legal questions to which the first answers of judicial practice are yet to be expected. Due to the recent enforcement of the new legal provisions, there is still no case law on the possibility of using the results of the interrogation of the suspect before the police as evidence in the trial phase of criminal proceedings. However, Croatian courts have made several decisions regarding the adequacy of the police questioning of the suspect for filling the indictment.[54]

Namely, according to the explicit provision of Art. 341 (4) CPA, before preferring the indictment, the defendant must be interrogated. In accordance with that, the public prosecutor is not allowed to file an indictment before the court until he has formally examined the defendant. This evidence collection action is essentially the only evidence that the public prosecutor must have before filing the indictment.

[54] See *infra* sub-heading 5.2.

All other evidentiary actions are only optional and are taken depending on the circumstances of each case.[55] Considering that the interrogation of the defendant is the only evidence-collecting action that the public prosecutor must carry out before filing the indictment, in the process of the judicial review of the indictment, the court *ex officio* controls whether the public prosecutor has conducted the interrogation of the defendant in accordance with the statutory obligation.

With the entry into force of the new provisions of the CPA that authorizes the police to formally interrogate a suspect, the public prosecutor's office took the stance that the police questioning of suspects meets the criteria for the interrogation of defendants pursuant to Art. 341 (4) CPA[56] and that it is not necessary to repeat the interrogation of the defendant[57] before filing the indictment if the police already interrogated the suspect in accordance with Art. 208.a CPA. This standpoint is justified with the circumstance that the police interrogation of the suspect is carried out with the same procedural safeguards of suspect defence and in the manner of conducting the interrogation of the suspect, which is practically identical to the interrogation of the defendant before the public prosecutor. Therefore, the public prosecutor's office points out that any subsequent re-interrogation of a defendant the police have already interrogated in the role of a suspect represents a repetition of the actions already taken and an unnecessary prolongation of the criminal proceedings. It should be emphasized that the described standpoint of the public prosecutor's office comes into consideration only if the public prosecutor determines that the facts in the case justify such a decision. In other words, there is no limitation to the fact that the public prosecutor, in order to clarify the circumstances of the criminal case, takes further evidence-collecting actions and thus conducts the interrogation of the defendants with a case by case evaluation. However, be that as it may, it is solely within the jurisdiction of the public prosecutor in accordance with the principle of the separation of procedural functions. On the other hand, the courts are explicitly referring to Art. 341 (4) of the CPA, pointing out that the police interrogation of the suspect is not the same as the interrogation of the defendant and that the public prosecutor must file an indict-

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55 An exception is an indictment with a proposal for imposing a penalty order (Art. 540 CPA) and an indictment with a motion for trial in absence (Art. 341 (4) CPA)

56 Although in Germany the public prosecutor is the *dominus litis* of pre-trial proceedings in practice, the interrogation of the suspect during the investigation phase occurs at the police station. The prosecution and the courts are not typically involved. Bohlander, M., *Principles of German Criminal Procedure*, Bloomsbury Publishing, 2012, p. 93

57 In most cases, the interrogation of the suspect in Austria is executed by the police. The prosecutor is only informed later, and has, in reality, more supervisory function. Bruckmüller, K., *Austria*, in: Schumann, S., Bruckmüller, K., Soyer, R., (eds), Pre-trial Emergency Defence, Intersentia, 2012, p. 36

ment, which can be done only after the formal interrogation of the defendant as opposed to the suspect.

4.3. The reasons „pro et contra" for the police questioning of the suspect as the basis for filing the indictment

4.3.1. Arguments against the police questioning of suspects as grounds for filing indictments

When it comes to arguments against the use of the police questioning of suspects as sufficient evidence to substantiate an indictment, several allegations of a formal nature may be highlighted.

First, the police questioning of the suspect is regulated to the criminal investigation phase. This phase of the proceedings is informal and cognizant; it is revealed and not proven. In contrast, an investigative function consisting of the gathering of evidence for the decision to initiate an indictment is solely in the hands of the public prosecutor. Consequently, only the public prosecutor is authorized to take evidentiary actions, and the interrogation of the defendant is an evidentiary act carried out by a public prosecutor but not by the police.

Second, according to the explicit provision of Art. 341 (4) of the CPA, the defendant must be examined before the indictment is filed. By the very nature of the matter, only the public prosecutor is authorized to examine the defendant because he is being examined in the investigation as a stage of the proceedings and is a criminal procedure in the formal sense.

Third, the general provision of Art. 202 (4) of the CPA prescribes that the term defendant refers to the general name of the accused and the convicted, while the term of "suspect" is not covered by that provision since the suspect has not been formally prosecuted yet.

4.3.2. Arguments for the police questioning of suspects as the basis for filing the indictment

Contrary to the tradition of Croatian criminal proceedings, under the influence of convention and European criminal law, Croatian law has increasingly been pervaded by the understanding that police activities at the earliest stages of the criminal proceedings often have a significant impact on said proceedings. Croatia has made an important step with the last reform of the CPA since it significantly improved the procedural position of the suspect in the pre-trial procedure. In addition, this reform gives legitimacy to the police questioning of the suspect, i.e.,

the interrogation of a suspect by the police can be used as evidence in criminal proceedings provided it is obtained in a legally prescribed manner.

This is also explained by the legislature, which emphasizes that it is illogical and ineffective that in the situation where the suspect is guaranteed the respect of all his procedural rights, and when the prescribed form of interrogation is prescribed in detail, such a questioning of the suspect by the police does not provide the probative force in further proceedings.[58]

In this respect, the following should be emphasized: First; in accordance with the provisions of Art. 208 (7) of the CPA, on the examination of the suspect, the provisions of the interrogation of the defendants referred to in Articles 272 to 282 shall apply. This regulation provides for the uniform interrogation procedure of the suspect while at the same time safeguarding the rights of suspect's defense applied in the same way regardless of whether it is a suspect or a defendant. Therefore, the circumstance that only the body responsible for conducting the examination has changed does not necessarily mean "a priori" that the outcome of that examination is insufficient to initiate the indictment. Moreover, the police questioning of the suspect can be used as evidence at the trial phase of criminal proceedings, and there is therefore no reason to dismiss this as grounds for filing the indictment.

Second, perhaps the most obvious argument can be found in Art. 202 (3) of the CPA, which prescribes that the provisions on the defendant apply to a suspect, defendant, accused and convicted person, and persons against whom special procedures are provided for by this law or others. From the excerpt of the said provision, no other conclusion can be drawn from the standpoint that the safeguards of defense prescribed by the law are appropriately applied to the suspect as defined in the law. The aforementioned provision anticipates the true meaning of Directive 2013/48/EU aimed at ensuring the same quality of protection of the rights of the defense in the pre-trial proceedings regardless of which body of the proceedings acts against the suspect or the defendant and regardless of the stage of the proceedings.

Third, it is unacceptable that for the activity of two state bodies that effectively share the common obligation to detect criminal offences and find perpetrators, two different "morals" apply in criminal proceedings—one for the public prosecutor, whose morality we do not suspect, and another for the police, whose morality is questioned.[59] Namely, the police are questioning a suspect linked to, on the one hand, a set of rules of Art. 208.a CPA and, on the other hand, the rules of

[58] Explanatory memorandum to the amendments of the Criminal procedure act, *op. cit.*, note 6, p. 7

[59] Bayer, V., *Zakonik o krivičnom postupku*, Uvod-Komentar-Registar, Zagreb, 1968, p. 140

professional ethics. The one who thinks that the police are at a lower standard of professional morals than the public prosecutor's does not understand the correct nature of the criminal prosecution bodies and thinks that the framework of the state's activities in combating crime can be governed by different mutually opposing moral principles.[60] This opinion is obviously shared by the legislature when it has decided to prescribe that a suspect's statements in front of the police can be used as evidence in criminal proceedings.

Fourth, the public prosecutor is the master of the preliminary proceedings. He preliminarily assesses the existence of the preconditions for the initiation of criminal proceedings. In one of the initiated proceedings, he is investigating and collecting evidence for the adoption of a decision to initiate the indictment. But, without the strong and ardent help of the police, he would be impotent and ineffective at prosecuting perpetrators of criminal offenses. These are two bodies that coordinate their functions during the pre-trial procedure. In doing so, the public prosecutor carries the absolute responsibility for the entire investigative activity in the pre-trial procedure. Consequently, when the result of the police questioning of a suspect is accepted as valid, it should be considered that public prosecutor merely validated the result of the interrogation as if it had undertaken it. This means that it also consciously accepts the potential risk of the illegality of such a interrogation and any legal consequences resulting from it. It is for this reason that the court should place the faith in the public prosecutor's in corresponding to the position of the public prosecutor as a judicial body which, by professional authority, guarantees that its acts are founded and established by law.

5. RAMIFICATIONS OF THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN THE PRACTICE OF CROATIAN CRIMINAL PROCEEDINGS

5.1. General impressions

The implementation of the Directive on the right of access to a lawyer in criminal proceedings, as well as other directives that have been introduced within the package of the VII Amendment of the CPA, required an adjustment of several other components of the domestic repressive apparatus. In this respect, it was noted that, in practice, there were no significant difficulties in the work of the police and the relationship between police and the public prosecutor's offices, especially

[60] *Ibid*., p. 143

regarding the interpretation of certain parts of the amended CPA, with reference to deviations from the uniformity of the proceedings.[61]

The differences in treatment that are perceived and referred to in further analysis concern the proceedings of the court. For the purposes of the analysis in this paper, data from multiple county and municipal courts in the Republic of Croatia was gathered, with regard to court decisions in cases tried in accordance with the procedural regime in force since 1 December 2017. The analysis focus was on the court's assessment regarding the new definition of the suspect in the criminal proceedings. It can be concluded that the collected data gives rise to apparent disagreement on the interpretation of the power of evidence during the interrogation of the suspect in the sense of the provision of Art 208a of the CPA and, in consequence of these differences, in the decisions of the indictment or appeal panels in the second-instance proceedings.

5.2. Analysis of individual decisions and differences in court decisions

The majority of the court decisions concerned were cases in which a public prosecutor filed an indictment with a proposal for issuing a penalty order while in other several analysed cases, a direct indictment was filed. According to the gathered data, the Municipal Courts in Novi Zagreb, Koprivnica, Pula (including its Permanent Service in Pazin), and Vukovar granted the motion of the public prosecutor and issued a penalty order in cases where the suspect was examined only in accordance with the Art 208a of the CPA and without having been presented evidence during the first examination in accordance with the provisions of the Art 272 of the CPA. Those cases, in which the court rendered a penal order, were not individually analyzed considering the fact that the record and DVD of the questioning of the suspect according to Art. 208a CPA was cited in the explanation part of the conviction which states details and evidence on which such a court decision is based.[62]

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61 See: Pavić, K., Gluščić, S., *The relationship between the police and the public prosecutor's office according to the VII. amendment to the CPA*, Croatian Annual of Criminal Law and Practice, vol. 24, no. 2, 2017, pp. 486-491

62 For further information please review following court decisions: Decisions of the Municipal Court in Novi Zagreb No. K-29/2018-2 of 26 January 2018 and K-77/2018 of 27 February 2018, Decisions of the Municipal Court in Koprivnica No. K-35/2018-2 of 31 January 2018 and K-80/2018-2 of 21 March 2018, Decision of the Municipal Court in Pula-Pola No. K-66/2018-2 of 8 February 2018 and K-45/2018-2 of 9 February 2018, Decision of the Municipal Court in Pula-Pola, Permanent Service in Pazin No. K-27/2018-2 of 6 February 2018 and K-40/2018-2 of 8 February 2018 and Decisions of the Municipal Court in Vukovar No. K-6/2018-2 of 9 January 2018 and K-227/2018-2 of 8 May 2018

Such practice was not recorded at the Municipal Court in Varaždin. The Municipal Public Prosecutor in Varaždin filed an indictment with a proposal to issue a penalty order. In this situation the public prosecutor's proposal to the court was not granted, and the court, pursuant to the provision of Art. 344 of the CPA, dismissed the indictment.[63] In the explanation part of the decision, it is stated that the indictment panel found that the indictment was filed without the legal preconditions described in the Art. 341 (4) of the CPA – that the defendant, before the filing of the indictment, had not been examined. The court referred to Art. 202 (2) of the CPA, where the legal definitions of suspects and defendants are contained, and emphasized that terms "suspect" and "defendant" were not adequately defined. It also referred to Art 202 (4) of the CPA, claiming that the term "defendant" could not be used as a general term for the term "suspect". As the last argument supporting its decision, the court stated that the rights of the suspect were listed in the Art. 208a of the CPA, which, in its scope, were significantly smaller than that of the rights of the defendant mentioned in Art. 239 of the CPA. By distinguishing the stages of the proceedings in which a person is questioned as a suspect from the one in which he is questioned as a defendant, any equalization of the concepts of the suspect and the defendant could call into question the violation of the defendant's rights in the proceedings.

Public prosecutor in the appeal against that decision emphasized the fact that the CPA stated that the DVD recording and the written record based on the Art. 208a of the CPA could be used as evidence in criminal proceedings. Additionally, the indictment could be filed in accordance with Art.341 of the CPA when the results of the actions pertaining to the criminal offense and the perpetrator give sufficient grounds for its filing, and for that reason, the requirement of Art. 341 (4) of the CPA have been fulfilled.

The Varaždin County Court rejected the appeal as unfounded and in its decision it confirmed the position of the first instance court,[64] stating that the legal opinion of the public prosecutor expressed in the appeal cannot be accepted "for purely formal reasons". The appellate court found that the first instance court correctly pointed to a different normative definition of the terms of suspect and defendant (Art. 202, (2) (1) (2) of the CPA). The court considers that in any case, the provisions of the Art. 341(4) of the CPA deal with the examination of the defendant and not the suspect, where, in the particular case, according to the position of the court at the time of the examination of the person, the suspect was considered to be one in the traditional sense of the word. It therefore considered that the exami-

[63] Decision of the Municipal Court in Varaždin No. 30 Kov-64 / 18-2 of 28 March, 2018

[64] Decision of the County Court in Varaždin No. 19 Kž-153 / 18-4 of 17 April, 2018

nation, in accordance with the provisions of the Art. 208a of the CPA, could not be considered as the first examination of the defendant, at least not according to the legal definition of these two terms *de lege lata*. The appellate court pointed out that it considered that the legislator should have been more precise in relation to the possible application of the Art 208a in conjunction with Art. 341 (4) of the CPA. However, as it has not been done, the court did not accept the attitude of the public prosecutor due to formal reasons. The same court essentially equated the position in the ruling on the dismissed direct indictment.[65]

Unlike the practice of the Municipal and County court in Varaždin, the Karlovac County Court had a very different interpretation of the same legal provisions.

The Municipal Court in Gospić, in its decision No. 3 Kov-17/2018-2 of 27 February 2018, pursuant to Art. 344 (1) (2) of the CPA dismissed the indictment, citing, as did the Municipal Court of Varaždin, that the precondition for filing the indictment is the examination of the defendant. It also relied on Art 341 (4) of the CPA in terms of defining the notion of the defendant and emphasizing that the examination of a suspect in accordance with Art. 208.a of the CPA and the examination of a defendant could be found in various parts of the CPA and therefore did not accept the claim of the public prosecutor that the formal requirement for filing an indictment is fulfilled, i.e., that the defendant was examined.

An appeal by the Municipal Public Prosecutor's in Gospić was filed against this court decision due to the wrongly established factual situation.

The County Court in Karlovac granted the appeal of the public prosecutor, abolishing the contested ruling of the Municipal Court in Gospić, and referred the case to the president of the indictment panel with instructions to resume the proceedings. In the explanation of the ruling of the County Court in Karlovac[66] it was stated that the appellate court considered that the records of the suspect questioning were made in accordance with the provisions of the Art 275 of the CPA in conjunction with Art. 208a of the CPA, i.e. that they were in accordance with the implemented Directive of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, setting out the obligation of a member state to implement effective mechanisms within its criminal justice system for a person suspected of having committed a criminal offense, which guarantee not only the right to a lawyer, but to exercise that right virtually and efficiently. The appellate court, based on the data in the

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65 Decision of the Municipal Court in Varaždin No. 29 Kov-56 / 18-2 dated 26 March 2018, confirmed by the County Court's decision in Varaždin No. 21 Kž-166 / 18-4 of 24 April 2018

66 Decision of the County Court in Karlovac No. Kž-44 / 2018-3 of 4 April 2018

case file, concluded that the defendant was questioned by the police, pursuant to Art. 208a of the CPA, and that his examination was recorded with an audio-video device; that an instruction on the rights of the suspect (Art. 208a (3) of the CPA) was recorded on the audio-video device; that during the examination, the suspect gave unambiguous written statement that he did not want a lawyer i.e. his waiver (Art. 208a 3, 4, and 5 of the CPA) as well as the instruction the suspect, in the same form, on what a lawyer's function in that situation was (Art. 273, paragraph 2, 3 and 5 of the CPA). Thus, the County Court in Karlovac concluded that the suspect was undoubtedly aware that the examination was recorded and that the recorded testimony could be made under the conditions of the Art 208 of the CPA, thus making it sufficient to be used as evidence in criminal proceedings. In connection with this, a record was made in the sense of the provision of Art. 275. of the CPA, which can be used as evidence in the procedure. Consequently, the court concluded that there was no reason to dismiss the indictment in the present case.

5.3. Further development of court practice

The described differences in the jurisprudence of different courts in the Republic of Croatia for the same procedural situations are primarily causing legal uncertainty, which will result in the proceedings being finalized in one court, while in the second court it will not even begin. The resolution of such procedural situation may, on the one hand, be in the new amendments of the Criminal Procedure Act, as further indicated by the Varaždin County Court in the aforementioned decisions. Another possibility is the decision of the Supreme Court of the Republic of Croatia regarding which requests for protection of legality are filed by the Head Public Prosecutor of the Republic of Croatia, and, in which proceedings the highest Croatian court gives the final interpretation of the current provisions of the Criminal Procedure Act after the implementation of the above mentioned Directive.

6. CONCLUSION

This paper shows that, currently in the Republic of Croatia, and after the seventh amendment of the Criminal Procedure Act, there is no unified standpoint on the notion of the defendant in the material sense, which has been introduced as a procedural standard by the Directive on the right of the access to a lawyer in criminal proceedings. It is evident that the courts partially accept such a Europeanized model and still have a firm formal concept of the defendant. However, further Europeanization of the Croatian Criminal Justice System will contribute to the change of this established paradigm, which is why further assumption of the

term of the defendant in the material sense is expected in the future. Removing possible ambiguities and taking into account an extremely traditional approach to the interpretation of legal provisions might have been avoided by harmonizing the existing provisions of the CPA with its seventh amendments package, but as it was not done, it is up to jurisprudence to determine the further course of the application of the law.

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THE IMPACT OF AMENDMENTS AND SUPPLEMENTS TO THE CRIMINAL PROCEDURE LAW IN DETERMINING, DISCUSSING, AND PROVING THE GENERAL CRIMINALITY OFFENSES*

ABSTRACT

The latest amendment to the CPA / 08 is one of the most demanding changes that accompanied the transposition of the EU Directive into our national legislation. Although more than one directive is concerned, the most significant is the Directive of the European Parliament and Council Directive 2013/48 / EU on 22 October 2013., on access to the lawyer in criminal proceedings and in proceedings based on a European Arrest Warrant, as well as on the right to third party information in the event of arrest and a right to communication with third parties and consular authorities. In essence, the Directive amended the police's conduct towards the suspect in a way that "forbids" the gathering of information from the suspect, and the police are obliged to conduct the investigation with the full guarantee of the right to defense. Considering the practical aspect of the current legislation, especially when conducting criminal investigations into the domain of general criminality (blood and property delicts), for police officers, the informal testimony of the suspect plays a significant role in further prosecuting and directing criminal investigation. Directing the investigation is important for detecting potential perpetrators of crime, finding objects and traces that have resulted from the perpetration of a criminal offense or from those used to commit a criminal offense, ie information, objects and traces that might be of use to successfully conduct criminal proceedings.

With the Amendments to the CPA / 08, police officers will no longer be able to conduct such informal informational conversation with the suspect for a specific criminal offense. The basic aim of the research is to establish which changes do the amendments to the legal provisions have

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on the detective and the demonstration activity of the police, and from a practical aspect, the research aims to look at the difficulties as well as the benefits faced daily by the police officers in detecting and proving the perpetration of criminal offenses. This paper presents the results of preliminary research conducted in the area of Zagreb County Police Administration.

Key words: *CPA / 08, police officers, suspect, informal informational conversation with the suspect, criminal offense*

1. INTRODUCTION

In the Republic of Croatia, the tasks and powers of the police in the detection and prosecution of criminal offenses are partially regulated by the Criminal Procedure Act[1] and partly by the Law on Police Affairs and Authorities.[2] The current concept of criminal prosecution was established by the 2008 CPA[3]. Although, it has changed significantly in comparison to it's previous legal iteration, it can be said that the fundamental police powers remained within the framework of traditional arrangements. The preliminary procedure consists of police and / or state attorneys inquiries and investigations. Police inquiries that are conducted before the criminal proceedings, according to their goals and the way of planning, have retained the traditional "informal" character in terms of most of the actions undertaken within their framework[4]. The goal of such "informal" actions is to acquire percivable evidence, an information base for the state attorney, on which he will make further decisions. Collection of information is also among those actions that could be undertaken. It could be conducted in accordance with requirements that were prescribed by the CPA / 08 and the LPAA, so that information was also collected from the suspects. The above mentioned activity was very important for inquieries overall, and was often the central point of the said inquieries, the results of which were significantly dependent on their further course.

Since its adoption, CPA / 08 has been amended seven times, and the latest amendments to the CPA / 08 are consequently linked to the need for harmonisation of Croatian criminal legislation with the acquis communautaire. Of the whole series of amendments to the CPA / 08, we state one which we consider to be the most

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1 Zakon o kaznenom postupku, Narodne novine, No. 152/08, 76/09, 80/11, 121/11 pročišćeni tekst, 91/12- Odluka Ustavnog suda Republike Hrvatske, 143/12, 56/13, 143/13, 152/14, 70/17; (in further text: CPA)

2 Zakon o policijskim poslovima i ovlastima, Narodne novine, No. 76/09, 92/14; (in further text LPAA)

3 Zakon o kaznenom postupku, Narodne novine, No. 152/08, 76/09, 80/11, 121/11 pročišćeni tekst, 91/12- Odluka Ustavnog suda Republike Hrvatske, 143/12, 56/13, 143/13, 152/14; (in further text: CPA/08)

4 Gluščić, S., *Izvidi kaznenih djela prema Noveli Zakona o kaznenom postupku*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 20, 2/2013., p. 613-630

demanding for police praxis and which is linked to the transposition of Directive 2013/ 48 / EU[5] of the European Parliament and of the Council of 22 October 2013 on access to justice attorney in criminal proceedings and in proceedings based on the European Arrest Warrant and the right to informing of third parties in the event of arrest, as well as the right to communication with third parties and consular authorities.

The question may be asked why the emphasis is put on the above-mentioned amendment. Namely, since Art. 2. para.1. c. 10. The LPAA stipulates that police procedures are conducted through the exercise of police powers, and are regulated by the said law, but also by other legal and subordinate acts, so that one part of very demanding amendments to the CPA / 08 directly reflect on the conduct of police inquiries, moreso, on the conduct of criminal investigations in cases where there are grounds for suspicion of the perpetration of criminal offenses prosecuted ex officio.

It is very likely that this amendment to CPA / 08 will have a powerful impact on the discovery work of police officers, clarification and gathering of evidence or collection of facts, objects and traces that may be of use to successfully conduct criminal proceedings, the appearance of unlawful evidence, and what is in a causal link with the rise or fall of the number of criminal charges dismissed by state attorneys, as well as other decisions in further stages of the criminal proceedings.[6]

In order to ascertain whether there is any impact of the transposition of Directive 2013/48 / EU into the CPA / 08 on the work of police officers, i.e. on the detection and resolution of criminal offenses, as well as on the quality of the gathered evidence, it is necessary to conduct an empirical research in such a way as to analyse the state prior to the entry into force of the last amendments to the CPA / 08, as well as the state after the said amendment was implemented.

In this paper, only a small part of the survey sample has been presented, ie the collected data from police files involving murders and attempted murders during 2016 in the Zagreb County Police Administration, respectively, before the entry into force of the latest amendments to the CPA / 08.

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5 Available at: [http://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32013L0048&from=HR] accessed 8 March 2018 (in further text: Directive 2013/48/EU)

6 Pavić, K., Gluščić, S., *Odnos policije i državnog odvjetništva prema VII. Noveli Zakona o kaznenom postupku*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 24, 2/2017, p. 483–498

2. SPECIFIC PROVISIONS OF DIRECTIVE 2013/48 / EU

The provisions of Directive 2013/48 / EU are implemented in Croatian criminal law with the latest amendments to the CPA / 08. CPA / 08 adopted a mixed definition of the suspect, in the formal[7] and material[8] sense. Given that in the Directive 2013/48 / EU, the term is defined only in the material sense in order to properly transpose the provisions of Directive 2013/48 / EU, it was necessary to change the definition of the suspect referred to in Art. 202. para. 2. c. 1. CPA/ 08.[9]

Therefore, the CPA, in the latest amendment from the 2017, defines the suspect as a person in relation to which there are grounds for suspicion of having committed a criminal offense and against whome the police or the State Attorney's Office take action to clarify this suspicion, in Art. 202. para. 2. c. 1.[10]

The most demanding and one of the most significant amendments to the CPA / 08, which is directly related to the conduct of police officers, is related to Art. 2 nd para. 1 of Directive 2013/ 48 / EU. Specifically, the article stipulates that its provisions shall apply to suspects or accused persons in criminal proceedings from the time the competent authorities of the Member States have informed them, by means of an official notice or otherwise, that they are suspected or accused of committing a criminal offense and regardless of whether or not they are deprived of their liberty, and in c. 3 of the same Article, that the Directive 2013/ 48 / EU applies under the same conditions to those persons who are not suspected or accused and who, during examination by the police or other body responsible for the enforcement of the law, become suspects or accused persons.[11]

The meaning and implication of examination is apparent in the introductory provision of Directive 20/ 68 / EU. Thus, examination does not include preliminary

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7 The status of the suspect is tied to filing criminal charges. For doubts about the new definition of the suspect and their interrogation as prescribed by the new CPA, see: Burić, Z., Karas, Ž., *Prilog raspravi o dvojbama vezanim uz novu definiciju osumnjičenika i radnju njegova ispitivanja*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 24, 2/2017, p. 443–482

8 The suspect is a person against whom inquries or or an urgent taking of evidence, are being conducted

9 Prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku, Nacrt, Zagreb, 2017, p. 7

10 On influences that the transposition of the European criminal law had on Croatian criminal procedural law via three Directives that we mentioned, as well as, the influence of the european legal standards on the right to defense in Croatian criminal procedure, one research has been conduced, namely: „ Jačanje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku u Hrvatskoj", see: Ivičević Karas, E., Burić, Z., Bonačić, M.*, Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu europskih pravnih standarda*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 23,1/2016, p. 11– 8; Ivičević Karas, E., Burić, Z., Bonačić, M.*, Prava obrane u različitim stadijima hrvatskog kaznenog postupka: rezultati istraživanja prakse*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 23, 2/2016, p. 509–545

11 *Ibid.*

investigation by the police or another body responsible for the implementation of the law, whose purpose is to identify the person concerned, check for the possession of weapons or other similar security issues, determine whether there is a need to initiate an investigation, for example during traffic control or during regular random checks if a suspect or accused a person has not yet been identified. From the aforementioned, as well as from the Draft Law on Amendments to the CPA[12] it follows that the questioning should be understood to be any inquiry of the suspect on the circumstances of the criminal offense and in relation to the criminal offense, while the preliminary examination should only be understood as establishing od equivalence, traffic control, weapons possession control and similar.

Furthermore, it is apparent from recital 20 of Directive 2013/ 48 / EU that the examination does not involve a preliminary investigation by a police or other law enforcement body whose purpose is to identify the person concerned, to check for the possession of weapons or other similar security issues, determine whether there is a need to initiate an investigation, for example during traffic control or during regular random checks, if the suspect or accused has not yet been identified. From the aforementioned, as well as from the Draft Law on Amendments to the CPA[12], it follows that the examination should include any inquiry of the suspect on the circumstances of the criminal offense and in connection with the criminal offense, while the preliminary investigation should only be considered to establish equivalence, traffic control, weapons possession and similar.

3. CROATIAN CRIMINAL PROCEDURAL LAW BEFORE AND AFTER THE IMPLEMENTATION OF DIRECTIVE 2013/ 48 / EU

Before and after the last amendments to the CPA / 08 Art. 207 para. 1 stipulates the objectives of the inquiries or conduct of the necessary measures by the police that concern the traditional measures of discovery of the perpetrator of the criminal offense, preventing him and all other participants from hiding or escaping, to detect and ensure the traces of the criminal offense and objects that can serve to determine the facts in the proceedings and to collect all the information that could be of use for the successful conduct of the criminal proceedings. In addition to the general definition of the police inquiries, the elaboration of individual actions is also regulated by the provisions of the special legislation, which is the reffered LPAA and Ordinance on the Procedures of Police Officers[13], based on the said law.

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12 *Ibid*.

13 Pravilnik o načinu postupanja policijskih službenika, Narodne novine, No. 89/10, 76/15

De lege lata, informal police proceedings are not legally regulated by the CPA, which in fact means that the police, during such proceedings, establishes facts relevant to criminal proceedings in accordance with the provisions of a special law, the rules of the profession and in accordance with the needs arising from each particular case. Thus, in most cases, the police conducted informal inquiries with suspects about a particular criminal offense.

However, in view of the amendments to the CPA / 08 for transposing Directive 2013/ 48 / EU, it is to be expected that in the work of police officers, especially in dealing with the suspected person for a particular criminal offense, certain difficulties will arise, ie a certain information deficit[14] given that informal inquiries with a suspected person for a particular criminal offense can no longer be performed. CPA in Art. 208a "formalizes" the questioning of the suspect, citing the contents of the summons of the suspect, the content of the instructions to be given prior to the examination, clear warnings about the rights to a defense attorney, the course of questioning and recording of such a questioning, as well as the consequences for violation of the questioning rules as prescribed.

The above-mentioned normative regulation, alongside the need for a theoretical consideration of the transposition of Directive 2013/ 48 / EU, also point to the need to conduct a scientific research in view of the amendments to Art. 208. CPA / 08, and especially in regard to the provision of Art. from paragraphs 5 to 15 of CPA / 08 from 2017.

If a practical aspect is considered, according to the regulations that were in effect prior to the entry into force of the last amendments to the CPA / 08, especially when conducting criminal investigations into the domain of general crime (e.g. homicide and property offences), informal statemets given by the suspect[15], especially those found perpetrating a criminal offence, or found shortly after the perpetration of a criminal offence[16], had a significant role in futher prosecution, but also in directing the criminal investigation towards discovery of other potential

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[14] On the importance of the suspect's statement before the beginning of criminal procedure, see: Karas, Ž., *Kriminalistički značaj pribavljanja osumnjičenikovog iskaza prije početka kaznenog postupka*, in: Policija i sigurnost, No. 2/2015, p. 101–109

[15] On the ratio of informal confessions of suspects to commiting murder and murder with malice towards a family member, see: Kondor-Langer, M., *Obiteljska ubojstva: ranije delinkventno ponašanje i tijek kaznenog postupka*, in: Hrvatski ljetopis za kazneno pravo i praksu, vol. 22., 1/2015, p. 153–183

[16] On perpetrators cought in flagrante, see: Kondor-Langer, M., *Neka obilježja izvršenja ubojstava u obitelji u odnosu na spol počinitelja i srodstvo žrtve i počinitelja*, Zbornik radova IV. Međunarodne znanstveno-stručne konferencije, "Istraživački dani Visoke policijske škole u Zagrebu", Zagreb, 2015, p. 345-363

perpetrators of the criminal offence, discovery of objects and traces resulting from perpetration of the criminal offence or those used to commit the offence.

However, due to the entry into force of the amendments to the CPA / 08, police officers can no longer conduct such informal inquiries with the suspectes for a specific criminal offense.

4. METHODOLOGY OF RESEARCH

4.1. Research goal

The aim of the research is to study the success of police officers in the area of Zagreb County Police Administration in detecting and solving certain criminal offenses in the area of general crime (homicide and property offences) before and after the entry into force of the amendments to the CPA / 08. The aim of the research is structured through several specific objectives:

* determining the characteristics of the perpetration of a criminal offense prior to the amendments to the CPA / 08

* criminal procedure before amendments to the CPA / 08

* determining the characteristics of the commission of a criminal offense after the amendments to the CPA / 08

* criminal procedure proceedings after amendments to the CPA / 08

The reason for the selection of these specific goals is in the possible practical use of the results of the research in terms of detecting, eliminating and improving the performance of police officers during the survey after the entry into force of the CPA / 08 amendment.

Based on the data collected so far, the aim of the research is to gain insight into certain features of the person suspected of committing the criminal offense of murder and murder in attempt, as well as into some of the actions conducted during police inquries against the suspect prior to the entry into force of the CPA / 08 Amendments Law. The specific objective of the research is to establish the existence of differences in the mentioned groups of characteristics in relation to the suspect's informal confession during the police interview.

4.2. Sample

The sample of research presented in this paper is part of a sample of research that will be used to analyze the impact of the amendments to the CPA / 08 amend-

menton detection, completion and proving of criminal offenses in the area of general criminality. As a sample for the research in this paper, secondary data sources were used, including collected police files of murders and murders in attempt from the area of the Zagreb County Police Administration in the period from 1 January 2016 to 31 December 2016. For the time being 35 murders and murders in attempt were analyzed, and the research sample encompasses 35 suspects, two of whom were still unknown at the time of conducting the research.

4.3. Instrument

The data necessary for the realization of the overall research are collected with the help of a specially compiled questionnaire that contains several groups of variables and the variables that define the features of the criminal offense prior to the amendment of the CPA / 08, the proceeding of the criminal procedure before amendments to the CPA / 08, the features of the commission of a criminal offense after the amendment of the CPA / 08 and the course of the criminal procedure after the amendment of the CPA / 08.

For this paper, some variables from questionnaires that used to define the characteristics of a criminal offense before the amendments to CPA / 08 and the course of criminal proceedings before the amendments to the CPA / 08, were used.

Given that the specific purpose of this paper is to establish the existence of differences in certain characteristics of persons suspected of committing a criminal offense of murder and murder in attempt, to distinguish between the actions taken against the suspect during conducting police inquries, prior to the entry into force of the amendments to the CPA / 08 in relation to the informal confession of the suspect during police interview, the following variables were used:

1. the qualification of a criminal offense,
2. ordering an expert's report,
3. knowledge about the perpetrator obtained from expert's report,
4. sex of the perpetrator,
5. the age of the perpetrator,
6. the relationship between the victim and the perpetrator,
7. education of perpetrators,

Along with these 7 variables, a variable that defines the informal confession of a suspect during an interview was used as a criterion variable.

These variables were selected for the purpose of achieving the objectives of this paper, or for the purpose of gaining insights into certain characteristics of the person suspected of committing the criminal offense of murder and murder in attempt and differences in the particular actions taken against the suspect during conducting police inquiries and establishing the existence of differences in said groups of characteristics given the suspect's informal confessions during the police interview.

4.4. Method of conducting research

The Ministry of the Interior of the Republic of Croatia in January 2018 gave the consent for the implementation of the research entitled "Influence of Amendments to the Criminal Procedure Act for the Discovery, Completion and Proving of Criminal Offenses in the Area of General Crime". No special consent was required from the Ethics Committee, which is usually sought in research involving people as respondents, given that research was conducted based on the analysis of secondary data. In terms of the general ethical principles in scientific research, the anonymity of perpetrators and victims was respected in the sense that the identification data were not included in the questionnaires. The survey was started in January 2018 and will last until 2020 and is conducted by filling in questionnaires and is based on insight into police files.

4.5. Data processing mode

After completion of the data collection, the data from the survey questionnaires were entered into the database in the statistical program „SPSS" (version 16.0), and after the data entry was completed, logical control was performed. Descriptive statistics were used for the purposes of the defined research objectives, and for the determination of statistically significant differences in the analyzed characteristics the Hi - quadrat test was used (significance level - $p < 0.05$).

5. RESEARCH RESULTS

5.1. Actions conducted towards the suspect while conducting inquries in relation to suspect's informal confession during a police interview

In order not to obtain too low frequencies in the variable defining the qualification of the criminal offense in the category of "murder" (N = 11), three offenses of aggravated murder were included, while in the category of "murder in attempt" one criminal offense of aggravated murder in attempt, and one concurrence of criminal offense: murder in attempt, endangering life and property by a generally

dangerous act or means and robbery, and one concurrence of criminal offense: aggravated murder in attempt and robbery in attempt.

Also in the criterion variable that defines the suspect's informal confession during the police interview in the "no" category (does not confess), include the cases in which the suspect did not want to answer (N = 4), cases in which the offender has so far remained unknown (N = 2), dead (N = 3), and cases where no interview with the suspect was conducted (N = 3).

If the criterion variable the informal confession of the suspect during a police interview in relation to the criminal offense the suspect had committed or the qualification of the criminal offense overall, it is apparent that the relatively high number of suspects during the interview do not confess the perpetration of the criminal offense (62.9 %).

However, if the suspect's confessions are looked upon separately in cases where the criminal offense is qualified as murder and murder in attempt, it is apparent that 63.6 % of the suspects confessed to committing the murder, while the perpetration of the murder in attempt was informally confessed to by only 1/4 of the suspects. The qualification of a criminal offense relative to the suspect's informal confession during a police interview is statistically significant.

Table 1.: Qualification of a criminal offense relative to the suspect's confession during an interview

Qualification of a criminal offense		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		yes	no	11		
murder	aps.	7	4	100		
	%	63,6	36,4			
murder in attempt	aps.	6	18	24	4,823	**,028**
	%	25,0	75,0	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

Criterion variable The suspect's informal confession in relation to the variable that defines whether in a particular case the competent State Attorney's Office has ordered an expert's report, has shown, in total, that in the relatively large number of cases of murder and murder in attempt, in a relatively large number of cases an expert's report had been conducted. In cases where expert's report was

conducted, it is apparent that the suspects were relatively equal, ie in 50 % of the cases have informally confessed or did not confess to the perpetrated criminal offense. Whereas, in cases where no expert's report was instructed, it was apparent that none of the suspects confessed the criminal offense they were charged with. It should be noted here that two unknown perpetrators were counted among the suspects who did not confess to the perpetration of the criminal offense. Conducting expert witnessing in relation to the suspect's confession during a police interview shows statistical significance.

Tabel 2.: Expert's report in relation to the suspect's confession during an interview

Expert's report		Suspect confessed to commiting the criminal offence during police intervju		total	X^2	significance
		yes	no			
yes	aps.	13	13	26	7,159	**,007**
	%	50,0	50,0	100		
no	aps.	/	9	9		
	%	/	100	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

The variable defining whether the expert's report provided information about the perpetrator, showed in total that in a relatively small number of cases the probative act of expert's report resulted in obtaining of information about the perpetrator of the criminal offense. It should be noted here that in three cases from those analyzed, it was not found whether the expert's report provided any information about the perpetrator. In two cases out of the three, the suspect informally confessed to committing the criminal offense during the informal interview.

In analyzed cases in which an expert's report resulted in information about the identity of the perpetrator, it is apparent that in a relatively few more cases, the suspects have formally confessed to the perpetrated criminal offense (58.3 %). In cases where the expert's report did not result in obtaining information about the perpetrator, it is apparent that even the suspects in the relatively large number of cases did not informally confess to the perpetrated criminal offense (80.0 %).

Table 3.: Obtained knowledge about the suspects during the expert's assessment in relation to the suspect's informal confession during the interview

Expert's report provided information about the perpetrator		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		yes	no			
no data	aps.	2	1	3	5,946	,051
	%	66,7	33,3	100		
yes	aps.	7	5	12		
	%	58,3	41,7	100		
no	aps.	4	16	20		
	%	20,0	80,0	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

5.2. Characteristics of suspects in relation to the suspect's informal confession during an interview

The criterion variable informaly confessions the suspect in relation to the variable defining the relationship between the victim and the suspect, indicate that in total, the relatively large number of suspects was closely related to the victim. For the purposes of this work, a close person is defined on the basis of Art. 87. of the Criminal Code of the Republic of Croatia[17]. When defining close persons including family members[18], the definition of family members covered by art. Art. 87., para. 8.[19] of the CC. In order not to get low frequencies, for the purpose of this work, close persons were also taken to include persons who were tempore criminis in a love affair (N = 1).

It should be noted here that, in one case, no information on the relationship between the victim and the suspect was found in the analyzed case. In cases where the victim and the suspect had a close relationship, but also in cases where the victim and the suspect were acquaintances[20], it is apparent that in a relatively large number of cases the suspect during the informal interview did not informally con-

[17] Kazneni zakon Republike Hrvatske, Narodne novine, br. 125/11, 144/12, 56/15, 61/15, 101/17; (in further text: CC)

[18] Family members are married or domestic partner, civil or informal civil partner, their children, children of each person, their lineal relatives, third generation collateral relatives, second degree in-laws, adopter and adoptee

[19] Close persons are family members, ex marital or domestic partner, ex civil or informal civil partner, persons who have a child together and persons who share a household together

[20] Aquaintance include: aquaintances (N=6), friends (N=3) and neighbours (N=1)

fess to the perpetration of the criminal offense (close persons - 62.5 % , victim and suspect are acquainted -70 %). Only in cases where the victim and the suspect did not know each other, it was apparent that the suspects, in the half of the analyzed cases, informally confessed to committing the criminal offense during an informal interview.

Table 4.: Relationship between the victim and perpetrator in relation to the suspect's confession during the interview

Relationship between the perpetrator and the victim		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		yes	no			
no data	aps.	/	1	1	1,377	,711
	%	/	100	100		
close persons	aps.	6	10	16		
	%	37,5	62,5	100		
perpetrator and victim are not aquainted	aps.	4	4	8		
	%	50,0	50,0	100		
victim and the perpetrator are aquainted	aps.	3	7	10		
	%	30,0	70,0	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

Out of a total of 35 suspects for committing a criminal offense of murder and murder in attempt, 26 suspects were male and 7 female. In the two offenses committed, perpetrators are still unknown. Observing the informal confession of the suspect during the police intervju in relation to suspect's genders, it is apparent that 61.5 % informally confessed the perpetration of a criminal offense. Similar data is also found for suspected women, namely that 57.1 % informally confessed the perpetration of a criminal offense.

***Table 5**.:* Gender of the perpetrator in relation to the suspect's confession during the police interview

Gender of the perpetrator		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		yes	no			
no dana	aps.	/	2	2	1,299	,522
	%	/	100	100		
male	aps.	10	16	26		
	%	38,5	61,5	100		
female	aps.	3	4	7		
	%	42,9	57,1	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

The criterion variable of informal conffesion of the suspects in relation to the age of the suspect at the time of the commission of the criminal offense, indicate that the relatively high number of suspects was 18 to 30 years old, while the least of those were the ages of 61 to 70. If the criterion variable is viewed in relation to each age group, it is apparent that 60 % of the suspects at the age of 18 to 30 during the informal interview informally confessed to the perpetrated criminal offense. And with the oldest ages of the suspects, the results show that all informally confessed to the perpetrated criminal offense. Unlike these two age groups, the suspects of the other age groups in the relatively large number of cases during the police interview most often did not informally confess to the perpetrated criminal offense. Thus, in the case of suspects aged between 31 and 40, it is evident that only 12.5 % of them informally confessed to the perpetrated criminal offense. The suspects aged 41 to 50 in 28.6 % of the cases informally confessed to the perpetration of the criminal offense and those aged between 51 and 60, in 1/3 of cases. It should be noted that at the time of the investigation in two cases, the perpetrators were still unknown and there was no data related to the perpetrator's age.

Table 6.: The age of the perpetrator in relation to the suspect's confessions during an interview

Age of the perpetrator		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		yes	no			
unknown perp.	aps.	/	2	2	9,143	,104
	%	/	100	100		
18-30 years	aps.	6	4	10		
	%	60,0	40,0	100		
31-40 years	aps.	1	7	8		
	%	12,5	87,5	100		
41-50 years	aps.	2	5	7		
	%	28,6	71,4	100		
51-60 years	aps.	2	4	6		
	%	33,3	66,7	100		
61-70 years	aps.	2	/	2		
	%	100,0	/	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

In order not to get too low frequencies in the interpretation of data related to perpetrator's education, it should be noted that in the category "finished high school or gymnasium" were counted those suspects who did not complete college, higher or high school (N = 2), and in the category "completed 8 grades of elementary school" there were also counted those who did not complete high school or gymnasium (N = 2) while in the category "without any school" were also counted those who did not complete 8 grades of elementary school (N = 1).

In most cases of murders and murders in the attempt, as expected, there was evidence that perpetrators finished secondary education during their education period. If the criterion variable of the suspect'sconfession is placed in relation to the particular defined categories of education, it is apparent that the suspects who had completed high school and college, higher or high school in the relatively large number of cases during the informal interview, did not informally confess to the perpetrated criminal offense (completed high school - 61.9 %, graduate, higher or high school – 100 %). By contrast, suspects who have not gained any education during their lifetime in 66.7 % of cases informally confessed to the perpetration of the criminal offense and those who completed 8 grades of elementary school, confessed in 50 % of cases. When interpreting information regarding the suspect's

education, it should be mentioned that in the four analyzed cases the data relating to the suspect's education was not found.

Table 7.: Education of the perpetrator in relation to the suspect's confession during an interview

Education of the perpetrator		Suspect confessed to commiting the criminal offence during police interview		total	X^2	significance
		Yes	No			
no data	aps.	/	4	4	4,508	,342
	%	/	100	100		
without any school	aps.	2	1	3		
	%	66,7	33,3	100		
finished 8 grades of elementary school	aps.	3	3	6		
	%	50,0	50,0	100		
finished high school or gymnasium	aps.	8	13	21		
	%	38,1	61,9	100		
completed college, higher education	aps.	/	1	1		
	%	/	100,0	100		
total	aps.	13	22	35		
	%	37,1	62,9	100		

6. SUMMARY OF RESEARCH RESULTS

It should be noted that limitations of this research are related to the lack of specific data in certain analyzed files therefore was formed the category "no data".

From the data obtained during the research it is apparent that 63.6 % of the suspects informally confess the perpetration of the criminal offense of murder during the police interview. In relation to the fact whether an expert's report has been conducted or not, in an analyzed case, it can be seen equal number of suspects informally confessing or not confessing the perpetrated criminal offense. In cases where expert's report did not provide useful insights about the perpetrator of a particular criminal offense, the suspects have informally confessed in 20 % of the cases.

Furthermore, it is apparent from the analyzed data that the suspects informally confessed the perpetrated criminal offense in 37.5 % of cases if committed at the expense of close persons, in half of the cases analyzed if the offense was committed to the detriment of persons who they do not know and in 30 % if the victim and

the suspect were tied to an earlier acquaintance. Men informally confessed in 38.5 % of cases and women in 42.9 % of cases.

If we look at the age structure of the suspects, it is clear that the suspects at the age of 18 to 30 informally confessed the perpetration of the criminal offense in 60.0 % of cases, from 31 to 40 years in 12.5 % cases, then at 41 up to 50 years in 28.6 % of cases and between the ages of 51 and 60 in 33.3 % of cases, while those of the eldest age (from 61 to 70 years) all informally admitted the perpetrated criminal offense.

The informal suspect's confession of the perpetrated criminal offense in relation to their educational structure showed that the suspects without formal education informally confessed the criminal offense in 66.7 % of cases and the suspects with completed elementary school in 50 % of cases. Suspects who had completed high school education and informally admitted the perpetrated criminal offense, was 38.1 %, while the only suspect who had completed university, higher or high school was not informally admitted the perpetrated criminal offense.

7. CONCLUDING DISCUSSION

Initial research results that include data before the entry into force of the recent amendments to the CPA indicate that police officers in the most serious criminal offenses committed in the domain of general crime, collect information from the suspect and that during those interviews they get a confession. Preliminary results based on the collected information are not surprising since the police officers, in accordance with the legal regulations, have also targeted the gathering of the information from the suspects.

The confession of the suspect, given during the interview, from an probative aspect is an "informal" percievable evidence, but nevertheless, an extremely important one, because it confirmed the suspicion that the person, from whom the information was collected, was the perpetrator himself, or could have averted the suspition about the perpetration. The significance of such confessions is also in the possibilities of discovering the new, added, other evidence that resulted from such police inquiries.

It is undisputed that such gathering of the information was a significant police power, based on which police officers conducted a number of cases, and therefore, the amendments to the CPA open up a whole series of questions about the future way of dealing with the suspect. Questions such as when does a person aquire the status of the suspect, how and under which conditions the police can contact potential suspects, under what conditions the suspect can provide evidence that

could be of use for futher conduct of the criminal proceedings, statements that result in obtaining of other evidence, what is the delimitation between the registering of a criminal report during which certain questions are asked, the collection of information and inquiries with the possibility of addressing issues such as discovering of objects and traces or even victims of the most serious criminal offenses and of course, the question of illegally obtained evidence, which ultimately reflect on further criminal proceedings.

Given the provisions of Directive 2013/48 / EU and its transposition into the CPA, the question arises as to how this will pratically affect the detection and resolution of criminal offenses and the gathering of evidence. Answers to these questions will be obtained by completing an overall research and comparing the obtained data before the amendments to the CPA and after the subsequent changes to the CPA.

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RIGHT OF THE CHILD TO INFORMATION ACCORDING TO THE DIRECTIVE 2016/800/EU ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

ABSTRACT

One of the elements that is often neglected in cases when children are suspects or accused persons in criminal proceeding is the fact that children and their parents almost always lack information about their rights during criminal proceeding. Children in that situation face a higher risk of deprivation of their fundamental procedural rights because of their young age, lack of knowledge, their incomplete physical and psychological development, and emotional immaturity. One of the guarantees of the right to a fair trial (article 6 ECHR) that has been developed in the ECtHR jurisprudence is the right to effectively participate in criminal proceeding, but to accomplish that in practice the judicial system first needs to ensure that children are informed in a child-friendly manner what rights they have during criminal proceeding and how they can exercise them. Directive EU 2016/800 sets a minimum number of rules on several procedural rights for children in criminal proceedings, including the right to information (article 4 and 5), in order to ensure a higher standard of protection for children as suspects or accused persons. This paper analyses the right to information according to the Directive EU 2016/800 and other international and regional documents and how this right is regulated in some EU Member States, whether special provisions are applied to children, with special reference to the legislation of the Republic of Croatia. The aim of this paper is to give an overview of how the right to information is regulated in the Directive 2016/800 (EU) and in EU Member States in order to offer new legal solutions (de lege ferenda) for implementation of this right in Croatian juvenile criminal legislation.

Keywords: *right to information, children as suspects or accused persons, criminal proceeding, Directive EU 2016/800*

1. INTRODUCTION

Criminal proceeding in Croatia has undergone significant changes over the last few years, which is proven the best by the number of amendments of the core legal act, Criminal Procedural Act (hereafter: CPA).[1] One of the main reasons for frequent changes of the CPA is the harmonization of Croatian criminal legislation with *acquis communautaire* of the European Union (hereafter: EU). EU was conceived initially as a state union with the aim of establishing a common market; however, after the Lisbon Treaty in 2009, EU received supranational legislative powers in the area of criminal justice, which a few years previously to it seemed unthinkable.[2] After the Lisbon Treaty, EU authorities were aware that, in order to achieve mutual recognition of court decisions in area of criminal justice, it was necessary to establish common minimum standards in all Member States (hereafter: MS) and that is why harmonization of criminal procedural law became an integrative tool for the EU criminal law area.[3]

In November 2009, the EU Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused in criminal proceeding.[4] European Council included the Roadmap as a part of the Stockholm programme – An open and secure Europe serving and protecting citizen.[5] The step-by-step approach from the Roadmap turned out to be very successful because the four measures on procedural rights in criminal proceedings have already been adopted: Directive 2010/64/EU[6], Directive 2012/13/EU[7], Directive 2013/48/

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1 Criminal Procedure Act, Official Gazette, No.152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14. Konačan prijedlog o izmjenama i dopunama ZKP-a, Vlada RH, Zagreb, lipanj 2017, pp. 41-54

2 Ćapeta T., Rodin, S., *Osnove prava Europske unije*, II. Izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011, pp.4-6; Đurđević, Z., *Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi*, HLJKPP, Zagreb, vol. 15, No. 2, 2008, pp. 1079-1083

3 Đurđević, *op. cit.* note 2, pp. 1090-1092; Ivičević Karas, E., Burić, Z., Bonačić, M., *Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu Europskih pravnih standarda*, HLJKPP, Zagreb, vol. 23, No. 1, 2016, pp.12-14

4 Resolution of the Council on a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, Brussels, 24 November 2009, 15434/09

5 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4. 5. 2010

6 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (20. 10. 2010), OJ L 280, 26. 10. 2010, p. 1

7 Directive2012/13/EU on the right to infromation in criminal proceedings (22.5.2012.), OJ L 142, 1.6.2012, p. 1

EU[8] and Directive 2016/343/EU.[9] Today, the directives have an important role in the process of the integration and the strengthening of the European criminal law, especially since the ECJ established in its practice that they could have the direct effect on vertical legal relations.[10]

2. DIRECTIVE 2016/800/EU – BASIC DEFINITIONS

The last in the series of directives to be adopted in accordance with Roadmap that refers to measure E, is the Directive 2016/800/EU of the European Parliament and of the Council of the 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereafter: Directive).[11] Commission decided that measure E would apply only to one category of vulnerable persons that could be easily defined, namely suspected or accused children.[12] Children are at a greater risk of being discriminated or deprived of their fundamental rights because of their age, incomplete physical and psychological development, lack of knowledge or the ability to act by exercising free will. That risk is even higher in the situations when children are removed from their natural surroundings because a large number of EU citizens travel often and migrate to other countries within the EU where they can become subjects in a criminal proceeding.[13] Proposal for the Directive was created in 2013 and the Directive was finally adopted on 11 May 2016. MS have to transpose it into their legislation by 11 June 2019.[14]

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8 Directive2013/48/EU on the right to access to a lawyer in criminal proceedings and in proceedings based on a European arrest warrant and on the right to information by a third party in the event of seizure and communication with third parties and consular authorities (22.10.2013), OJ L 294, 6. 11.2013, p. 1

9 Directive 206/343/EU on the strengthening of certain aspects of the presumptions of innocence and the right to be present at the trial in the criminal proceedings (9.3.2016), OJ L 65, 11.3.2016, p. 1

10 Goldner Lang, I., *Europsko pravo kao okvir pravosudne suradnje u kaznenim stvarima*, HLJKPP (Zagreb), vol. 21, No. 2, 2014, pp. 240-245; Ćapeta, Rodin, *op. cit.* note 2, pp. 78-81

11 Directive 2016/800/EU of the European Parliament and of the Council of the 11 May 2016 on the procedural safeguards for children who are suspects or accused persons in criminal proceedings (21.5.2016), OJ L 132/1

12 Cras, S., *The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings, Genesis and Descriptive Comments Relating to Selected Articles*, Eucrim, No. 2, 2016, p. 110. Some authors think that it is very problematic that the Directive does not set out a definition of vulnerability. See: de Vocht D.L.F., Panzavolta M., Vanderhallen Miet, Oosterhout M, *Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission Proposal in Light of an EU Comparative Study*, New journal of European criminal law, Vol. 5, No. 4, 2014, p. 488-490

13 Klimek, L., *Mutual Recognitions of Judicial Decisions in European Criminal Law*, Springer- Switzerland, 2017, pp. 650-651

14 Directive, art. 24, Ireland and UK decided not to participate in the adoption of the Directive and Denmark also. Because of the absence of a uniform position on many issues between MS regarding juvenile

"The purpose of this Directive is to establish procedural safeguard for children who are suspect or accused persons in criminal proceedings in order to ensure that they are able to understand and follow the proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration."[15] Since its beginning, this Directive differs from the previous ones because it regulates various procedural rights that can be applied only to a specific category of persons, suspect/accused children.[16] Many of those procedural rights have already been regulated by previous directives, but this Directive sets minimum rules on procedural rights for suspects/accused children in order to ensure a higher standard of protection for them and this is why this Directive must be considered as *lex specialis*.[17] Before we start discussing the right to information, first we must determine the scope of application of the Directive in order to resolve any possible doubts about the implementation of the Directive in MS.[18]

2.1. Scope of application of the Directive

The Directive applies to children who are suspects or accused persons in criminal proceedings and to children who are wanted persons from the time of their arrest in the executing MS.[19] According to the Directive, a child is a person under the age of 18.[20] The Directive does not define the minimum age of criminal responsibility and it states that its provisions do not affect national rules on determining the age of criminal responsibility.[21] The age of criminal responsibility in EU is not uniform and it varies from 10 (The UK, Switzerland) to 18 years of age (Belgium) because of a different historical, cultural, social and legal reasons that are related to political and legal systems of each MS.[22] Despite different opinions in the process

criminal legislation, Directive didn't include in its text the provisions on the minimum age of criminal responsibility, establishment of juvenile courts and the rules on the waiver of judicial systems. Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822/2, p. 10

15 Directive, para. 1

16 Cras, *op. cit.* note 12, pp. 110

17 *Ibid.,* pp. 111

18 Directive also incorporates all relevant child related international standards and documents. Directive, para. 3, 7, 8

19 Directive, art. 2 (1) and (2)

20 Directive, art. 3 (1). This definition is in accordance with the art. 1. of the UN CRC 1989

21 Directive, art. 2(5)

22 Dünkel, F., Grzywa, J., Pruin, I., Šelih, A., *Juvenile justice in Europe – Legal aspects, policy trends and perspectives in the light of human rights standards* in Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I., (eds.) in Juvenile Justice Systems in Europe, Current Situation and Reform Developments, vol. 4., Forum Verlag Godesberg, 2011, pp. 1846-1849

of making the Directive,[23] it can also apply to suspect/accused persons in criminal proceedings or wanted persons who were children when they became subjects of the proceedings but have in the interim reached the age of 18. In these situations, the Directive should be applied only when it is found "appropriate" in the light of all circumstances of the case, including the maturity and vulnerability of the person concerned. MS can decide not to apply provisions of the Directive in cases when the person in question has reached the age of 21.[24] Directive also applies to children who were not initially suspects or accused persons but became one in the course of questioning by the police or by another law enforcement authority.[25] In cases of persons who were children at the time when the criminal offence had been committed and have already reached the age of 18 when they became a suspect/accused person in criminal proceedings, the Directive encourages MS to apply the procedural guarantees provided by the Directive until such persons reach the age of 21.[26]

Directive should apply only to criminal proceedings and it should not be applied to other types of proceedings, in particular to proceedings that are specially designed for children.[27] In cases of minor offences, with the exception of cases prosecuted before a court which has jurisdiction in criminal matters, the Directive should not be applied because it would be unreasonable to expect from the competent authorities in MS to ensure all the procedural safeguards and rights from the Directive.[28] The Directive should be applied fully in situations when a suspect/accused child is deprived of liberty, regardless of the stage of criminal proceedings.[29]

In regards to the temporal scope of application, Directive states that it "...applies to children who are suspects or accused persons in criminal proceedings".[30] If we compare this provision with the provisions from the previous directives, we can notice the difference.[31] Previous directives are applied in the criminal proceeding from the moment that the suspect or accused person have been notified by the competent authorities, by formal legal act or otherwise that they are suspect or

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23 Cras, *op. cit.* note 12, pp. 112

24 Directive, art. 2(3), Directive, para. 11

25 Directive, art. 2(4)

26 Directive, para. 12 and 13

27 Directive, art. 5 (1) and para. 17

28 Directive, para. 15 and 16

29 Directive, art. 2(6). For critique of this solution see: De Vocht, Panzavolta, Vanderhallen, Van Oosterhout, *op. cit.* note 12, pp. 484-486

30 Directive, art. 1(1)

31 Directive on the right to infromation, art. 2(1), Directive on the right to lawyer, art. 2(1)

accused of having committed a criminal offence.[32] In the process of adopting the Directive, it was decided that this Directive should apply in criminal proceedings from the moment when the child becomes suspect or accused of committing a criminal offence. This means that the Directive applies in criminal proceedings even before the child has been in any way, orally or in writing (by formal legal act) informed by the competent authorities that he/she is suspect or accused for committing a criminal offence.[33] Reasons why this solution has been accepted is the fact that many of the procedural rights from the Directive are being used only in the later stages of the criminal proceeding and because in the meantime the same solution has been accepted in the Directive on the presumption of innocence.[34] The Directive should be applied "...until the final determination of the question whether the suspect or accused person has committed a criminal offence, including where applicable, sentencing and the resolution of any appeal."[35] That means that the Directive should be applied until the final sentence has been proclaimed, which includes the stage of appeal process.[36] The Directive, as all other directives, also has a non-regression clause.[37]

3. THE RIGHT OF SUSPECT/ACCUSED CHILD TO INFORMATION IN CRIMINAL PROCEEDING IN INTERNATIONAL DOCUMENTS

Charter of the Fundamental Rights of the EU[38] in several provisions establishes the basic rights of access to justice that sustain fair trial guarantees for both adults

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32 Ivičević Karas, Burić, Bonačić, *op. cit.* note 3, pp. 15-16; Krapac, D. i suradnici: *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, VI. Izmijenjeno i dopunjeno izdanje, studeni 2014, pp. 230-231

33 Cras, *op. cit.* note 12, pp. 112

34 Directive 2016/343 / EU, art 2. In the introduction of this directive, it is stated that it should be applied from the moment when a person is suspected or accused of committing a criminal offense and therefore even before the competent authorities of a MS have notified the person by letter or otherwise, that he/she is the suspect or the accused. Directive 2016/343 / EU, para 12

35 Directive, art. 2(1)

36 During the process of adopting the Directive there's been some discussion whether Directive should be applied even in the execution phase in order to ensure protection of children especially in the cases of sanction that include deprivation of liberty, but that proposal was not accepted. Cras, *op. cit.* note 12, pp. 112-113

37 Klimek, *op. cit.* note 13, pp. 654

38 Charter of the Fundamental Rights of the EU, OJ C 326/395, 26. 12. 2012

and children.[39] Children's rights are mentioned in article 24, but there are no child-specific provisions regarding their rights in criminal procedure.[40]

One of the most important rights that has been established by the UN Convention on the Rights of the Child (hereafter: CRC)[41] is the child's right to participate in the judicial proceedings and the right to express their opinion on the matters that concern them. These rights should naturally include the right of child to be opportunely informed about his rights in a child-friendly manner.[42] Regarding the right to information, CRC stipulates that the child has the right to be "…informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians…".[43] The UN Committee on the Rights of the Child (hereafter: Committee)[44] in their General comment No. 10 specifically states that in order for the child to effectively participate in the criminal proceeding, he/she must first be informed not only of the charges brought against him/her, but also of the juvenile justice process as such, and the possible measures and sanctions.[45] The child has to be informed promptly and directly (as soon as possible) of the charges brought against him/her and the Committee emphasises that it is the job of the legal authorities (e.g. police, prosecutor, judge) to explain to the child those charges in a language and manner that the child can understand (child-friendly manner) and to make sure that the child understands the given information. They should not leave this to the child's parents or legal guardians.[46]

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39 Charter of Fundamental Rights, art 47 and 49. Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights and Council of Europe, Belgium, June 2015, pp. 197

40 Regardless of the fact that Charter of Fundamental Rights does not contain any child-specific related provision, MS must always observe the EU Charter when implementing the provisions of any of the directive. Handbook on European law relating to the rights of the child, *op. cit.* note 39, pp. 198

41 Convention on the Rights of the Child (CRC,) General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, text: [http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf] Accessed 20.3.2016.

42 Kovačević, M., *Maloletničko pravosuđe u Evropi i maloletnici kao aktivni učesnici krivičnog postupka*, Zbornik PF u Splitu, year 51., No. 4, 2014, pp. 879

43 UN CRC 1989, art. 40(2) ii)

44 The UN Committee in charge of monitoring the implementation of the CRC issued in 2007 General Comment No. 10 on Children's Rights in Juvenile Justice. CRC/C/GC/10, 25 April 2007. Text: [http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf] Accessed 15.3.2018

45 General Comment No. 10, para. 44, p. 14

46 General Comment No. 10, para. 46-47, p. 15

The European Convention on the Exercise of Children's rights[47] is primarily applied to family judicial proceedings and it states that one of the rights of children in cases of proceedings before a judicial authority that affects them is the right to receive all relevant information.[48]

One of the international documents that specifically regulates the right of children to information in criminal proceedings are Guidelines on child-friendly justice (hereafter: Guidelines).[49] Guidelines states that children and their parents should be promptly and adequately informed about their rights from their first involvement with the justice system or other competent authorities and throughout the process, and they should be informed about the instruments that are available to remedy possible violations of their rights.[50] Information should be given to children and their parents as soon as possible, directly, in a manner that is adapted to the child's age and maturity, and in a language that they can understand according to the needs of every individual case.[51] After receiving the information, children should be able to understand what is happening, how things will move forward and which options they have in the current situation.[52]

ECHR[53] does not contain any child-specific provisions regarding the children's right in criminal proceedings, but from the jurisprudence of ECtHR, we can conclude that all of the guarantees contained in article 6 ECHR regarding the right

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47 European Convention on the exercise of the children's right s from 1996, Međunarodni ugovori Official Gazette No. 1/2010

48 European Convention on the exercise of the children's rights, art 1, 2 and 3. Hrabar, D., *Nova procesna prava djeteta- europski pogled*, Godišnjak Akademija pravnih znanosti, vol. IV, No. 1, April 2013, pp. 70-73

49 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum. Council of Europe Publishing, 2010, [https://rm.coe.int/16804b2cf3] Accessed 15.3.2018

50 Guidelines lists some examples of what kind of information children and their parents should receive: information on the likely duration of the proceedings, the system and procedures involved; information about the support mechanisms for the child, the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected; the general progress and outcome of the proceedings or intervention; the availability of protective measures and so on. Guidelines on child-friendly justice, part IV, A 1, p. 20-21

51 Child friendly materials containing relevant legal information should be made available and widely distributed, and special information services for children, such as specialised websites and help lines, established. Guidelines on child friendly justice, Part IV., A 2-5, pp. 21, part B 25, p. 25

52 Guidelines on child-friendly justice, Second part, explanatory memorandum, part IV, A. 50, 51, 52, 54, pp. 58-60

53 European Convention on Human Rights, [https://www.echr.coe.int/Documents/Convention_ENG.pdf] Accessed 26.3.2018

to a fair trial equally applies to children.[54] The right to information in criminal proceeding is not guaranteed in ECHR as a specific right but despite that, the ECtHR has established in its case law some positive obligations for the competent authorities of the States Parties, which refers to their duties to inform the suspect or defendant about his rights that emanate from Article 6 ECHR.[55]

Aspects of the right to a fair trial that have generated child-specific case law, and these are connected to the right to information, the right to an access to a lawyer and the right to an effective participation.[56] The right to the access to a lawyer is considered one of the fundamental elements of the right to a fair trial. In its case law, ECtHR has established that the judicial authorities are not only obligated to inform accused/suspect person about his right to the access to a lawyer and the right to free legal help, but also that it is not enough that those information are given to the suspect/accused person in written form without the fact that legal authorities have not taken all reasonable measures to make sure that suspect/accused person has understood all of the mentioned rights.[57] ECtHR scrutiny of whether an applicant had effective access to a lawyer is stricter in cases involving children.[58]

In order to ensure children's effective participation in criminal proceeding, according to the ECtHR case law, as a rule, proceedings have to ensure that the childs age, level of maturity and emotional capacities are taken in to account. This has to be assessed according to the national proceedings and concrete circumstances of each individual case.[59]

4. THE RIGHT TO INFORMATION TO SUSPECTS/ACCUSED CHILDREN IN CRIMINAL PROCEEDINGS IN SOME EU MEMBER STATES

In Austria, same rules apply for the right to information for suspect/accused child in criminal proceeding as for adult suspects/accused.[60] This means that the police or the public prosecutor must inform the suspect/accused child about his/

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54 T and V vs. U.K., ECHR 16.12.1999, 24724/94 and S.C. vs. U.K., ECHR15.06.2004, 60958/00. Carić, A., Kustura, I., *Kamo ide hrvatsko maloljetničko kazneno zakonodavstvo?*, Zbornik radova PF Split, god. 47, No. 4, 2010, pp. 806-808, Handbook on European law ..., *op. cit.* note 39, pp. 199

55 Ivičević Karas, Burić, Bonačić, *op. cit.* note 3, pp. 24

56 Handbook on European law....., *op. cit.* note 39, pp. 199

57 Ivičević Karas, Burić, Bonačić, *op. cit.* note 3, pp. 24-25

58 ECtHR Salduz v Turkey (GC), No. 36391/02, 27 November 2008, para. 51, 61, 62.; ECtHR Panovits v. Cyprus, No. 4268/04, 11 December 2008, Handbook on European law ....., *op. cit.* note 39, pp. 204

59 *Ibid,* pp. 202

60 § 37 (1) Jugendgerichtsgesetz (JGG) 1988, Austrian Juvenile Court Act, BGBI 1988/599... last change: 154/2015,

her rights during the proceeding according to the general provisions of the Austrian Code of Criminal Procedure.[61] The legal representative of the child, usually the parents, benefits from all significant procedural right that the child has.[62] In Germany, before the first interrogation by the public prosecutor or the president of the youth court, the suspect/accused child has to be informed of his/her rights in criminal proceeding according to the general provisions of German Code of Criminal Procedure that applies to adults suspects/accused persons.[63] The only difference is that the child must be informed about his/her rights in a way that considers his/her level of development, education and majority.[64] Child's parents or legal guardians also have to be informed about the child's rights.[65]

Italy has a special legal act (DPR 448/1988) that applies to children as suspect/accused persons and one of the main principles of that law is that the judge has to verbally explain to the accused child the meaning of the procedural activities that take place in his/her presence and the content and the ethical-social reasons behind the decisions.[66] Some of the rights of the children in criminal proceeding are the following: the right to legal assistance, the right to be heard and informed about the charges, process and possible sentence and the right to privacy.[67] Par-

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[https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002825] Accessed 27.3.2018

61 § 50, § 51, § 53, § 58, § 61, § 62 Austrian Criminal Procedure Act, Strafprozeßordnung 1975 (StPO) BGBI 631/1975.... last change: BGBI I 117/2017, [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326] Accessed 27.3.2018; Maleczky, O., *Jugendstrafrecht*, 4. Auflage, Wien, 2008, Manz, pp. 34-35

62 §38 JGG. Bruckmüller, K., Pilgram, A., Stummvoll, G., *Austria* in Dünkel, F., Grzywa, J., Horsfield, P., Pruin, I., (eds.), Juvenile Justice Systems in Europe, vol. 1., 2011, Forum Verlag Godesberg, pp. 58-60

63 §136 German Code of Criminal Procedure, Strafprozessordnung BGBI I 1074, last change 30.10.2017 (BGBl. I S. 3618), [https://dejure.org/gesetze/StPO] Accessed 27.3.2018

64 § 70a JGG, German Juvenile Court Act, Jugendgerichtsgesetz (JGG): BGBI 11.12.1974 (BGBl. I S. 3427) last change 27.08.2017 (BGBl. I S. 3295), [https://dejure.org/gesetze/JGG] Accessed 27.3.2018

65 § 67a, § 67 JGG, *Study on children's involvement in judicial proceedings, Contextual overview for the criminal justice phase – Germany*, June, 2013, Luxembourg, Publications Office of the European Union, 2014, p. 18-19, [http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Germany.pdf] Accessed 28.3.2018

66 See ar. 1.(2) Decreto del Presidente della Repubblica, 1988 - DPR 22. 9. 1988, No 448. [http://www.altalex.com/documents/leggi/2014/06/18/codice-processo-penale-minorile-d-p-r-448-1988#_Toc306371661] Accessed 24.3.2018

67 DPR 448/1988, art 9, 11, 12, 13, 28, 31, 33, 38. *Children's right to participation and the juvenile justice system, Italy National Report*, 25.11.2015., Defence for Children, International Italy, 2015, pp. 8-9, 15-16 [https://defenceforchildren.org/wp-content/uploads/2015/12/Twelve_Italy.pdf] Accessed 26.3.2018

ents or the guardians of the child also have to be informed about the rights of the child.[68]

In Netherlands, criminal procedural law for adults is also applicable to children, unless child-specific provisions apply. There are no specific provisions regarding the right to information for suspects/accused children, however, in practice, lawyers, the Child Care and Protection Board, and the Juvenile Probation Service prepare children for the criminal procedure. The lawyer has to provide information to child and his/her parents, from the moment the child comes in contact with the police until the ending of the proceeding. Representatives of the Child Care and Protection Board also have to give information to the child about criminal procedure prior to the hearing. Children can also get information about the criminal proceeding in a more informal way in Juvenile Legal Advice Centres that provide consultation for children and there are different websites, movies and leaflets with information about criminal proceeding for children written in a child-friendly manner.[69]

In Finland, there are no special provisions regarding the right to information for suspect/accused children, which means that general provisions also apply to children. Children have the right to be notified about their role in the investigation and investigated act and about the progress of the investigation as long as that does not harm the investigation. They also have to be informed in writing about the right to have a defence counsel present during the investigation. When the prosecutor decides to bring charges against a child, he/she has to be informed about the charges brought against him/her. Social services must be present during criminal proceeding and inform the child of the possibility of mediation when necessary.[70]

All MS, except Hungary, have legal provisions on the right of suspects/accused child to information about their rights in criminal proceedings. In most of the MS, general provisions that are prescribed by general legislation apply equally to

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68 *Study on children's involvement in judicial proceedings, Contextual overview for the criminal justice phase – Italy*, June, 2013, Luxembourg, Publications Office of the European Union, 2014, pp. 15-16 [http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Italy.pdf] Accessed 26.3.2018

69 *Study on children's involvement in judicial proceedings, Contextual overview for the criminal justice phase – the Netherlands*, June, 2013, Luxembourg, Publications Office of the European Union, 2014, pp. 13-14 [http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Netherlands.pdf] Accessed 26.3.2018; As exampels of god practice on infromal way of informing children about their rights Guidlines on child-friendly justice mentions Belgium and the Netherlands (part IV. A., pp. 59-60)

70 *Study on children' s involvement in judicial proceedings, Contextual overview for the criminal justice phase – Finland*, June, 2013, Luxembourg, Publications Office of the European Union, 2014, pp. 13-14 [http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Finland.pdf] Accessed 26.3.2018

children and adults.[71] The amount of information that child receives depends on the MS, but usually they receive the same information as adults,[72] and maybe certain additional information, such as the right to inform his/her parents. In cases of arrest or detention, the information is usually given in writing. There is also a difference between MS on who gives this information to suspect/accused chid. In most of the MS, it is the police, because they are the child's first contact with legal authorities, but in many MS, lawyers, judges, prosecutors, and even social services, also give children the information in different stages of the criminal procedure.[73] The biggest problem is that the information are usually given to children verbally in the same manner as to adults, because in most of the MS there are no special provisions and obligation that information needs to be given to the child in a child-friendly manner, or at least in a way that is adapted to the child's level of understanding and maturity. Usually, the right to information about rights in criminal proceeding or children is not regulated in details or in special legal acts that means that practice on the ground varies greatly.[74]

4.1. The right to information for suspect/accused children in criminal proceedings in Croatia

In Croatia, legal status of children[75] who are suspects or accused of committing a criminal offence is regulated by special law, The Youth Courts Act (hereafter: YCA).[76] YCA encompasses all relevant provisions on children's rights in criminal proceedings, both under Penal Code and under the Criminal Procedure Act.[77]

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71 *Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 MS of the EU*, June, 2013, Luxembourg, Publications Office of the European Union, 2014, pp. 21, 83 [http://www.childreninjudicialproceedings.eu/docs/EU%20Summary.pdf] Accessed 26.3.2018

72 Children are usually informed about the basic rights of the suspect/accused person in criminal proceedings: right to be informed about the charges brought against him, the right to legal assistance and lawyer, right to be heard, right to use his/her language and so on

73 Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 MS of the EU, *op. cit.* note 71, pp. 21

74 Duroy, S., Foussard, C., Vanhove, A.: *Pre-trial detention of children in the EU, Analysis of legislation and practice in EU28*, JUST/2014/JACC/AG/PROC/6600, IJJO, pp. 8-9 [http://www.ijjo.org/sites/default/files/mipredet_ijjo2015_updated07122016.pdf] Accessed 26.3.2018

75 In Croatia the term "juvenile" is used for children that are criminally responsible. A 'juvenile' is a person who, at the time of committing an offence, was at least 14 years of age but under 18. (YCA art. 2). For purposes of this paper, we will use the term child as a synonym for the term juvenile that is being used in Croatia. Carić, A., *Kazneni postupak prema maloljetnicima*, Split, 2004, p. 2-6

76 Official Gazette No. 84/2011, 143/2012, 148/2013, 56/2015

77 See more about the characteristics of YCA in Cvjetko, B., Singer, M., *Kaznenopravna odgovornost mladeži u praksi i teoriji*, Organizator, Zagreb, 2011, pp. 48-49, 83

YCA is *lex specialis* in regards to the Penal Code[78], Criminal Procedure Act, Courts Act and other general regulations. In cases of children who are suspects or accused in criminal proceedings these acts will be applied only if the matter in question is not regulated otherwise by the YCA.[79]

The right to information for suspects/accused children in criminal proceeding in Croatia is not regulated by special law (YCA) which means that general provisions from CPA that applies to adults also applies to children. The right of child to be informed of his/her right in criminal proceeding is mentioned in only one place in YCA: in the beginning of the court trial, the judge has to inform the accused child of his/her rights before the interrogation at the beginning of the main hearing, and also has to make sure that the accused child understood the Letter of Rights.[80]

Directive 2012/13/EU has been transported into the Croatian legal system with the Law on Amendments to the CPA in November 2013.[81] As a result, the Letter of Rights was introduced into our legal system and criminal proceeding. Article 239 of the CPA prescribes the content of the Letter of Rights, and in which situations during criminal proceeding does the Letter of Rights have to be administered to the suspect or accused person.[82] CPA also prescribes in which stages of criminal proceedings, and with which procedural acts, does the Letter of Rights have to be delivered to the suspect or accused person.[83] Legal authority that carries out the specific action during criminal proceeding *ex officio* before the commencement of the action has to check whether the suspect or accused person has already received the Letter of Rights, and if they establish that the Letter of Rights has not been delivered to the person in question, they have to halt the procedure and give the suspect or accused person the Letter of Right. Only after that can they continue with the criminal proceeding. Information that suspect or accused person has already received the Letter of Rights has to be noted in accordance with the recording procedure.[84]

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78 Penal Code, Official Gazette No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017

79 YCA, art. 3, PC, art. 7

80 YCA, art. 85 (1)

81 Ivičević Karas, Burić, Bonačić, *op. cit.* note 3, pp. 36-37, Konačan prijedlog ZID-a ZKP-a 145/2013., Vlada RH, studeni, 2013, pp. 48-49, 81-87, 138

82 CPA, art. 239 (1) CPA; All rights that suspect or accused person has in criminal proceeding are listed in art. 64. CPA

83 CPA, art. 239 (2) CPA. Arrested person in case of arrest also has to be promptly informed about his/her rights, see CPA, art. 7 (2), 108a, 108b. Krapac, *op. cit.* note 32, pp. 242, 373-375

84 CPA, art. 239 (3) and (4) CPA. Before the first interrogation of the suspect/accused person, the police has to make sure that the suspect or accused person has received and fully understood the content of the Letter of Rights. If the suspect or accused person says that he/she does not fully understand his/her rights, according to the Letter of Rights it is the duty of the police to explain to him/her in an un-

In 2016, research was conducted on the application of new legal provisions in Croatian criminal practice, including the right to information.[85] The results of the conducted research showed that most of the problems regarding the right to information in criminal proceeding in practice happened in the earliest stages of the criminal proceedings, at the stage of police actions related to criminal proceedings. It is important to mention that this problem has been resolved since then with the new Law on Amendments to the CPA 2017.[86] Regarding the further stages of the criminal procedure, that included actions of attorney general and courts, it was concluded that legal provisions related to the right to information of suspect or accused person, are consistently implemented in practice.[87]

5. THE RIGHT TO INFORMATION ACCORDING TO THE DIRECTIVE EU/2016/800

In the process of adoption of the Directive in EU Parliament, there has not been much discussion about the right to information because MS did not consider this right problematic.[88] Directive states that after the children are made aware that they are suspects or accused persons in criminal proceedings[89], MS have to ensure that they are promptly informed about their rights in accordance with the Directive 2012/13/EU, and about general aspects of the conduct of proceedings.[90] This means that children first have to be informed about the procedural rights that all suspects/accused persons have in criminal proceeding, and then they have to be informed about additional rights they have according to the Directive. The Directive 2012/13/EU distinguishes two types of rights to information: the right to information about rights (art. 3) and the right to information about the accusation

derstandable way his/her rights and their meaning. Only after suspect or accused person confirms that he/she has fully understood his/her rights can the interrogation begin. See: CPA, art. 208a (3). Before the first interrogation before state attorney, the procedure is the same. See: Ivičević Karas, E., Burić, Z., Bonačić, M., *Prava obrane u različitim stadijima hrvatskog kaznenog postupka: rezultati istraživanja prakse*, HLJKPP (Zagreb), Vol. 23., No. 2, 2016, pp. 512-517, 528-530

85 For more details about the project: *Ibid.*, pp. 510-512

86 Official Gazette No. 70/2017. Konačan prijedlog ZID-a ZKP-a 2017, Ministarstvo pravosuđa, Zagreb, lipanj, 2017, pp. 11-12, 18-19, 45-50, 81-85

87 Ivičević Karas, Burić, Bonačić, *op.cit.* note 84, pp. 512-516, 528-530, 536-537, 541-542

88 The biggest discussion has been about the right to assistance by a lawyer. Cras, *op. cit.* note 3, pp. 111

89 The right to information is the only right from the Directive that is being applied from the moment that the child has been informed by official authorities, by official notifications or otherwise (orally) that he/she is suspected or accused of having committed a criminal offence. That is only a logical solution because in the past the official authorities, which gave children the information on their rights, first had to inform them that they are suspected or accused of having committed a criminal offence

90 Directive, art. 4(1)

(art. 6).[91] In this paper, we will analyse the first aspect of the right to information, the right to information about rights.

5.1. The right to information in criminal proceeding according to the Directive 2012/13/EU

Directive 2012/13/EU states that MS have to ensure that all suspects/accused persons are promptly[92] informed about: the right to access to a lawyer; any entitlement to free legal advice and the conditions for obtaining such advice; the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent and how these rights are applied under national law so that they can exercise them effectively.[93] The Directive 2012/13/EU only regulates the obligation of the MS to inform the suspects/accused person about those rights, while the scope of the regulation of a particular right is left to national legislation.[94] Information about these rights have to be given orally or in writing,[95] in simple and accessible language, taking into account any particular needs of vulnerable suspects/accused persons.[96] Competent authorities should pay particular attention to persons who cannot understand the content or meaning of information, for example, because of their youth, mental or physical condition, but the Directive 2012/13/EU does not elaborate further in what way this should be done.[97]

After children have been informed about their rights, they also have to be informed about the general aspects of the conduct of the proceeding.[98] They should be given a brief explanation about the next procedural steps in the proceedings, and about the role of the authorities involved. Given information should depend on the circumstances of the case.[99]

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91 Ivičević Karas, Burić, Bonačić,*op. cit.* note 3, pp. 24

92 Information should be provided at least before the first official interview of the suspect/accused person by the police or by another competent authority, Directive 2012/13, para. 19

93 Directive 2012/13/EU, art. 3(1)

94 Ivičević Karas, Burić, Bonačić, *op. cit.* note 3, pp. 26

95 If the suspect/accused person is arrested or detained, then they have to receive written Letter of Rights that contains additional rights set in art. 4 Directive 2012/13/EU and they are allow to keep that Letter of Rights throughout the time they are deprivated of liberty. Directive 2012/13/EU, art. 4 and para. 21-23

96 Directive 2012/13/EU, art. 3(2)

97 Directive 2012/13/EU, para. 26, 37 and 38

98 This part of right to information enter the Directive as a direct consequence of the ECtHR case law (Pantovis vs. Cyprus, 11 December 2008, Appl. No. 4268/04). The Council was against this becuse they thougt that providing such infromation should be the obligation of the lawyer and not of the competent authorities. Cras, *op. cit.* note 3, p. 113

99 Directive, art. 1(1) and para. 19

5.2. The right to information to suspects/accused children in criminal proceedings according to the Directive 2016/800/EU

In situations when children are provided with the Letter of Rights, pursuant in the Directive 2012/13/EU MS have to ensure that such Letter also includes a reference to their rights from the Directive.[100] We can say that there are three groups of rights that children have to be informed about in different stages of criminal proceeding.

First group of rights can be described as basic rights that children have during the criminal proceedings: the right to have the holder of parental responsibility informed (art. 5 Directive); the right to be assisted by a lawyer (art. 6 Directive); the right to protection of privacy (art. 14 Directive); the right to be accompanied by the holder of parental responsibility during stages of proceedings other than court hearing (art. 15(4) Directive); the right to legal aid (art. 18 Directive). Children have to be informed about these rights promptly after they are made aware that they are considered suspects or accused persons.[101] Problem is that the Directive does not clearly define the term "promptly", but looking at the preamble of the Directive 2012/13/EU[102] and the time scope of application of the Directive, we can conclude that it means that children have to be informed of them at the earliest possible stage of criminal proceedings.[103]

Second group of right are the rights that children need to be informed of at the earliest appropriate stage in the proceedings, which means that those rights are connected with a specific stage or acts during criminal proceeding. In an appropriate stage of criminal proceeding, children have to be informed about: the right to an individual assessment (art. 7 Directive); the right to medical examination, including the right to medical assistance (art. 8 Directive); the right to limitation of deprivation of liberty and the use of alternative measures, including the right to periodic review of detention (art. 10 and 11 Directive); the right to be accompanied by the holder of parental responsibility during court hearings (art. 15(1) Directive); the right to appear in person at trial (art. 16 Directive); the right to effective remedies (art. 19 Directive).[104] The decision not to inform children about all rights that they have in criminal proceeding at the beginning of proceedings, was a good decision made by the Council of the EU.[105] We agree that it is unnecessary to

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100 Directive, art. 1 (3)

101 Directive, art. 1(1a)

102 Directive 2012/13/EU, para. 19

103 See: 2. part of the paper

104 Directive, art. 1(1b)

105 Cras, *op. cit.* note 3, pp. 113

inform children about all rights at the beginning of the proceeding because some of those rights are only relevant at a specific stage of criminal proceeding (e.g. the right to effective remedy). It is more effective that children are informed of their rights at the appropriate stage of criminal proceeding so that they can understand them better and exercise them at the right time.

The third group of rights that children need to be informed about refers to the situation when they are deprived of liberty, it is then that they have to be informed of the right to a specific treatment during deprivation of liberty (art. 12 Directive).[106]

We can say that some of these rights are "juvenile specific" such as the right to have a holder of parental responsibility informed, while others are more of the traditional procedural safeguards, which are given specific shape and content in connection to the needs of suspects/accused children such as right to a lawyer and the right to legal aid.[107]

MS have to ensure that all rights, from all three groups of rights, are given to children in writing, orally, or both, in simple and accessible language. They also have to ensure that given information is noted according to the recording procedure as regulated under national law.[108] Children do not have the same capacity to understand the scope and content of their procedural rights as adults, which means that there should be a difference between administering the right to information to the children, as opposed to adults. This problem has been recognized by the Directive, but the problem is that the Directive does not define or elaborate in detail what the term "simple and accessible language" refers to, meaning that it is left to the practice of each MS to decide how and from whom will the child receive the information about his/her procedural rights in criminal proceeding. Still, the bigger problem is that the Directive did not prescribe the obligation for the competent authorities of the MS to make sure that the suspect/accused child fully understood the content and the meaning of the right that has been administrated to him/her.

In case T vs. UK, ECtHR established that the article 6 ECHR has been violated, specifically the right to effective participation. This case demonstrated that, in practice, there is a big difference between simply informing the child about its rights in criminal proceedings, and the process of determining whether the child actually understood all of the information it received. For national justice system it is easy to define by legal provisions who, when and how will give the child information about his rights in criminal proceeding. It is much more complicated to

106 Directive, art. 1(1c)

107 de Vocht, Panzavolta,Vanderhallen Miet, Oosterhout,*op. cit.* note 12, pp. 492

108 Directive, art. 1(2)

determine whether the child in question has the intellectual and emotional capacity to understand the information that has been administrated to him/her and if the child actually understood the information that he/she has received.[109]

The Americans have conducted several researches on the juvenile's ability to understand and exercise the so-called Miranda rights.[110] "Research indicates that young juveniles (14-16) in particular may not yet have obtained the cognitive abilities to understand and effectively participate in juvenile justice proceedings. Multiple studies show that juveniles 15 years of age and younger, as well as 16 and 17 years old with a low IQ (below 85), have far more difficulties understanding Miranda rights than adults do, even compared to adults with low IQ. Most 16 and 17-year-old juveniles, however, are consider cognitively able to understand the meaning of Miranda rights."[111] Although 16 and 17-year-old juveniles possess the ability to understand Miranda rights, research also showed that they are generally still not able to make grown-up decisions, which means that they are generally still not capable of adequately exercising their Miranda rights. Results of different researches showed that the lower the age of the children, the higher the risk of not understanding the procedural right that they are being informed of.[112] It is also important to notice that legal authorities often have prejudice regarding the children that have already been involved in some criminal offence, because then they often presume that the child who has already been in contact with the police or judge has enough knowledge of criminal proceedings, which is also not true.[113]

That is why the Directive should have prescribed that every MS should implement in their legislation some kind of procedure to determine in each individual case whether the suspect/accused child fully understood his/her rights, and the concept of criminal proceeding, or if he/she needs extra explanation or help in understanding and exercising those rights.[114] This means that it is not enough that MS simply proscribe the legal provisions for ensuring the right to information, but they should also include in their legal provisions an obligation for competent authorities to check if the child in question fully understands the meaning of the

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109 Kovačević, *op. cit.* note 42, pp. 885-886

110 Miranda rights refers to to the right to remain silent and the right to legal counsel prior to, and during police interrogations. The concept of Miranda rights was estabished in the US criminal justice system as the result of the Miranda vs. Arizona case, 13 June 1966, 384 US. 436

111 Liefaard, T., van den Brink, Y., *Juveniles Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands,* ELR, December 2014, No. 4, pp. 214

112 *Ibid.,* pp. 214. See also: de Vocht, Panzavolta, Vanderhallen Miet, Oosterhout, *op. cit.* note 12, pp. 493

113 Kovačević, *op. cit.* note 42, pp. 888

114 *Ibid*., pp. 885-886

received information and what the consequences of those legal provisions are. If they determine that the child did not understand his/her right, they should be obligated to halt the criminal proceeding and try to explain to him/her those rights, and even try to ensure the help of a professional with special education in working with children. Only after they have established that the child has understood given information, should they continue with the criminal proceeding.

6. CONCLUSION

In cases of suspects/accused children in criminal proceedings, it is often neglected that when they get in contact with criminal justice system, both them and their parents almost always feel intimidated and lack information about their rights during criminal proceeding. Because of that, children face a higher risk of deprivation of their fundamental procedural rights. In order to ensure that suspects/accused children are an active and understanding participant in the criminal proceedings, the justice system first has to provide them with all relevant information in a child-friendly manner.[115] Ensuring that children are properly informed about their rights in criminal proceeding can be seen as the prerequisite for the realization of all other procedural rights that the children have during criminal proceeding. In order for an individual to exercise the rights that belong to him, it is necessary to ensure that the subject is acquainted with the rights that belong to him, and that the individual is aware that he is the subject of those rights.[116]

The Directive 2016/800/EU is a step forward in the right direction because MS are obligated to implement provisions from this Directive to their national legislation and that means that every MS will have a child-specific provision for the right to information in criminal proceeding, which today is not the case. MS first have to implement the right to information for suspects/accused children in criminal proceedings in special legal acts (*lex specialis*) that refer only to children, and if they do not have child specific legal acts, then they have to implement this right into their general criminal procedure act. MS also have to determine who and how will give the information to suspect/accused child about their rights in criminal proceedings according to the nature and characteristics of their criminal proceedings. In most of the MS, the information the child receives promptly will come from the police, because they are the child's first contact with legal authorities, but in the later stages of criminal procedure, it can come from other competent

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115 Doek, J., *The UN Convention on the Rights of the Child*, in Reforming Juvenile Justice, (ed.) Junger-Tas, J., Dünkel, F., Springer, pp. 25, 26-28

116 Božićević Grbić, M., Roksandič Vidlička, S., *Reforma maloljetničkog prava i sudovanja*, HLJKPP, Zagreb, Vol. 18, No. 2, 2011, pp. 680

authorities (lawyer, public prosecutor, judge and social services), depending on the stage of criminal procedure. It is important to emphasize that all competent authorities should have special education in working with the children, and MS should ensure a special training for them in order to ensure a correct implementation of the Directive.

The biggest problem is how competent authorities will administer information about their procedural right to children. The Directive only states orally or in writing, in simple and accessible language. It would be a good practice if MS would create a written Letter of Rights for children that would include all of information that children have in the criminal proceeding. In that Letter of Rights, they should avoid using too many legal and technical terms that children, and even their parents, cannot understand. MS should try to implement in their practice in juvenile justice system more informal ways of informing children about their rights with leaflets, promotional videos, schools lectures, or by social services.

All thought the Directive does not prescribe that as an obligation, it would be in the child's best interest that MS also proscribe a procedure where competent authorities are obligated to inquire; after the child received the Letter of Rights, whether the child fully understood the concept and the meaning of the received information. If competent authorities find that child is not capable of understanding, or did not understand the received information, they should stop with the procedure and offer legal advice and help. They should continue with the process only after the child says that he/she understood the given information. It is also very important that in this whole process, the parent or legal guardians of the child in question are included.

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GENERAL RULES FOR IMPOSING A SENTENCE OF JUVENILE IMPRISONMENT

ABSTRACT

Sentence of juvenile imprisonment is analyzed in its theoretical aspect and then in the aspect of legislative regulation in positive criminal legislation. Taking into consideration the content and legal nature, in practice this subject is mainly defined through criminal law in its material aspect, with certain explanation of those questions that are related to procedural and executive law to that level which the subject of investigation allows. In the perspective of criminal law, the legal terms in both national and comparative juvenile legislation are analyzed, in order to determine the complete sense and justification of the punishment. The analysis is done through interrelations of juvenile imprisonment sentence and certain institutes of criminal law, then relevant theoretical and practical concepts and discussions. Normative aspect aims to better explain the content and function of this punishment based on certain legal modification both in national and in comparative law, especially in European criminal legislation. Criminal justice analysis of the terms of juvenile court, contributes to clear differentiation from other criminal sanctions, above all, corrective measures, with special effect on its practical use. The investigation made in regards to the content, conditions of passing and justification of juvenile imprisonment sentence provides certain knowledge of its efficacy and justification in the system of criminal sanctions. The necessity of studying general and specific circumstances for its imposing contributes to more complete approach to the discussions both in the theory and court practice. Allowing the possibility that the sentence of juvenile imprisonment is only imposed on senior juveniles, simultaneously leads us to think that a special attention will be paid to two groups of circumstances: level of maturity and necessary time for both behavioral and professional education of the juvenile. In parallel to this aspect, some other questions appearing both in theoretical and practical aspect of this serious and only punishment have been discussed.

Keywords: *minors, juvenile imprisonment, criminal law, criminal procedure*

1. INTRODUCTION

Juvenile criminal law in the legal system of a country is determined by special criminal law provisions, which aim to contribute to the achievement of a better criminal position in accordance with the criminal responsibility of the minor. The task of criminal law, firstly, relates to the exercise of a protective function in terms of protecting the most important assets and values in the society. Therefore, the protective function of criminal law is the essence and the reason for its existence, indicating the need to protect individuals and society from crime. At the foundation of the criminal law, there is a need for criminal sanctions to be applied only against an individual whom can imposed the appropriate criminal sanctions for unlawful conduct.[1]

Provision of criminal law protection to the most important goods and values is realized through criminal law norms, which determine socially dangerous behavior, or which present the criminal offense.[2] In this way, criminal sanctions are prescribed for the perpetrators of the criminal offense, when certain legal good is already hurt or endangered. Thus, criminal protection is achieved through the application of criminal sanctions and other measures aimed at combating crime.[3] Taking into account many of the relevant international documents[4] and in the juvenile criminal legislation of the Republic of Serbia it is prescribed how and what types of criminal sanctions and measures can be imposed and applied to minors. In many European legal solutions it is also envisaged that the sole punishment that can be imposed against a minor is a punishment of juvenile imprisonment. Criminal law action by the social community with the penalty of juvenile imprisonment is an exception to the possibility of imposing numerous educational measures. Therefore, the sentence of juvenile imprisonment is a special type of deprivation of liberty that qualitatively differs, both in terms of content and in the terms of pronouncement in relation to the sentence of imprisonment applicable to adult persons.[5]

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1 Stojanović, Z., *Politika suzbijanja kriminaliteta*, Novi Sad, 1991, p. 59

2 *Ibid,*p. 60

3 Jescheck, H. H, Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 1996, p. 5–6

4 The 1989 Convention on the Rights of the Child, signed by virtually all UN member states and representing the most widely accepted international document dealing with children's and juvenile issues from the point of view of human rights. The Beijing Rules of 1985 (Standard Minimum Rules for the Juvenile Judiciary) are very important. Also important are the Riyadh Guidelines (UN Guidelines for the Prevention of Juvenile Delinquency) since 1990. Tokyo Rules (The UN Standard Minimum Rules for Alternative Institutional Treatment Procedures since 1990, as well as the UN Rules for the Protection of Juveniles Deprived of Freedom since 1990, constitute an important international document on the protection of the rights of children and juveniles Child Rights and Juvenile Justice, Belgrade, 2011

5 Eltern, M., *Jugendstrafrecht, Delinquenz und Normorientierung Jugendlicher, Eine empirische Überprüfung des Zusammenhanges von Sozialisation*, Hamburg, 2003, p. 19–20

In the course of further discussion, we will first analyze different European solutions regarding the rules of pronouncing the sentence of juvenile imprisonment, and because of their specificity and content, we will specifically explain the guilt as the only subjective condition and its degree, in order to show in a more comprehensive manner different legal solutions and theoretical considerations in our and comparative criminal legislation in which these rules are explicitly prescribed.

2. PRONOUNCEMENT OF JUVENILE IMPRISONMENT IN EUROPEAN LEGISLATION

In contemporary criminal justice system, in comparative view, the sentence of juvenile imprisonment is characterized by different conditions of pronouncement and treatment of a perpetrator in its execution. First, in addition to the fact that it is not the sole punishment in the system of juvenile criminal offenses, the sentence of juvenile imprisonment is regulated differently in the criminal legislation of individual countries. Thus, in many European countries, the legislator does not prescribe, in a unique manner, the pronouncement, assessment, duration and execution of the sentence of juvenile imprisonment, but in accordance with its particularities of the normative system, it adapts to adequate social circumstances. Bearing in mind the great significance and impact of German criminal law in general, it is particularly noticeable the legislator's efforts to build a system of juvenile criminal law that is different from the one which is related to adult persons. That direction started very early, having in mind the aforementioned Laws on Juvenile Justice, which refer to position, age, criminal responsibility and special procedure against juvenile offenders.[6]

The Law on Juvenile Courts (Jugendgerichtgesetz) provides for various types of sanctions, depending on the age and personality of the minor. In addition to educational measures, Article 16 of the JGG contains a provision related to different modalities of deprivation of liberty (Jugendarrest) in terms of the length of its duration.[7] Juvenile Prison (Jugendrest) is the most severe type of disciplinary mea-

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6 Dünkel, F, *„Juvenile Justice in Germany"*, Schriften zum Strafvollzug, Jugendstrafercht und zur Kriminologie, 32/4, Greifswald, 2005, p. 6-7

7 In the theory of juvenile criminal law there are different perceptions of this type of criminal sanction. Namely, whether here we are talking about juvenile imprisonment or detention, that is, Is this just one of the foreseen educational instruments (Zuchtmittel) or a kind of penalty of deprivation of liberty? There is a perception that this is a punishment for deprivation of liberty with regard to its content and character and that the juvenile is deprived of liberty for a certain time, that is, it is a measure of an institutional character with pronounced elements of educational character. More on this: Schaffstein, F., Beulke, W., *Jugendstrafrecht: eine systematische Darstellung*, 13., überarbeitete Auflage, Stuttgart, Berlin, Köln 1998; Carić, A., *„Provedba standarda Ujedinjenih naroda za maloljetničko pravosuđe u hrvatskom maloljetničkom zakonodavstvu"*, Zbornik radova Pravnog

sure ie. educational mean, which can be implemented in three ways. First of all, a prison at leisure or a prison at weekend (Freizeitarrest) cannot last longer than two weekends. Then, the short-term imprisonment (Kurzarrest) is pronounced instead of a prison at leisure, if it is purposeful for educational reasons, and if there is no interruption in the education and work of the minor. Two days of imprisonment for a short period of time replace one prison measure in free time, the duration of which may not exceed six days. And finally, a long-term prison (Dauerarrest) is determined for at least one, and for a maximum of four weeks, it is calculated on full days and weeks.[8] This type of measure of institutional character, according to research of German court practice,[9] has not proved to be particularly purposeful. Named as a substitute for the short-term punishment of deprivation of liberty of a minor, this type of deprivation did not provide satisfactory results.

Namely, today's attempts to achieve the retention of juveniles in terms of shorter provision of help and it are possible to achieve the best possible education impact on the juvenile. Given that in this case, it cannot be provided a longer devotion to the juvenile's personality, thus removing the behavior that contributed to his/her abandonment, then the assumption confirms that this measure does not achieve a corresponding educational impact.[10]

Unlike the measure of deprivation of liberty for a shorter duration, the Law on Juvenile Justice in a separate chapter on penalties in Article 17 provides for only one sentence - juvenile imprisonment sentence (Jugendstrafe). The said provision respects the principle of minimum intervention that the punishment is the last resort (*ultima ratio*) in respect of juvenile justice and is applicable only in cases where all other legal possibilities have been exhausted. Therefore, the sentence of juvenile imprisonment is a subsidiary punishment, because it is applied only if

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fakulteta u Splitu, Split, br. 1/2006, p. 147 et seq. More recently, the view that here is first of all thought of only one modality of deprivation of liberty for a shorter duration, as is also stated in the law in the chapter on educational means. In this way, the Jugendarrest can be understood as a juvenile prison - a modality of deprivation of liberty for a shorter duration, rather than a real punishment of juvenile imprisonment, because this is only a disciplinary sanction by which a minor deprives of liberty for a shorter duration in order to provide appropriate assistance and protection. Dillenburg, C., *Jugendstrafrecht in Deutschland und Frankreich: Eine rechtsvergleichende Untersuchung*, Universität zu Köln, German, 2003, p. 177-179; Laubenthal, K., Baier, H., Nestler N., *Jugendstrafrecht, 2. Auflage,* Würzburg, 2010, p. 303

8 Eltern, *op. cit* note 5,16-17

9 Research was conducted over a period of five years, indicating that almost 60% of minors were returnees, although they had some educational treatment of juvenile imprisonment for different duration. Streng, F., *Jugendstrafreht* (*Erfolg und Misserfolg von Jugendarrest*) Erlangen,2003, p. 202

10 *Ibid.,* p. 203

the harmful consequences which led to the commission of the crime cannot be remedied by the educational measures or means.[11]

In the criminal law of France, the system of punishing minors has been resolved in a special way by finding that the age of thirteen years makes juveniles criminally responsible. In the existing French criminal legislation, the Regulation, as amended in 2009, envisages in Art. (20-2) that a court may impose a penal sentence of deprivation of liberty (*peine privative de liberté*) to a juvenile aged thirteen, with the jury specifying in particular their decision and the reasons for which the sentence of deprivation of liberty and not some other milder measure was imposed. Regarding the length of the sentence, the Regulation stipulates that minors who have reached thirteen years may not be punished as adult persons, so that the court cannot impose a sentence on a juvenile that would be more than half the amount foreseen for a particular criminal offense. When it comes to imposing a sentence of life imprisonment, than in that case, a minor of thirteen years could not be sentenced to more than twenty years of imprisonment.[12] Furthermore, the punishment of a juvenile aged sixteen to eighteen years, who is accused of a serious criminal offense, may be sentenced to life imprisonment, with the juvenile panel in that case appreciating all the circumstances under which the criminal act was committed and assessing the personality in the sense of the existence of conditions for the pronouncement of this sentence or a sentence of deprivation of liberty for a certain duration. Also, the French Code (Code Penal, Articles 131-4) provides for a sentence of six months to ten years of imprisonment for appropriate offenses. Anyway, the trial chamber shall take into account all circumstances of the commission of the offense and, according to the personality of the juvenile, determine the sentence of deprivation of liberty for certain duration.[13]

Also, the legal provision (20 - 2 II) foresees that the institute of mitigation of sentences cannot be applied to minors who have reached the age of sixteen, because in case of a recidivist and severe circumstances when committing a criminal offense. It is also regulated by the law that serious crimes (against life, sexual

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11 Ostendorf, H., *Jugendgerichtsgesetz, Kommentar. 8. Auflage,* Baden-Baden 2009, p. 146

12 As can be seen from the stated above, the French legislation provides for the punishment of minors from the age of thirteen, with the rules governing the application of penalties applicable to adults. This further means that the sentence of deprivation of liberty is, in principle, possible, with the plaintiff or panel of juveniles specifying in particular the reasons for imposing the sentence. In addition to this, it can still be said that in French legislation the punishment of deprivation of liberty is an exception, i.e. it is pronounced only when the court finds that the offender cannot act on the perpetrator in a certain measure. Dillenburg C., *Jugendstrafrecht in Deutschland und Frankreich: Ein rechtsvergleichende Untersuchung*, p. 73

13 *Ibid.,* p. 74

morality) with elements of violence cannot be mitigated.[14] The determination of the sentence of deprivation of liberty against juveniles, according to the legal solutions, with regard to the number of educational measures, relates primarily to the protection and assistance, and less to punishment. Therefore, the juvenile panel, when possible, will apply the institute of mitigation of punishment or impose some milder educational measures, instead of the penalty of deprivation of liberty (20-2 I). Thus, in the French criminal legislation, under the influence of many international conventions, the sentence of deprivation of liberty is increasingly pronounced for a shorter period of one year, all for the purpose of educating the minor perpetrators.[15]

However, in addition to the above, it can be noted from the legal provisions that the lower age limit of juvenile criminal responsibility at age of 13 is low compared to other criminal legislation, and that the court can pronounce some measure of the court warning or may impose a sentence in that sense. Also, unlike other criminal legislation that is familiar with the category of juvenile adults, in the French criminal law persons who have reached the age of 18 years are considered to be adult (*jeunes adultes*) and are subject to the criminal sanctions provided for adult perpetrators of criminal offenses.[16]

In accordance with contemporary trends, the comparative juvenile legislation provides for the sentence of deprivation of liberty, ie, the special punishment of juvenile imprisonment in the Austrian legal system. The adoption of the Law on Special Juvenile Court (*Jugendgerichtsgesetz*) is of great importance for the Juvenile Criminal Law of Austria not only in the normative sense, but also in the special approach of the society towards the personality of the juvenile. The provision of the juvenile imprisonment sentence in Austrian criminal law is characterized by a number of foreseen conditions for imprisonment (*Freiheitsstrafe*) in Article 5 of JGG. According to the aforementioned provision, it is foreseen that, instead of life imprisonment (*Lebenslange Freiheitsstrafe*) or imprisonment sentence (*Freiheitsstrafe*) from ten to twenty years, it may be imposed a sentence of imprisonment from one to fifteen years if the minor has reached the age of 16 at the time of

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14 *Ibid.*, p. 75

15 Carić A., Kustura I., *„Kamo ide hrvatsko maloljetničko kazneno zakonodavstvo?",* Zbornik radova Pravnog fakulteta u Splitu, 47/2010, p. 796

16 According to prof. Peric, special attention is given to the system of penalties in French legislation, which is characterized by, first of all, backward legal solutions, which are precisely the application of a milder punishment of a juvenile who has reached the age of sixteen. The Trial Chamber, when assessing the penalty of deprivation of liberty, often assesses the personality of the juvenile in a stereotypical way, that the circumstances under which the act was made more than the price, rather than the maturity of the minor. Perić, O., Milošević N., Stefanović, I., *Politika izricanja krivičnih sankcija prema maloletnicicma u Srbiji*, Beograd, 2008, p. 38-39

the commission of the criminal offense. It is also legally regulated that a sentence of imprisonment of one to ten years may be imposed against a minor who has not reached the age of 16 (Article 5, paragraph 2). In addition, there is a possibility that a juvenile will be sentenced to imprisonment of six months to ten years instead of a sentence of imprisonment of ten to twenty years. In all other cases, the law provides that half of the prescribed imprisonment may be imposed, whereby the court is not bound to impose the minimum amount of that sentence (Article 5 § 4 JGG).[17]

The progressive efforts to further develop juvenile criminal law in Anglo-Saxon law are encountered in Canada's criminal legislation. In that sense, legal solutions regulating the criminal law status, age limit, and punishment of minors reflect the need for of the legal system for occasional reform of Canada's juvenile criminal law. In the first place, the Law on Criminal Justice for Juveniles was adopted in 2003 (*The Youth Criminal Justice Act*), which specifically provides for principles in terms of establishing a more just and effective juvenile law.[18] The Law on Criminal Justice for Juveniles (YCJA), unlike European legislation, contains the Preamble shown in several points at the very beginning, and outside the legal text also the Declaration of Principles (Article 3) on which this law is based.[19] The basic principles contained in the Declaration first refer to guidelines on how juvenile justice affects the prevention of juvenile offenses in terms of preventive action and the imposition of extra-judicial and criminal sanctions, differing from those pertaining to adult persons.[20] In the system of criminal sanctions, the Law provides for the punishment of minors in Art. 38. (YCJA) where the conditions for the application of a sentence of deprivation of liberty (Custody a young person) are explained in more details. Firstly, the purpose of criminal sanctions is defined, where the minor is held accountable, where by this sentence his/her rehabilitation and reintegration into society is accelerated. It is then individually emphasized in several points that: a) the punishment imposed against a minor cannot be more severe than the one which would have been imposed on adult person for the same offense under approximately equal circumstances; b) a punishment of (juvenile) imprisonment

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17 Maleczky, O., *Österreichisches Jugendstrafrecht*, *Kommentar,* Wien, 2008*,* p. 14

18 Krawchuk, M., D., *The Use of Custody Under the Youth Criminal Justice Act*, A Review of Section 39, Prohibitions on the Use of Custodial Sentences, Manitoba, Canada, 2008, p. 16

19 The preamble first refers to the views of the Parliament of Canada in the sense that the society should respond to the needs of the proper development of the minor, their relationship with the family, about the rights of the victim of the crime. It is then pointed out that the most stringent measures are applied to the most serious crimes, whereby criminal sanctions are imposed only when necessary and purposeful. Pru, Ž., *„Kanadski zakon o krivičnom gonjenju maloletnika"*, Zbornik, Krivičnopravna pitanja maloletničke delikvencije, Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2008, p. 38

20 Perić, Milošević, Stefanović *op. cit.* note 16, p. 41–42

may be imposed against a minor who has reached the age of 14, knowing that the stated is regulated in such way where the provinces can independently raise that limit to 15 or 16 years; c) the punishment must be proportionate to the gravity of the offense and the degree of responsibility of the minor; g) It is also of importance for deliberation of a punishment whether and to what extent the juvenile compensated the damage, whether he/she has been convicted in the past, with the existence of aggravating or mitigating circumstances.[21] A sentence of (juvenile) imprisonment under the mentioned law can be pronounced only for crimes involving elements of violence, perpetrators of serious crimes and minor's recidivists. The law states that these are crimes of first and second degree murder, as well as serious crimes for which prison sentences of more than two years can be imposed, and there are no conditions for pronouncing the so-called *non-custodial sentence.*[22]

Particular attention is given to a greater number of the following specific sentences (Youth sentences), which can be imposed on a juvenile for up to two years of deprivation of liberty, except in the case of criminal offenses committed in the course, where the imprisonment of up to three years can be imposed. Also, in the provision of Article 42 (YCJA), different types of sentences are mentioned, which in European criminal legislation more resemble to measures of diversion. These are measures of warning, work in public interest, compensation of damages, fines, protection of minors with intensive supervision and support. Shortly, all these measures (special punishments) are left to the court to use the possibility of a different reaction to the conduct of the minor. Prior to the fact that the penalty of deprivation of liberty and the Canadian legislation is the last resort, the court first decides on different types of alternative measures, based on less strict sanctions.[23] In addition to prescribing so-called special penalties, Art. 42 (YCJA) also stated that for the murder of first degree the sentence of imprisonment for a term of up to ten years is prescribed, while for the murder of a second degree, imprisonment for a term of up to seven years is imposed. Therefore, the legislator prescribed that even for the most serious crimes the sentence of deprivation of liberty will be for a certain duration, i.e. that it cannot be higher than ten or seven years respectively. However, in addition, the law also recognizes a special circumstance that refers to the existence of two new types of punishment, namely: a) a delayed imprisonment sentence(Probation for delayed custody) that refers to the fact that if the minor

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21 Pru, *op, cit.* note 18, p. 45, Bala, N; Sanjeev, A., „The First Months under the Youth Criminal Justice Act, a Survey and Analysis of Case Law", *Canadian Journal of Criminology and Criminal Justice,* Vol. 46, 2004, p. 256

22 Bala, N., Carrington, P., J., Roberts, J., V., *„Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success"*, Canadian Journal of Criminology and Criminal Justice, Vol. 51, 2009, p. 146

23 Sprott, J. B., *„The Persistence of Status Offences in the Youth Justice System"*, Canadian Journal of Criminology and Criminal Justice, Vol. 54, 2012, p. 320–321

does not respect and does not fulfill the envisaged obligations, in this case, this type of punishment is replaced by a sentence of deprivation of liberty for a certain duration; b) and deprivation of liberty with intensified rehabilitation and supervision, where the sentence is pronounced for criminal offenses with an element of violence (murder, attempted murder, murder by negligence, serious sexual offenses), whereby a minor suffers from mental or psychological disorders, so it is necessary to prevent his treatment and apply special programs for the recovery of minors.[24]

As can be seen, in general terms, the further development of juvenile criminal law internationally is accompanied by significant reforms of the criminal legislation of England and Wales. In English provisions of criminal law on minors (the Criminal Justice and Public Order Act 1994), the chapter on penalties provided for a special form of deprivation of liberty (the Secure Training Order) applicable to minors aged 12 to 14 years. Therefore, they are juveniles who have committed at least three times the criminal offense for which the imprisonment is prescribed and which present a permanent danger for further commission of criminal acts. This type of deprivation of liberty (imprisonment) may last for at least six months to two years, with the possibility that half of the sentence is executed at a prison, while the other half may be executed outside with the proper supervision of the competent authority.[25] The second type of deprivation of freedom provided for in the legal act of 1998 (Crime and Disorder Act) is a special type of sanction Detention and Training Order that is issued to minors aged 12 to 17 years. This type of deprivation of liberty appears to be a possibility of pronouncing instead of the Secure Training Order, as it is considered more effective and more useful in order to criminal law reaction against juveniles.

The measure of institutional character is mainly imposed against minors older than 15 years, who show a constant need for committing criminal offenses. In addition, it is also legally regulated that this type of measure can be imposed on

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[24] Barnhorst, R., *„The Youth Criminal Justice Act: New Directions and Implementation Issues",* Canadian Journal of Criminology and Criminal Justice, Vol. 46, 2004, p. 242–243

[25] Until 1994, this type (prison sentence) was applied to minors aged 15 to 17 years. One in the series of murders committed (in this case, a child under three years of age) by minors under the age of 15 led to a change in the provision and to punish persons aged 12 to 14 years. However, according to the records, the execution of the aforementioned sentence in the period from 1998 to 2001 led to the fact that it soon proved to be an unreasonable and very expensive sanction. Insufficiently trained officers, then inadequate supervision and support programs for minors, indicate that the sentence is very rarely pronounced or replaced with some other type of detention, such as the Detention and Training Order. More about: Graham, J., Moore, C. *„Beyond Welfare Versus Justice: Juvenile Justice in England and Wales"*, International Handbook of Juvenile Justice, New York, USA, 2006, p. 86

minors aged 10 and 11, provided that it is determined by the Secretary of State.[26] According to minors, this type of deprivation of liberty is levied for at least four to twenty-four months, with half of the imposed sanction being enforced at the institution, while the other half is carried out under the supervision of the competent service for providing assistance and support. This measure can also be imposed on minors who have committed more serious crimes with elements of violence and in cases of committing more serious sexual offenses. When the court assesses this sanction, it takes into account all the circumstances, under which the crime was committed, as well as the time spent in police custody, hospital or other accommodation provided by the local authorities.[27] Another in the series of criminal sanctions for juvenile offenders for the most serious offenses is the long-term imprisonment (*Long-Term Detention*) provided for in the statutory act in Article 91 of the 2000 Powers of Criminal Courts (Sentencing) Act. This legal act envisages that the Crown Court, which undertakes proceedings for adults, determines the punishment also for juvenile offenders for serious crimes. In this case, the Crown Court indicts the juvenile aged 10 to 14 only for the criminal offense of murder, since in principle, the indictment is not raised against this category of persons. Against to the juveniles aged between 14 and 17 years for the committed murder and other serious crimes (robbery, rape), the court raises the indictment, and in the case of adult persons where the imprisonment for more than 14 years is provided and are charged with juveniles, then there is the need to judge have them on trial together.[28]

3. SOME RULES IMPOSING A SENTENCE OF JUVENILE IMPRISONMENT

The concept of punishment of minors in a criminal legislation is mainly the result of the existence and development of a special criminal status of minors. For these reasons, a special criminal justice status of minors is different in respect to adults also in terms of punishment, and therefore, minors are punished only in exceptional circumstances by sentence of a special juvenile imprisonment. The punishment of minors is an exceptional measure in most foreign legislation and

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[26] Hazel, N., Hagell, A., *Assessment of the Detention and Training Order and its impact on the secure estate across England and Wales*, London, 2002, p. 24–26

[27] In addition to the good sides of this sanction with the aim of enforcing them in institutions with very favorable treatment and supervision of minors, there are serious objections that are made in the sense that this measure is carried out in a place that is most remote from the home of a minor, that he/she does not have enough communication with the family, and that often after only a few weeks after release, crimes are repeated. More on this: Graham, J., Moore, C.*, „Beyond Welfare Versus Justice*, 87

[28] Ashworth, A., *Sentencing and Criminal Justice,* Cambridge University, USA, 2005, p. 35–36; Murray, R., *Children and Young People in Custody,* London, 2011, p. 79-81

in our legislation expressly stated by Article. 9 paragraph 3 of Law on the Juvenile Offenders (ZOMUKD).[29]

Imposing a sentence of juvenile imprisonment essentially means the actual implementation of punishment against the senior juvenile for a committed criminal offense. In the theory of criminal law concerning the conditions for imposing of a punishment, which are prescribed by law, there are different points of view, because the conditions of sentencing followed a number of reforms in criminal law. Bearing in mind the temporal connection of many legal solutions on a number of terms of imposing a juvenile imprisonment, there is a different understanding of their systematization. Thus, the prevalent view is that the legal conditions for pronouncing juvenile imprisonment sentence can be divided into objective, subjective and criminal-policy conditions. The objective conditions are: prescribed punishment of imprisonment of more than five years, the age of the offender; while the subjetivne conditions include all circumstances related to the high degree of criminal liability of the offender. Criminal-policy conditions are related to the existence of the serious consequences of the offense and because of the high degree of criminal liability, it would not be justifiable to apply an educational measure. [30] Among other things, there is a thought that the conditions for the imposition of a sentence of juvenile imprisonment are classified into two legal groups: substantive and procedural. Substantive are related to the stated objective and subjective conditions, while procedural are related to the legal possibility of Article 446 of the CPC that the juvenile imprisonment cannot be imposed, if criminal proceedings are conducted without the motion of the public prosecutor or if the public prosecutor withdrew the motion during the procedure. As a reason for the division of the conditions in this way is the fact to mitigate as much as possible already problematic legal systematization, especially because it is about punishment of older juveniles.[31]

Generally speaking, the conditions of imposition provided in the provision of Article 28 of ZOMUKD can be also divided in three mandatory: (that is about an older juvenile, that there is a guilt and that he/she committed a criminal offense for which a sentence of imprisonment of over five years is provided). Three circumstances must be taken into account: that due to the high degree of guilt, the nature and gravity of the offense, it would not be justifiable to apply an educa-

[29] Educational measures can be imposed to older juveniles, and exceptionally a sentence of juvenile imprisonment (Art 9 para 3 ZOMUKD). Excellence in punishment, therefore, refers to the particular age category of minors on whom this punishment can be imposed, but these are older juveniles aged 16 to 18

[30] Lazarević Lj., *Položaj mladih punoletnika u krivičnom pravu*, Beograd, 1963, p. 254

[31] Perić O., *Maloletnički zatvor*, Beograd, 1979, p. 32

tional measure. These circumstances must be assessed by the the court in each individual case to impose a sentence of juvenile imprisonment, as the punishment of juveniles is determined as optional and represents the ultimate measure to resort to. All of the above conditions must be cumulatively met in order to implement the juvenile imprisonment, so it is necessary to indicate that these conditions are of such a nature that without their existence would not be possible at all to talk about the application of the punishment.[32]

3.1. HIGH DEGREE OF GUILT – SUBJECTIVE CIRCUMSTANCE FOR IMPOSING THE SENTENCE OF JUVENILE IMPRISONMENT

In a direct and close relationship with the guilt as one of the conditions for the punishment of minors is also a high degree of guilt. In addition to determining guilt as a subjective element of the overall concept of criminal offense, the provisions of Article 28 of ZOMUKD requested a high degree of guilt for the older minor, in order to impose juvenile imprisonment. In essence, it is required that this circumstance is met both in qualitative and quantitative manner, which would still mean that existence of high degree of guilt in a meaningful sense of the word must be graded in each case, when it comes to punishing of older juveniles. [33]

On the occasion of these circumstances, we should first point out that grading of guilt is done in accordance with all the subjective circumstances of the offense. Special attention requires a statement that the grading of guilt should be done in the same way as it is done with sentencing adults. Therefore, when considering this issue, Stojanović points out that the grading of guilt is demanded as an essential factor on which may depend the imposition of juvenile imprisonment. When it comes to adults, a high degree of guilt is only relevant to determination of the sentence, in the sense of the existence of mitigating or aggravating circumstances, not as a decisive factor when sentencing older juveniles. [34]

When grading the guilt, the starting point should be that the older minor in the commission of the crime, showed great persistence, ruthlessness, cruelty, insensitivity or a similar relationship. The mentioned subjective circumstances indicate the existence of a high degree of guilt, whereby they must be established in each particular case. The task of the juvenile judge in any case is to examine all subjective elements which relate to the character of older juveniles and thus to perform the grading of guilt correctly in the best possible way. In any case, a high degree

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32 Stojanović, *op. cit.* note 1, p. 355

33 Radulović Lj, *Maloletničko krivično pravo*, Beograd, p. 150

34 Stojanović Z., *Krivično pravo*, Beograd, p. 354

of guilt must be different than the normal or average degree of it, where no coarsening, severity or rough persistence or other indicators exist. [35] The level of guilt, among others, may be affect by motives or motives as internal reasons which led the juvenile to commit a criminal offense. Motives or incentives can be ethicaly evaluated and thus it can be determined the intensity of subjective factors, which have led to a high degree of guilt. Given that the guilt consists of intent or negligence, we can rightly ask if the intent only (direct or eventual) refers to the existence of high degree of guilt or when it comes to negligence as shape as guilt.

On this issue there are thoughts in the theory of criminal law that only the intent as a severe form of guilt refers to the existence of a high degree of guilt. As a legitimate reason for this position it is stated that it is almost impossible to take negligence as a form that may involve a high degree of guilt.[36] However, the guilt is manifested in two forms - as an intentional or negligent criminal offense which was committed and for that reason, it can mainly be possible to the negligence can also include a high degree of guilt in the theoretical and practical sense.[37] No matter that negligence can be graded, high degree of guilt will not exist when it comes to the existence of any grounds for mitigation of punishment of subjective character (offense comited under the influence of compulsive force or threats), or in the event when the minor did not know that the act is prohibited, but was obliged and could have known, i.e. he/she was in rectifiable legal delusion.[38]

In view of the high degree of guilt, it is necessary to point out another issue that is of significant importance to jurisprudence, rather than the theoretical considerations. In some situations a question of impacts of reduced or substantially diminished accountability at the level of guilt, and what is the assessment of the court in concrete case and how to properly evaluate and implement the above

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35 Milošević N., *Maloletnički zatvor, zakonodavsto i sudska praksa*, Pravni život, Beograd, br. 2/2002, p. 561

36 Lazarević LJ., Grubač M., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Beograd, 2005, p. 73

37 Drakić D., *O krivičnoj odgovornosti maloletnika*, Novi Sad, 2010 p. 55

38 Stojanović, *op. cit.* note 34, p. 355; Perić O., *Komentar zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*. Beograd, 2005, p. 85; Radulović, *op. cit.* note 33 p. 151. Contrary to the mentioned standpoint, there is a perception that negligent criminal conduct and diminished mental capacity, although generally do not indicate a high degree of guilt, sometimes could not exclude the existence of a high degree of guilt. As an explanation it is stated that all forms of guilt can be graded and this may exceptionally occur that lesser degree forms (negligence, diminished mental capacity) can compensate with the other two elements of guilt (intent, the awareness of the illegality). More on this: Drakić D, *O krivičnoj odgovornosti*, p. 56–57. We believe that the presented standpoint is theoretically and practically possible, but in a legal criminal view, juvenile imprisonment is optional measure and a last resort of criminal justice response, where particularly it must be taken into account the reality and the purpose of punishment of juveniles

circumstances. According to the general provisions of the Criminal Code, when it comes to adult offenders, it provides that significantly reduced mental capacity does not exclude guilt, but it can be ground for mitigation of punishment (art. 23, para 3 of CC), while diminished mental capacity can have an impact on punishment. In the first place, diminished mental capacity and its manifestation in the form of lower degree of mental development of minors, in any case, results into a question of existence of a high degree of guilt. It further follows that in this situation among minors one cannot talk about the existence of a high degree of guilt. Namely, when the offender is a minor, the determination of significantly reduced mental capacity should be particularly taken into account, as for punishment of minors is not enough to have a statement that there is guilt, but it requires a determination of high degree of guilt.[39] Accordingly, for a long period of time in the jurisprudence the position has been taken that the existence of significantly reduced mental capacity is not the basis and circumstance for punishment, because the mental state of minors does not allow it.[40]

Bearing in mind the importance of a proper assessment of the high degree of guilt from the standpoint of jurisprudence, it is necessary to explain this issue as well, which is perhaps of greater relevance to practical application in relation to the theory itself. It is known that in spite of well-written legal formulation in terms of clarity and precision, the standpoints of courts occupy a very important place when it comes to determining the conditions and imposing a sentence of juvenile imprisonment. Very complex task at the end is left to judges to, based on all characteristics in each specific case, determine the existence of a high degree of guilt in relation to the committed criminal offense. Determining of this circumstance in judicial practice is not easy, because it is a very sensitive issue that requires special commitment and expertise of the juvenile judge. During imposing of a sentence to juvenile imprisonment, it is necessary that in addition to meeting other requirements, to require the existence of a high degree of guilt in the commission of the criminal offense, where the older juvenile manifested great persistence, ruthlessness, cruelty, insensitivity or a similar kind of approach. During an inspection in a big number of court decisions, when it comes to assessment and explanation what constitutes a high level of guilt in a particular criminal offense (murder or severe forms of rape and robbery), there is a superficial approach, without any special explanation and stating reasons in imposition of a sentence of juvenile imprison-

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[39] Stojanović *op. cit.* note 34, p. 355; Perić, *op. cit.* note 38, p. 87

[40] Standpoints of the contemporary jurisprudence, in a very similar way as those previously stated, point out to interpretations with regard to issue of diminished or significantly diminished state of mind. See Decision of the Supreme Court of Serbia, Kžm. 44 / 09 dated 11.05.2009., *Bilten sudske prakse VSS*, 2/2009, p. 31

ment. Therefore, it is mainly stated that the high degree of guilt "is reflected in the overall behavior of older juveniles according to his mental maturity and intellectual capacity to understand the significance of his actions."[41]

Accordingly, in terms of special clarification and stating of reasons which are crucial for the implementation of juvenile imprisonment, the court does not state or specify the decisive facts, which influenced the decision on the imposition of this punishment. Mainly the general view is taken, which is implemented by judges to not enter into a specific explanation and grading of circumstances, to which the law itself indicates, however, it often happens that the first instance verdict is appealed, referring to the absolutely significant violation of provisions of the criminal procedure, Art. 438 paragraph 2 point 2 of the CPC. Also, in some court decisions, it can be observed the fact that some circumstances, which are more significant to the imposition of juvenile imprisonment, are taken as those that are related to explanation of the high degree of guilt. As an example, it can be stated that during the commission of the offense it was a minor who has repeatedly been prosecuted, against whom correctional measures were imposed and are thus the conditions for the imposition of a sentence to juvenile imprisonment.[42]

Regarding legal solutions in some European criminal legislation, such as Croatia, it is identically resolved like in the Serbian legislation. Namely, it is explicitly required in Art. 24. Of the Law on Juvenile Courts prescribes (a high level of guilt) where it is the court's obligation to determine whether a high level of guilt has been achieved during the commission of a criminal offense.[43]

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41 As an example, from practical reasons we are going to state several judgments in relation to reviewed judgments, not just of the court in Belgrade, but also in Užice and Šabac. Verdict of the Higher Court in Belgrade Km. 387/06 of 31 December 2008, the Higher Court Judgment in Belgrade, Km. 275/11 dated 6 September 2012, the verdict of the Higher Court in Uzice Km. 103/09 of 19 August 2009, the verdict of the Higher Court in Šabac, Km. 28/13 of 24 July 2013. These judgments indicated a high degree of guilt, which comprises in the existence of direct intent by which the minor manifested a persistence in committing the criminal offense. The reasoning of those judgments indicate only the type of intent, then that the minor is guilty, referring to Art. 22 of the Criminal Code and thus perform the grading of guilt if possible, while not analyzing other subjective circumstances arising during the commission of the offense.

42 Therefore, Milosevic rightly pointed out that multiple recidivist with a distinct educational neglect (in this case a senior juvenile), indicates the existence of circumstances and conditions for imposing this penalty, but this fact cannot be subsumed under the concept of a high degree of guilt, but it can only be taken as a circumstance which is of importance for sentencing juvenile imprisonment; Milošević N, *Maloletnički zatvor*, Pravni život, Beograd, br. 2/2002 p. 76

43 The juvenile can commit a serious criminal offense, for example, the murder of a parent who for a long time in an alcoholic state committed psychological violence against a minor and other family members. Is there a high level of guilt in this situation? Regardless of the serious crime of murder, the author believes that it is not possible to speak of a high level of guilt, due to the specific conditions in the conduct of this criminal offense. Cvjetko,B„Zakonska i sudska politika kažnjavanja maloljetnika

As far as legal solutions in some European criminal legislation are concerned, such as Germany, the high degree of guilt (Schwere der Schuld) is reflected in a similar way in our criminal legislation. It is taken as subjective condition which is necessary for the application of juvenile imprisonment. First, the existence of guilt in the psychological and normative sense of the word is determined, after which the guilt is graded, and it is established whether there is a high degree of guilt. Intent and negligence as the two forms of guilt which are determined according to the categories of mental awareness will, while the consciousness of the illegality relates to reproach, which is ordered against the juvenile offender.[44]

Establishing guilt is a very complex issue in court practice, since it requires the fulfillment of all elements of guilt in order to charge the juvenile with a criminal offense and at the same time imposes a sentence of juvenile imprisonment. There is no doubt that guilt must be established in each particular case, in order to consider that an older minor has committed a criminal offense. The court's assessment implies that all subjective circumstances related to the personality and the committed offence are determined and in this way the older minor can be punished with other fulfilled conditions.

4. CONCLUSION

The penalty of juvenile imprisonment, regardless of the differences that exist in many criminal legislation, is still considered one of the most severe criminal sanctions that can be applied to a juvenile. It should also be pointed out that the punishment of juvenile imprisonment in almost all of the aforementioned European legislations is pronounced only as a last resort, that is, *ultima ratio*. This further means that respecting the principle of minimum intervention, the deprivation of liberty of a minor occurs only when there is no other way for the criminal law to react. In other words, as a rule, minors are initially sanctioned with milder criminal-law measures, which are not of institutional charter, thus avoiding the application of deprivation of liberty for a shorter duration. Then, the current solutions in Anglo-Saxon criminal legislation are significant in terms of punishing juveniles in various forms of deprivation of liberty. So we can say that Canada's criminal legislation on the one hand presents the precedential legal solutions, while on the other, it points to some similar solutions envisaged in the continental law that has already been discussed. The legal possibility of applying different models of depri-

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i mlađih punoljetnika kaznom maloletničkog zatvora", Hrvatski ljetopis za kazneno pravo i praksu, 2/2004, 843

[44] Dillenburg, C., *Jugendstrafrecht in Deutschland und Frankreich: Eine rechtsvergleichende Untersuchung*, Universität zu Köln, German, 2003, p. 188

vation of liberty and its specific duration indicates the similarity of the normative solutions of Germany, Austria, France and our law.

Grading of guilt as an independent prerequisite for the imposition of this sentence implies that there is recklessness or similar relationship of subjective character of the juvenile offender, which indicates that they were manifested when carrying out the criminal offense. Moreover, in the literature one can meet the understanding that the primacy is given to existence of the high degree of guilt, rather than the severity of the crime, when it comes to the conditions for imposing punishments. As the reason for this opinion, it is stated that a personality of a minor, i.e.his inner side of his personality is the most important component which influence his/her behavior in a given situation.[45]

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[45] High degree of guilt is sufficient presumption that after imposing juvenile imprisonment, the juvenile will be provided with intensive psychological treatment and other necessary support and assistance in the penitentiary institution. German system of juvenile criminal law is not only based on the idea of punishment, but the so-called three pillars: education, guilt (punishment) and proportionality in terms of measures or criminal sanctions correspond to the gravity of the offense and that are tailored to the personality of the juvenile. Diemer H, Schoreit A, Sonnen B, R., *Jugendgerichtsgestz, Kommentar,* Heidelberg, 2011, p. 206

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SUPREME COURT DECISINOS

1. Kžm 09/1996
2. Kžm. 42/2000
3. Kžm. 17/2003
4. Kžm. 44 /2009

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1. Km. 387/2006
2. Km. 103/2009
3. Km. 746 / 2010
4. Km. 275/2011
5. Km. 28/2013.

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CASE LAW ON THE EUROPEAN ARREST WARRANT

ABSTRACT

The paper deals with the European arrest warrant in the case law of Croatian courts and presents the principles of mutual recognition and trust, as well as the principle of the verification of double criminality which has attracted a lot of attention in professional circles in the area of international judicial cooperation in criminal matters. The introductory part of the paper addresses the importance of this instrument as the cornerstone of judicial cooperation in criminal matters between EU Member States. This is followed by an analysis of the fundamental principles, specifically the principle of mutual trust as a structural principle of EU constitutional law, its origin and context in the light of the decisions rendered by the Supreme Court of the Republic of Croatia and the Constitutional Court of the Republic of Croatia. The central part of the paper analyses the principle of verification of double criminality and the implementation of that principle in the process of executing the European arrest warrant, and relates that principle to the mandatory and optional grounds for non-execution of the warrant. A brief overview is then provided of the execution of the warrant with reference to the decisions of the Supreme Court of the Republic of Croatia, and the paper ends with an evaluation of the significance of the principle of mutual recognition in criminal matters as exemplified by the judgments of the Court of Justice of the European Union.

Keywords: *European arrest warrant, mutual trust, mutual recognition, double criminality*

1. INTRODUCTION

The European arrest warrant is an arrest warrant issued by the competent judicial body of a Member State of the European Union (hereafter: EU) for the arrest and surrender of a person who happens to be in another Member State, with a view to prosecution or execution of a custodial sentence or a detention order. The purpose of the European arrest warrant is to create a quick, efficient and effective judicial cooperation between EU Member States in the suppression and deterrence of crime. Judicial cooperation in criminal matters between EU Member States must involve such mutual trust and surrender of persons requested by another Member

State that supersedes state sovereignty and allows all Member States to effectively combat serious crime.[1]

However, given the sensitivity of all States about the surrender of their own citizens and their initial caution with regard to accepting the Framework Decision on the European arrest warrant and the surrender procedures between Member States [2], the process of implementation of the Framework Decision, pursuant to Article 32, allowed each Member State to, once the Council has adopted the Framework Decision, make a statement indicating that as executing Member State it would continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. Some member States have thus placed a time restriction on the application of the European arrest warrant, and such statements have been issued by: the Czech Republic in respect of its citizens who committed crimes before 1 November 2004, the Republic of Austria and Luxembourg for crimes committed before 7 August 2002, France for crimes committed before 1 November 1993 (related to the entry into force of the Treaty on European Union) and Italy for crimes committed before 1 August 2002 (but executing those warrants issued before 14 May 2005).

Since the option of making the statement about placing a time restriction on the application of the European arrest warrant existed only at the time the the Framework Decision was being adopted by the Council, and given the fact that during accession negotiations the Republic of Croatia had not requested that such time restriction be placed on the application of the warrant, the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (hereafter: AJCCM-EU), which did contain a time restriction, was amended in the way that Article 132(3) reading „The European arrest warrant shall be executed in respect of the crimes committed after 7 August 2002" was deleted.[3]

In accordance with that, European arrest warrants are also issues retroactively in the Republic of Croatia for crimes committed before the coming into force of AJCCM-EU and Croatia's accession to the European Union.[4]

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1 Turudić, I., Pavelin Borzić, T., Bujas, I., *European arrest warrant with examples from case law*, Novi Informator, Zagreb, 2014, p. 13

2 Council Framework Decision 2002/584/JHA on the European arrest warrant t and the surrender procedures between Member States [2002] OJ L 190/1

3 Turudić, I., Pavelin Borzić, T., Bujas, I. *The Impact of the Framework Decision on the European Arrest Warrant on the Constitutional Order of Member States (part 1),* Novi informator, no.6285/2014, p. 2

4 For more on the reasons for amendments to AJCCM-EU see: Krapac, D., F*ramework Decision of the Council [of the European Union] of 13 June 2002 on the European (EUN) and the surrender procedures*

2. FUNDAMENTAL PRINCIPLES OF JUDICIAL COOPERATION

In the preamble to the Framework Decision it is pointed out that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, that the mechanism of the European arrest warrant is based on a high level of confidence between Member States, and that its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union.

The origin and context of the prinicple of mutual confidence is manifest in the principle of mutual recognition as a method of cooperation and integration in the area of freedom, security and justice.[5] The principle of mutual recognition presupposes and derives from the principle of mutual confidence, which is also pointed out by the Court of Justice of the European Union in the Court's decision *Jeremy F. v Premier ministre*[6] which reads as follows:"The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at European Union level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested." [7]

As regards the Republic of Croatia, the principles the domestic courts should be guided by in judicial cooperation in criminal matters with EU Member States are found in decision No. U-III-351/2014 of the Constitutional Court of the Republic of Croatia of 24 January 2014 wherby the Constitutional Court decided on the consitutional complaint alleging violations of human rights and fundamental freedoms guaranteed under the Constitution of the Republic of Croatia, which violations were, according to the complainant, committed in the process of surrender based on the European arrest warrant under order No. Kv-eun-2/14 of the

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between Member States (2002/584/JHA), Collected Papers of the Law Faculty of Zagreb, 64(5-6), p. 960

5 For more on the development of the principle of mutual confidence see: [www.ejtn.eu/.../THEMIS%20written%20paper%20-%20Romania...] Accessed 1 March 2018

6 Case C-168/13 *Jeremy F. v Premier ministre* [2013] OJ C 156, par. 50

7 Turudić, I., Pavelin Borzić, T., Bujas, I., *Relationship Between the Principles of Mutual Recognition/Confidence and Verification of Double Criminality*, Collected Papers of the Law Faculty of the University of Rijeka, 36(2), p. 1081

County Court of Zagreb of 8 January 2014 and order No. Kž-eun-2/14 of the Supreme Court of 17 January 2014. The relevant decision of the Constitutional Court affirmed the Supreme Court of the Republic of Croiatia as the supreme authority on statutory interpretation. The lawmakers have thus been precluded from influencing court decisions in concrete cases by frequent amendments to legislation, given that national courts are under a duty to interpret laws in accordance with the EU *acquis communautaire*, the principle of the effective judicial cooperation in criminal matters and loyalty, and in the light of the principle of mutual recognition. Thus, the Constitutional Court of the Republic of Croatia bound the national courts to construe domestic legislation in the light of the decision of the Court of Justice of the European Union in the case Pupino.[8]

The relevant part of the cited decision of the Constitutional Court of the Republic of Croatia reads as follows:

"10. Framework Decision 2002/584, which in its preamble invokes the principle of mutual recognition of judgments and judicial decisions in criminal matters (item 10, first sentence of the preamble) and replaces the previous instruments providing for „classical" extradition between Member States, must be implemented in domestic law in the way that contributes to the realisation of the principle of mutual recognition of the Member States' judicial decisions and in that way creates a cross-border common area of criminal law for the application of national criminal laws and national jurisdiction of the criminal courts of EU Member States.

In that context, it is sufficient to recall that, even before the Treaty of Lisbon took effect on 1 December 2009, the Court of Justice of the European Union, in its judgment C-105/03 - Pupino (Criminal proceedings against Maria Pupino [2005] ECR I-5285) given by the Grand Chamber on 16 June 2005, had expanded the doctrine of indirect effect of Community law to apply to framework decisions, too, by establishing the loyalty principle as the basis for the obligation of conformity of interpretation.

Neverheless, due to the diversity in the legal orders of EU Member States in the area of criminal law, their cultural and social differences as well as the different underlying criminal law doctrines, surrender is an institution still in the process of being developed, which leads to potential differences in the approach adopted by individual EU Member States in respect of the normative framework for transposing Framework Decision 2002/584 and the interpretation of surrender in the light of the principle of mutual recognition (as the cornerstone in creating an

[8] Turudić *et al.*, *op. cit.* note 7, p. 1093

area of freedom, security and justice based on a high level of confidence between member States), the principle of subsidiarity and the principle of proportionality.

11. In light of that, the Constitutiona Court recalls that the procedure involving the surrender of a Croatian citizen to another EU Member State is not a criminal procedure, but rather a judicial procedure *sui generis* aimed at enabling criminal prosecution or enforcement of a penal judgment to take place in another EU Member State, and not aimed at deciding on the guilt of a criminal suspect or punishment for the committed offence.

It follows that judicial decisions made in that procedure are subject to constitutional review only in respect of a narrow range of potential violations involving exclusively human rights and fundamental freedoms guaranteed under the Constitution (i.e. constitutional rights).

Consequently, the Constitutional Court is competent to assess, for instance, whether the requested person faces in the requesting Member State the risk of torture or inhuman or degrading process or punishment. …

In addition, the Constitutional Court is competent to examine, for instance, whether there is a real risk that the requested person (a Croatian citizen) might, in the Member State that issued the European arrest warrant, suffer a flagrant denial of a fair trial in the way that would negate the very essence of his or her right to a fair trial. Until the Court of Justice of the European Union potentially sets a different benchmark, the Constitutional Court shall be guided by the meaning of "a flagrant denial of a fair trial" as defined by the European Court of Human Rights in the case *Ahorugeze v. Sweden* (judgment of 27 October 2011, application no. 37075/09, § 114-115) …

Finally, as regards the procedure before domestic courts in the execution of the European arrest warrant, the Constitutional Court is competent to examine whether the assessment of the domestic courts deciding on surrender was "flagrantly and manifestly arbitrary" to the extent that allowed a Croatian citizen to be surrendered to another Member State in contravention of Article 9(2) of the Constitution."

The principles underlying any decision on the execution of the European arrest warrant are also analysed in decision No. Kž-eun 12/17 of the Supreme Court of the Republic of Croatia of 7 March 2017, which reads as follows:

"It is worth pointing out that the European arrest warrant is an instrument of mutual cooperation between EU Member States founded on the principles of mutual recognition (AJCCM-EU, Article 3) and effective cooperation (AJCCM-

EU, Article 4) between the Member States, and that it consequently imposes on the national courts of the executing States a legal obligation and moral responsibility to approve the surrender of a requested person, save in the case of the rare and expressly prescribed grounds for refusing surrender. Among other possible grounds for refusing execution of the European arrest warrant, Article 20(2)(2) of AJCCM-EU provides for the situation where it has come to the court's attention that the requested person has already been finally convicted in respect of the charged offence in another Member State, provided that the penal sanction has already been executed, or is in the process of being executed, or can no longer be executed under the law of the country in which the judgment was rendered. From the submitted documentation on which the requested person's appeal is founded, not only is it not apparent that A.B. has already been finally convicted in respect of the same offences, but the very claim made by the appellant about the 54 days he spent in detention negates the existence of the statutory bar prescribed under Article 20(2)(2) of AJCCM-EU, which is met only where a penal sanction has been executed, or is in the process of being executed, or can no longer be executed under the law of the country that rendered the judgment, none of which is obviously the case in the instant case."

The same is apparent from the decision of the Supreme Court of the Republic of Croatia No. Kž-eun-5/14 of 6 March 2014:

"…Thereore, in order to achieve the objectives and comply with the principles set out in EU law, national courts are under a duty to apply national law in the light o the letter and the spirit o EU legislation. This means that national law must in its application to the highest possible extent be interpreted in the light of the wording and purpose of the relevant framework decisions and directives, with a view to producing the result the framework decisions and directives strive to achieve, and to complying with Article 34(2.b.) of the Treaty on European Union (which is expressly stated in the judgment given by the European Court o Justice on 16 June 2005 in case no. C-105/03 P). By acceding to the European Union, the Republic of Croatia undertook to act along those lines."

3. DOUBLE CRIMINALITY

The transposition of the Framework Decision on the European arrest warrant into EU Member States' national legislation called for amending the constitutional guarantees, *inter alia* the one that had for ages been part of the countries' domestic legal orders – the possibility of refusing to extradite one's own citizens.

Besides that, the European arrest warrant excludes the verification of double criminality for 32 categories of criminal offence,[9] provided that the offences are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, which makes the warrant an instrument that, besides requiring Member States to extradite their own nationals, also demands extradition for an offence that under the Member States' legislation does not amount to a criminal offence at all so that there are no impediments to extradition on account of a financial element of the offence.[10]

In respect of offences that are not encompassed by one of the categories for which the verification of double criminality is excluded, the condition for execution of the European arrest warrant is that the relevant crime constitutes a punishable offence under the national law of the executing country, too, provided that it carries a custodial penalty of at least four months.[11]

The condition regarding the prescribed custodial sentence of at least one year for offences for which double criminality must be verified, and at least three years for those for which no verification of double criminality is required, must be fulfilled only in the country issuing the European arrest warrant, and not in the excuting country, as is apparent from the Judgment *Openbaar Ministerie v A.* ,[12] whose relevant part reads:

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9 The list reads: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage

10 Turudić, *et al.*, *op. cit.* note 3, p. 2

11 Where the European arrest warrant is issued in respect of an offence punishable by custodial life sentence or lifetime detention, the court may make its execution subject to the condition that 1) there is a statutorily prescribed possibility for the imposed penalty or sanction to be reviewed in the issuing country at the request of the convict or *ex officio* not later than 20 years from the sanction being imposed, and 2) the convicted person has the right to apply for pardon from further serving his or her sentence or sanction in accordance with the law or case law of the issuing country

12 Case C-463/15 *Openbaar Ministerie v. A.* [2015] OJ C 38

"§ 27 Moreover, neither Article 2(4) and Article 4.1 of Framework Decision 2002/584 nor any other provisions thereof provide for the possibility of opposing the execution of a European arrest warrant concerning an act which, while constituting an offence in the executing Member State, is not there punishable by a custodial sentence of a maximum of at least twelve months.

§ 28 This finding is corroborated by the general background of Framework Decision 2002/584 and by the objectives that it pursues.

§ 29 As is clear from the first two paragraphs of Article 2, this Framework Decision focuses, with regard to offences in respect of which a European arrest warrant may be issued, on the level of punishment applicable in the issuing Member State (see, to that effect, the judgment in *Advocaten voor de Wereld*, C303/05, EU:C:2007:261, paragraph 52). The reason for this is that criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State.

§ 30 In contrast to the extradition regime which it removed and replaced by a system of surrender between judicial authorities, Framework Decision 2002/584 no longer takes account of the levels of punishments applicable in the executing Member States. This corresponds to the primary objective of this Framework Decision, referred to in recital 5 in its preamble, of ensuring free movement of judicial decisions in criminal matters, within an area of freedom, security and justice.

§ 31 It follows from all of the foregoing considerations that Article 2(4) and Article 4.1 of Framework Decision 2002/584 must be interpreted as precluding a situation in which surrender pursuant to a European arrest warrant is subject, in the executing Member State, not only to the condition that the act for which the arrest warrant was issued constitutes an offence under the law of that Member State, but also to the condition that it is, under that same law, punishable by a custodial sentence of a maximum of at least twelve months."

AJCCM-EU in Article 20(1) defines the requirement of double criminality as being met where "the offence contains the same essential elements under domestic legislation, too, irrespective of the statutory description and the legal designation of the punishable act indicated in the issued warrant", and Article 2(4) of the Framework Decision provides that " the requested person may be surrendered subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described."

In addition, in deciding on the execution of the European arrest warrant, the courts establish whether formal requirements for issuing the European arrest warrant existed in the first place, and whether mandatory or optional grounds exist for refusing execution, whereas the merits of the factual and legal description of the act indicated in the warrant are not ascertained at all, as is apparent, *inter alia*, from decision No. Kž-eun 22/17 rendered by the Supreme Court of the Republic of Croatia on 31 August 2017:

"The appellant disputes the existence of reasonable grounds to believe that he committed the offence alleged in the warrant and submits that 'he should have been given an oportunity to plead in respect of the facts, by being summoned, etc.)'. Given that detention is involved, and that the requested person has never received a summons or a warrant in Germany and has consequently been denied participation in the proceedings, the grounds for refusing execution of the warrant as set out in Article 21(2) of AJCCM-EU do exist.

Contrary to the allegations made by the appellant, the first-instance court acted properly in finding, after having conducted the proceedings and questioned the requested person, that all statutory requirements set out in Article 29 of AJCCM-EU had been met for surrendering D.T., despite his opposition, to the Federal Republic of Germany, in order for criminal proceedings to be conducted for the offence described in the warrant. This second-instance court does not find acceptable the appellant's claim that there are no reasonable grounds for believing that he committed the charged offence. Namely, it is not for this court in this proceeding to establish whether the factual and legal description of the charged offence are well founded; rather, the court's task is to assess whether the requirements for surrendering the requested person have been met, and whether there may be grounds for refusing surrender as prescribed in Articles 20 and 21 of the cited Act. Since the appellant's objection is of a factual nature, it is exclusively up to the court of the country that issued the warrant to decide on it after conducting a comprehensive proceeding and hearing all the necessary evidence."

Mandatory and optional grounds for refusing execution of the warrant are set out in Article 20 and 21 of AJCCM-EU. Where mandatory grounds exist, the court must refuse to execute the warrant, and where there are optional grounds it may, following the principles of effective cooperation, expediency and the right to a fair trial, refuse to execute the warrant. The court must refuse execution of the European arrest warrant where: 1) the European arrest warrant was issued for an offence covered by amnesty in the Republic of Croatia, and the domestic court is vested with jurisdiction under the law; 2) the court is informed that the requested person has already been finally convicted in a Member State in respect of the same

offence, subject to the condition that the penal sanction has been executed, or is in the process of being executed, or can no longer be executed under the law of the country in which the judgment was rendered; 3) at the time the offence was committed, the requested person was below the age of 14; 4) the offence from Article 17(2) of this Act, to which the European arrest warrant pertains, does not constitute a criminal offence under domestic law (for fiscal offences, the execution of an EAW may not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State); 5) criminal proceedings against the requested person are pending in the Republic of Croatia on charges of having committed the same offence as that charged in the EAW, save where the state attorney and the competent authority of the issuing Member State have agreed that the proceeding will be conducted by the judicial body of the issuing State; 6) the domestic judicial body has decided not to bring criminal proceedings for the offence charged in the EAW on the grounds that the suspect has fulfilled the obligations imposed on him or her as a condition for non-institution of such proceedings; 7) criminal prosecution or the execution of a penal sanction has become statute-barred, and the Republic of Croatia has jurisdiction under domestic law; 8) the court is informed that the requested person has already been finally convicted in respect of the same offence in a third country, and the sanction has been executed, or is in the process of being executed, or can no longer be executed under the law of the country in which the judgment was rendered. The court may refuse to execute the EAW where: 1) the domestic judicial authority has decided not to bring criminal proceedings for an offence in respect of which the EAW has been issued, or criminal proceedings have been discontinued, or a final judgment has been given against the requested person in a Member State for the same offence; 2) the EAW pertains to offences which: a) were in whole or in part committed in the territory of the Republic of Croatia, b) were committed outside of the issuing country's territory, and domestic law does not allow such offences to be prosecuted when they are committed outside of the territory of the Republic of Croatia.[13]

[13] The Framework Decision provides for three cases where non-execution of the EAW is mandatory: amnesty (if the offence in respect of which the warrant is issued is covered by amnesty in the executing Member State, and that Member State has jurisdiction to prosecute the offence in accordance with its criminal law), *ne bis in idem* (if the executing judicial authority has been notified that the requested person has been finally convicted in respect of the same offence in another Member State, subject to the condition that, where there has been sentence, the sentence has been served, or is in the process of being served, or may no longer be executed under the law of the sentencing Member State), and the age of the requested person (if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law

Grounds for non-execution of the EAW are listed in Article 20 of AJCCM-EU after paragraph 1 which begins: "In addition to to the offences from Article 10 hereof,…" Given that Article 10 expressly lists 32 categories of offence in respect of which double criminality is not verified, from the wording of the Act it follows that the existence or otherwise of the grounds for non-execution of the EAW are not to be ascertained where offences listed in Article 10 of AJCCM-EU are involved.

In case Kž-eun 23/17 of 7 September 2017 involving verification of double criminality, the Supreme Court of the Republic of Croatia had this to say:

"Furthermore, the appellant himself does not dispute that the European arrest warrant was issued in respect of one of the offences listed in Article 10 AJCCM-EU (accessoryship – aiding homicide). This means that the domestic court, as the court responsible for executing the EAW, does not verify the criminality of the charged offence under domestic law, and the cited provision of AJCCM-EU is in accordance with Article 2(2) of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of 13 June 2002 (2002/584/JHA). Therefore, given that in the case at hand the arrest warrant was issued for the purpose of executing a custodial sentence passed for one of the offences listed under Article 10 of AJCCM-EU, for which an EAW is executed without verification of double criminality, the first-instance court correctly concluded that the statute of limitation is not to be verified against the domestic legislation either – a standpoint expressed in a number of decisions of this Court (Kž-eun-7/14, Kž-eun-8/14), which makes it unnecessary to consider other objections raised by the appellant concerning the calculation of the time when the execution of the sentence became statute-barred."

The same is apparent from the decision of the Supreme Court of the Republic of Croatia in case No. Kž-eun 3/17-4 of 24 January 2017:

"Namely, the subject of the European arrest warrant in this case is forgery, a criminal offence listed among the offences covered by Article 10 of AJCCM-EU, i.e. offences for which there is no verification of double criminality. Verification of double criminality is ruled out where any punishable conduct referred to in Article 10 of AJCCM-EU is involved.

According to the established case law (Kž-eun 2/14 of 17 January 2014, Kž-eun 5/14 and Kž-eun 14/14 of 6 March 2014), and pursuant to the legal opinion ex-

of the executing State). Other grounds for non-execution are indicated in the Framework Decision as optional grounds for non-execution of the warrant

pressed by the Criminal Division of the Supreme Court of the Republic of Croatia in Su-IV k-21/16.-11, verification of double criminality is ruled out in the instant case. The latter includes a prohition on verifying whether criminal prosecution has become statute-barred, because the statute of limitation is a component of the notion of double criminality.

This case law and legal opinion should also be applied, *mutatis mutandis*, in respect of *ne bis in idem*. In other words, there is no verification of whether the requested person has already been finally convicted of the same offence in another Member State, provided that the criminal sanction has been executed, or is in the process of being executed, or may no longer be executed under the law of the country in which the relevant judgment was given (Article 20(2)(2) of AJCCM-EU). This ground for refusing execution of the European arrest warrant is placed in the same provision as the expiry of the statute of limitations (Article 20(2)(7) of AJCCM-EU). Neither of the grounds referred to in the cited provision of Article 20(2) AJCCM-EU are verified where the subject of the European arrest warrant is punishable conduct listed under Article 10 of AJCCM-EU, which is exactly the case here."

4. SUBSEQUENT CONSENT

In cases where the requested person has been surrendered under the European arrest warrant, and in the issuing State or another country another criminal proceeding is pending or there is a final judgment whereby a custodial sentence was imposed, which was not encompassed by the warrant and consequently not by the surrender order, then there is the possibility of a subsequent consent to conducting proceedings or executing the custodial sentence. In that procedure, grounds for refusal of the execution of the European arrest warrant envisaged by Articles 20 and 21 of AJCCM-EU are assessed, and if mandatory or optional grounds for non-execution are found to exist, then consent is to be denied, as is apparent from decision No. Kž-eun 20/16-4 rendered by the Supreme Court of the Republic of Croatia on 9 May 2016:

"In the procedure involving consent within the meaning of Article 41 AJCCM-EU, the first-instance court found that all statutory requirements had been met for consent to be given, and did not find any grounds for mandatory refusal as provided for in Article 20(2) of AJCCM-EU, nor any grounds for optional refusal provided for in Article 21 thereof.

Having regard to the principle of mutual recognition between EU Member States as provided in Article 3 of AJCCM-EU and the rpinciple of effective cooperation

as provided in Article 4 thereof, the first-instance court acted correctly in giving consent for the Republic of Poland to conduct criminal proceedings against the requested person J. A. P. for offences committed prior to the surrender but not contained in the European arrest warrant."

Pursuant to Article 41 of AJCCM-EU, consent is given by the court that made the order for the concerned person to be surrendered under the European arrest warrant. The court must make that decision within 30 days of receiving the request, without prior examination of the person.

Consent may be given for:

a) conducting criminal proceedings against or executing a custodial sentence or a sanction involving detention of the surrendered person for an offence non covered by the warrant but committed before surrender,

b) surrendering the person to another Member State for an offence committed before surrender,

c) surrendering the person to a third country for an offence committed before surrender.[14]

No appeal lies against the consent order, as is apparent from the decision of the Supreme Court of the Republic of Croatia No. Kž-eun 32/16-4 of 12 September 2016:

"Pursuant to Article 491(1) of the Criminal Procedure Act (Official Gazette, No. 152/08, 76/09, 80/11, 91/12 – Constitutional Court decisions 143/12, 56/13, 145/13 i 152/14; hereafter: CPA/08), an appeal against an order of the state attorney, pre-trial judge, or any other first-instance court decision, may always be brought by any party or person whose rights have been violated, unless CPA provides that no appeal is allowed. The Act on Judicial Cooperation in Criminal Matters with EU Member States is indisputably a *lex specialis* governing the application of the instruments of cooperation in criminal matters between the competent domestic judicial authorities and the competent judicial authorities of other EU Member States expressly listed therein, and Article 41 of that Act, entitled „Consent giving procedure", in paragraph 3 provides that no appeal shall lie against a decision rendered in that procedure. The cited provision is of a cogent nature and does not envisage any exceptions, which makes it obvious that the appeal is not allowed, notwithstanding the fact that the County Court of Split in the notice of the right to appeal ending the contested order stated that it was allowed, seen that

[14] Article 41 of AJCCM-EU

an erroneous notice of the court may not confer a right that is not conferred by the statute."

5. TIME LIMITS FOR THE DECISION TO EXECUTE EAW AND REMEDIES

The procedure and the time limits for executing the European arrest warrant depend on the statement by the requested person on whether or not they consent to surrender. Where the state attorney has filed a motion for pre-trial detention of the requested person in order to secure execution of the European arrest warrant, the requested person may, at the hearing held to decide on pre-trial detention, give consent to surrender, in which case the pre-trial judge shall, alongside the detention order, also make a surrender order within three days from consent. The order shall be served on the requested person, their defence council, and the state attorney, who shall have three days to file appeals, and the decision on an appeal against the order made by the pre-trial judge shall be rendered by the pre-trial panel within three days.

In the event that the state attorney has not filed a motion for detaining the requested person, or the requested person has not consented to surrender before the pre-trial judge, the surrender order shall be made by the pre-trial panel. Where the requested person has, at the hearing, consented to surrender, the pre-trial panel must also without delay, within three days from consent at the latest, make an order allowing surrender, unless there are grounds for non-execution of the European arrest warrant as prescribed by Articles 20 and 21 of AJCCM-EU, and appeal against the order of the pre-trial panel lies to a higher court panel which has three days to decide on it. Consent shall be entered in the record which shall be drafted in the way that makes it indisputably apparent that, in giving consent, the requested person acted voluntarily and was fully aware of the consequences thereof, and consent and renunciation of entitlement to the speciality rule are irrevocable.

Although the state attorney questions the requested person prior to the procedure before the court and must inform him or her of the possibility of consenting to be surrendered to the issuing State, whereby the consent statement is entered in the record, such a statement has no legal effect, as is apparent from the reasons for decision Kž-eun 2/2018-4 delivered by the Supreme Court of the Republic of Croatia on 13 February 2018:

"Namely, pursuant to the provisions of AJCCM-EU, the requested person may give consent to surrender only before the pre-trial judge or the pre-trial panel of

the competent court. Such an interpretation follows from Articles 24.a.(4) and 24.b.(6) of AJCCM-EU, which expressly provide that the requested person may give consent to surrender either before the pre-trial judge (where there is a hearing scheduled to decide on pre-trial detention at the motion of the state attorney) or before the pre-trial panel (both in the situation where no hearing was held before the pre-trial judge and where such a hearing was held but the requested person did not consent to surrender). Furthermore, under Article 27(4) and 28(1) of AJCCM-EU the court is under a duty to, within the prescribed time limits, inform the competent authority that issued the European arrest warrant about the requested person's consent. In order for the time limit to be met, it is logical that the consent to surrender must be given in court, because time starts running from the date consent is given. Admittedly, pursuant to Article 24(2) of AJCCM-EU, the state attorney is under a duty to, before questioning the requested person, read them the Letter of Rights, i.e., put them on notice of the rights they enjoy under the domestic rules of criminal procedure and, pusuant to Article 24(3) of AJCCM-EU, inform them about the contents of and the basis for issuing the European arrest warrant, the possibility of consenting to surrender to the issuing country, and the possibility of renouncing the entitlement to the speciality principle and the consequences of the renunciation statement within the meaning of Article 38(1) of AJCCM-EU. It follows that the state attorney's powers in respect of consent to surrender and renunciation of the speciality rule do not go beyond informing the requested person about the contents of those rights and the consequences thereof. The authority competent to receive the requested person's consent statement, and the statement on renunciation of the entitlement to the speaciality rule, is the court, which makes sense in view of the fact that, in the surrender procedure, the state attorney assumes a double role: on the one hand he represents the foreign country that issued the European arrest warrant, and on the other hand he or she conducts certain preparatory activities towards instituting the EAW execution procedure, i.e., activities which *mutatis mutandis* correspnd to the state attorney's role and powers at the criminal investigation stage. It follows that the consent to surrender given by the requested person in the course of being questioned by the state attorney is not validly given and may consequently not produce any legal effects."

Where the requested person opposes surrender, the pre-trial panel shall question him or her about the reasons for opposing it. The competent state attorney may, and the person's defence council must attend the hearing. The requested person, their defence council, and the state attorney are given three days to appeal against the order of the pre-trial panel, and appeals are heard, within three days, by the

pre-trial panel of a higher court. In the latter case, a decision on surrender of the requested person must be made within 60 days from arrest or first interrogation.

With regard to the possibility of filing a second appeal against a surrender order, the Supreme Court of the Republic of Croatia, in reasons for its decision No. Kž-eun 7/17 of 6 February 2017, had this to say:

"In this appeal, the requested person repeats at length the grounds for which he moves for a new procedure on the execution of the European arrest warrant and surrender of the requested person V. Č. R. to Italy, which surrender was granted by the final order of the County Court of Vukovar, No. Kv-eun-12/16 of 21 April 2016, but was adjourned until the final conclusion of criminal proceedings pending before the County Court of Rijeka against V.Č. on charges of having committed the offence referred to in Article 173(3) of the Penal Code (Official Gazette, No. 110/97, 27/98 – correction, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05 – correction, 71/06, 110/07, 152/08, 57/11 and 77/11; hereafter: PC/97), and the outcome of those proceedings in respect of the requested person is uncertain because the other defendants are absconding. As regards the admissibility of his application for a new procedure, the appellant submits that „the court failed to comply with Article 132 of AJCCM-EU which provides for the application of other statutes, including the Penal Code, in situations such as the one at hand, i.e. where a particular issue is not regulated by AJCCM-EU.

However, in denying the requested person's motion for a new procedure for the execution of the European arrest warrant and the person's surrender to the Republic of Italy, the first-instance court correctly pointed out that the provision of Article 501(1)(3) of CPA/08, which the requested person invokes in his application, may not be applied in the instant procedure because it pertains to criminal proceedings concluded with a final judgment, nor is there room for it to be applied analogously to the procedure for the execution of the European arrest warrant given that, pursuant to that provision, „new facts" must be „such as to be conducive to an acquittal of a convicted person or to their being convicted under a more lenient penal law", and the procedure for the execution of a European arrest warrant is not designed to decide on a defendant's conviction or acquittal, but rather on the fulfillment of the strictly prescribed formal procedural requirements for surrender as set out in the relevant provisions of AJCCM-EU, whose existence is established in a procedure conducted in accordance with AJCCM-EU, and subsidiary application of CPA/08, prescribed under Article 132 of AJCCM-EU, is an option only where it is possible by the nature of things, which is not the case with respect to the provisions on criminal retrial.

6. CONCLUSION

"§ 25 It should be recalled, as a preliminary point, that the purpose of the Framework Decision, as is apparent in particular from Article 1(1) and (2) thereof and recitals 5 and 7 in the preamble thereto, is to replace the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, para 75 and the cited case law).

§ 26 The Framework Decision thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, para 76, and the cited case law).

§ 27 Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C 659/15 PPU, EU:C:2016:198, para 78, and the case law cited).

§ 28 The principle of mutual recognition, which pursuant to Article 1(2) of the Framework Decision constitutes the 'cornerstone' of judicial cooperation in criminal matters, means that the Member States are in principle obliged to execute the European arrest warrant. It follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Articles 4 and 4a of the Framework Decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Deci-

sion (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paras 79 and 80 and the case law cited). "[15]

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[15] Case C-477/16 *Openbaar Ministerie v Ruslanas Kovalkovas* [2016] OJ C 14, par. 25-28

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NEW EU CRIMINAL LAW APPROACH TO TERRORIST OFFENCES

ABSTRACT

Acts of terrorism constitute one of the most serious violations of human rights and fundamental freedoms on which the European Union (EU) is founded. The threat from terrorism has grown rapidly in recent years after numerous terrorist attacks that occurred Europe lately. Taking into account the evolution of terrorist threats and too narrow legal framework EU on combating terrorism, EU decided to extend it by prescribing new terrorist offenses. Accordingly, EU adopted Directive 2017/541 on combating terrorism in 2017 by prescribing new rules in order to strengthen legal framework to prevent terrorist attacks. This is precisely the main reason why the first part of the paper covers the new EU concept of terrorist offenses. Special attention is dedicating to offenses related to terrorist activities. Furthermore, the author points out to the national legislative framework in order to examine whether the Criminal Code of the Republic of Serbia is in compliance with adopted EU framework on combating terrorism. Since terrorist attacks cause serious consequences on the population, the Directive 2017/541 complements the current legislation on the rights of victims of terrorism by imposing special provisions on its protection and support. For that reason, the second part of the article presents the scope of the rights of the victims of terrorism. In concluding remarks, the author highlights that, by adopting the Directive 2017/541, EU has developed a comprehensive criminal law response on preventing and combating terrorism. It also points out that criminal legislation of the Republic of Serbia, when it comes to the matter of combating terrorism, with certain exceptions, is already adjusted to EU framework. Finally, some recommendations for accelerating the implementation of adopted measures on combating terrorism are listed.

Keywords: criminal law, EU , Directive 2017/541, terrorism

1. INTRODUCTION

Since November 2015, several EU member states have been hit by episodes of terrorist violence. Moments of crisis count as focal points at which policymakers re-think frameworks for new decision-making. Although in EU legislation has existed the landmark Framework Decision 2002/475/JHA on combating terrorism, which established for the first time a common European definition of terrorism and a list of preparatory acts that the Member States were obliged to implement

in their national legal orders, the challenges posed by foreign terrorist fighters have called for new measures specifically addressed to tackle this evolutionary threat. In particular, it was necessary to effectively criminalize the travel of individuals to receive terrorist training as well as the dissemination of propaganda and the interaction with potential recruits through the Internet.[1] The recent terrorist attacks in EU highlighted the contradiction between the seemingly free movement of terrorists across Europe and the lack of EU-wide intelligence sharing, although most perpetrators of the attacks were known to the various security agencies in several EU member states. [2] The European Union declared that terrorist threat has grown and has rapidly evolved in recent years. Individuals travel abroad for the aim of terrorism, and when they return, these foreign terrorist fighters pose a heightened security threat to all Member States.[3]

Therefore, in 2016 started EU's inter-institutional negotiations on a new Directive on combatting terrorism, aiming to reinforce the EU's legal framework in preventing terrorist attacks, but also to complement the current legislation on the rights for the victims of terrorism.[4] The Directive is based on two main pillars: the definition of new forms of terrorism in order to overcome the gaps of the existing EU framework and the protection of victims of terrorism.[5] Eventually, new Directive on combatting terrorism adopted in 2017 (hereinafter: Directive 2017/541). Directive 2017/541 exhaustively lists a number of serious crimes, such as attacks against a person's life, as intentional acts that can qualify as terrorist offences when and insofar is committed with a specific terrorist aim, namely to seriously intimidate a population, to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. The threat to commit abovementioned intentional acts should also be considered to be a terrorist offense when it is established, on the basis of objective circumstances, that such threat was made with the terrorist aim. Beside terrorist offenses, Directive 2017/541 introduces offenses related to terrorist activities. These offenses are of a very serious nature as they have the potential to lead to the commission of terrorist offenses and enable terrorists

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1 Muñoz A. G., *The Proposal for a New Directive on Countering Terrorism: Two Steps Forward, How Many Steps Back?*, European Papers, No.1, 2016, p. 759

2 Bureš O., *Intelligence sharing and the fight against terrorism in the EU: lessons learned from Europol*, European View No.1, 2016, p. 58

3 Bartko R., *Challenges of Fight Against Terrorism*, Polish Political Science Yearbook No.1 2017, p. 316

4 Baker-Beall C., *The European Union's Fight Against Terrorism: Discourse, Policies and Identity*, 2016, [https://www.europenowjournal.org/2017/11/01/the-european-unions-fight-against-terrorism-discourse-policies-and-identity/] Accessed 5 March 2018

5 Muñoz, *op.cit.* note 1, p. 760

and terrorist groups to maintain and further develop their criminal activities, justifying the criminalization of such conduct.[6]

However, although Directive 2017/541 integrates to the counter against terrorism in a comprehensive way, some non-governmental organizations are warning that the overly broad language of the new EU Directive on combating terrorism could lead to criminalising peaceful acts as well as to the suppression of the exercise of freedom of expression protected under international law and other unjustified limitations on human rights. According to these non-governmental organizations Directive 2017/541 requires states to criminalise a series of preparatory acts that may have a minimal or no direct link to a violent act of terrorism, and may never result in one being committed such as the case with the offences of travelling or receiving training for terrorist purposed which are not adequately defined.[7]

2. NEW EU CONCEPT OF TERRORIST OFFENSES

EU legislation on terrorist offenses was adopted in 2002, shortly after the 9/11 attacks on the US, and was updated in 2008. Council Framework Decision (hereinafter: FD) 2002/475/JHA on combating terrorism sought to align the Member States' legislation and established a first-ever common EU definition of terrorist offenses. It furthermore required the Member States to introduce provisions in their criminal codes penalizing terrorism and prepared a harmonized list of acts constituting terrorist offenses and their corresponding penalties. It was later amended by Council FD 2008/919/JHA to include three new offenses: the public provocation to commit a terrorist offense, recruitment for terrorism, and providing (but not receiving) training for terrorism.[8] Although FD has introduced an extended approach to terrorist offenses, it must be noted that the EU Member States have different past experiences involving terrorism and therefore not all of them share the same approach or sense of urgency when addressing this issue. However, since some of them have been affected by the foreign fighters phenomenon it was obvious that current EU framework on combating terrorism must be improved. Faced with home-grown terrorism and the foreign fighters phenom-

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6 Directive (EU) 2017/541 Of The European Parliament And Of The Council of 15 March 2017 on combating terrorism, (2017) OJL 88/6

7 The European Network Against Racism, *European Union Directive on Counterterrorism is Seriously Flawed*, 2016 [http://enar-eu.org/European-Union-Directive-on-Counterterrorism-is-Seriously-Flawed] Accessed 5 March 2018

8 Voronova S., *Combating terrorism,* European Parliamentary Research Service, Bruxelles, 2017, p. 3 [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599269/EPRS_BRI(2017)599269_EN.pdf] Accessed 22 March 2018

enon, the EU has sought to reinforce its counter-terrorism arsenal. Furthermore, as part of a global approach to tackling this threat, the criminal justice response has been developed at both international and European level. In 2014, the United Nations Security Council adopted Resolution 2178, obliging UN members to criminalise the act of travelling or attempting to travel to another country for terrorist purposes, or for providing or receiving terrorist training, as well as financing or facilitating such travel, whereas the Council of Europe adopted an Additional Protocol to its Convention on the Prevention of Terrorism.[9]

For that reason, at EU level, by 2015, a majority of Member States had started criminalizing *receiving* terrorist training whereas some Member States had made *travel* undertaken by foreign fighters a criminal offense. From that time, it was clear that EU should express its views on the foreign fighters phenomenon.[10] Since, returning foreign terrorist fighters pose a heightened security threat to all Member States it was completely undisputed that EU should ensure new and updated approach for combating terrorism, criminalizing offenses related to this phenomenon more comprehensively. On the other side, some theorists criticized the proposal for imposing extraordinarily wide-reaching obligations without offering the necessary guarantees regarding fundamental rights. With regard to the criminal offense of traveling abroad for terrorist purposes, there is opinion advocated that such action should only be criminalized when the terrorist purpose of the travel is proven from objective, factual circumstances. Furthermore, when it comes to the criminal offense of public provocation, some experts suggest that it should be criminalized only when it causes a danger in a concrete case that terrorist offenses may be committed.[11]

Anyway, Directive 2017/541 introduces new approach for combating terrorism defining three categories of conduct to criminalize: terrorist offences (Article 3), offences relating to a terrorist group (Article 4), and offences related to terrorist activities (Articles 5 to 12), which mainly cover preparatory acts, such as public provocation, recruitment, providing or receiving of training and travelling abroad for terrorism. New elements are also introduced in the general provisions, includ-

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9 Voronova S., *Directive on combating terrorism*, European Parliament, 2017 [http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599254/EPRS_ATA(2017)599254_EN.pdf] Accessed 11 March 2018; The United Nations Security Council adopted Resolution 2178 [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29] Accessed 22 March 2018;
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series-No. 217

10 Voronova, *op.cit.* note 8, pp. 3-4

11 Vestergaard J., *Foreign Terrorist Fighters*, University of Copenhagen, Copenhagen, 2018, p. 276

ing extended grounds for criminalizing aiding or abetting, inciting and attempting, as well as establishing jurisdiction for the offense of providing terrorist training, whatever the nationality of the offender. Finally, Directive 2017/541 contains specific provisions on the protection of victims of terrorism.[12]

2.1. OFFENSES RELATED TO TERRORIST ACTIVITIES

According to the Directive 2017/541 offences related to terrorist activities are the following: public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6), providing training for terrorism (Article 7), receiving training for terrorism (Article 8), travelling for the purpose of terrorism (Article 9), organising or otherwise facilitating travelling for the purpose of terrorism (Article 10), terrorist financing (Article 11) and other offences related to terrorist activities such as aggravated theft, extortion with a view to committing one of the terrorist offences as well as drawing up or using false administrative documents with a view to committing one of the terrorist offences or offences relating to a terrorist group and travelling for the purpose of terrorism.

Criminal offence *public provocation to commit a terrorist offence* is prescribed as distribution, or making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the terrorist offences listed in Directive 2017/541, where such conduct, directly or indirectly, (for example by the glorification of terrorist acts), advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed. The intent to incite terrorism requires some purposeful knowledge of how the speech online or offline will impact a wider community and actually motivate violence. Moreover, this criminal offense would be punishable only if there is a causal link between an individual's speech and the likelihood of a violent terrorist act being committed. The causal relationship between speech and violence helps to ensure that there is a concrete threat associated with a potential act of violence. Therefore, all acts must have a requisite intent and a causal relationship to a potential act of violence. Finally, the speech must be public in nature, nonetheless, it can be difficult to define exactly every public/private distinction as it occurs on the Internet. In this regard e.g.instant messaging, Facebook posting, or members-only websites should not be punishable. On the other side, public Twitter and Instagram accounts should be punishable, since it is a truly public forum capable of reaching a wide public audience.[13] However, the critique on the scope of the

[12] Voronova, *op.cit.* note 8, p. 6

[13] Rediker E., *The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union*, Michigan Journal of International Law, No. 2, 2015, pp. 346-348

offense refers to the content of the speech that falls within the range. Thus, Directive 2017/541, like FD before, not only includes those acts that directly incite the commission of terrorist acts but also allows for the criminalization of indirect provocation to terrorist offenses e.g. where previous statements made by a terrorist could be understood by supporters as an appeal to continue terrorist activities.[14] Hence, in the scope of that broadly accepted definition of indirect incitement could be classified criminal acts that are not legitimate.[15] The term "distribution" refers to the active dissemination of a message advocating terrorism, while the expression "making available" refers to providing that message in a way that is easily accessible to the public, for instance, by placing it on the Internet or by creating or compiling hyperlinks in order to facilitate access to it. The term "to the public" makes it clear that private communications fall outside the scope of this provision. In order to make a message available to the public, a variety of means and techniques may be used. For instance, printed publications or speeches delivered at places accessible to others, the use of mass media or electronic facilities, in particular, the Internet, which provides for the dissemination of messages by e-mail or for possibilities such as the exchange of materials in chat rooms, newsgroups.[16]

Freedom of expression is one of the essential foundations of a democratic society and applies, according to the case-law of the European Court of Human Rights, not only to ideas and information that are favorably received or regarded as inoffensive but also to those that offend, shock or disturb. However, in contrast to certain fundamental rights which are absolute rights and therefore admit no restrictions, Article 10, paragraph 2 of the ECHR lays down the conditions for restrictions on the exercise of freedom of expression.[17] The question is where the boundary lies between indirect incitement to commit terrorist offenses and the legitimate voicing of criticism. In this regard, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism suggests that indirect provocation to terrorist violence could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims,

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14 EUR-Lex, EU rules on terrorist offences and related penalties, 2015 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33168] Accessed 8 March 2018

15 Ginkel B., *Incitement to Terrorism: A Matter of Prevention or Repression?*, The International Centre for Counter-Terrorism, The Hague, 2011, p. 1

16 Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, 2005, Council of Europe Treaty Series-No. 196, p.12 [https://rm.coe.int/16800d3811] Accessed 22 March 2018

17 European Convention on Human Rights [https://www.echr.coe.int/Documents/Convention_ENG.pdf] Accessed 22 March 2018

calls for funding for terrorist organizations or other similar behavior." [18] ECHR in the case Döner and Others v. Turkey has stated that although freedom of expression could be legitimately curtailed in the interests of national security, territorial integrity, and public safety, those restrictions still had to be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner.[19] Furthermore, ECHR in the case Müdür Duman v. Turkey concerned the complaint by a local leader of a political party that his conviction on account of illegal pictures and publications found in the office of his party had amounted to an unjustified interference with his right to freedom of expression, stressed out that his conviction constituted an interference with his rights under Article 10 since there was no indication that the material in question advocated violence, armed resistance or an uprising and finding that the applicant's conviction had been disproportionate to the aims pursued, namely the need to protect public order and to prevent crime as part of the fight against terrorism.[20] Moreover, in the case Ürper and Others v. Turkey concerning the applicants complained about the suspension of the publication and dissemination of their newspapers, considered propaganda in favour of a terrorist organization, ECHR taking into account role of the press found in particular that less draconian measures could have been envisaged by the Turkish authorities, such as confiscation of particular issues of the newspapers or restrictions on the publication of specific articles.[21]

Moreover, criminal offense *recruitment for terrorism* is prescribed as soliciting another person to commit or contribute to the commission of one of the listed terrorist offenses. Solicitation can take place by various means, for instance, via the Internet or directly by addressing a person. For the completion of the act, it is not necessary that the addressee actually participates in the commission of a terrorist offense or that he or she joins a group for that purpose. Nevertheless, for the crime to be completed, it is necessary that the recruiter successfully approach the addressee. The solicitation effectively takes place regardless of whether the addresses of the solicitation actually participate in the commission of a terrorist offense or

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18 Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, *op. cit.* note 16, p. 11

19 Döner and Others v. Turkey - 29994/02, Judgment 7.3.2017, [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11421%22]}] Accessed 19 April 2018

20 Müdür Duman v. Turkey, application no. 15450/03, [https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5191081-6425326%22]}] Accessed 19 April 2018

21 Ürper and Others v. Turkey, (application nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and54637/07), [https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2899247-3189363%22]}] Accessed 19 April 2018

join an association or group for that purpose. On the other hand, this provision requires that the recruiter intends that the person, he or she recruits, commits or contributes to the commission of a terrorist offense or joins an association or group for that purpose.[22]

Furthermore, Directive 2017/541 makes a difference between *providing* training for terrorism and *receiving training for terrorism*. Precisely, these two offenses are prescribed as providing or receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the terrorist offences listed in Directive 2017/541. This provision covers the receiving of such training both in person, for instance, by attending a training camp run by a terrorist association or group, and through various electronic media (for instance, Internet). In this way, it also addresses self-training for terrorism. Anyway, the receiving of training must take place with a terrorism-related purpose and an intention to commit a terrorist offense. To be found guilty of the offense, an individual must provide the training for the purpose of committing a terrorist offense, knowing that the skills are intended to be so used. This appears to require a double intention—on behalf of both the instructor and the instructed. [23] This article criminalizes the supplying of know-how for the purpose of carrying out or contributing to the commission of a terrorist offense. For such conduct to be criminally liable, it is necessary that the trainer know that the skills provided are intended to be used for the commission of or the contribution to commit a terrorist offense.[24] The receiving of training for terrorism may take place in person, e.g. by attending a training camp run by a terrorist association or group, or through various electronic media, including through the Internet. However, the mere fact of visiting websites containing information or receiving communications, which could be used for training for terrorism, i.e. "self-study", is not enough to commit the crime of receiving training for terrorism. The perpetrator must normally take an active part in the training e.g., the participation of the perpetrator in interactive training sessions via the Internet. The participation in otherwise lawful activities, such as taking a chemistry course at university, taking flying lessons or receiving military training provided by a State, may also be considered as unlawfully committing the criminal offence of receiv-

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22 Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, *op. cit.* note 16, pp. 12-13

23 Cian M., *EU Counter-Terrorism Law : Pre-Emption and the Rule of Law*, Oxford : Hart Publishing, 2012, 73

24 Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, *op.cit.* note 16, pp. 13-14

ing training for terrorism, only if it can be demonstrated that the person receiving the training has the required criminal intent to use the training thus acquired to commit a terrorist offence.[25]

When it comes to *travelling for the purpose of terrorism* Directive 2017/541 makes a difference between travelling to a country other than Member State and travelling to Member State for the purpose of committing, or contributing to the commission of, a terrorist offence, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group, or for the purpose of the providing or receiving of training for terrorism. Preparatory acts are undertaken by a person entering that Member State with the intention to commit or contribute to the commission of, a terrorist offense shall be punishable as a criminal offense. Depending on the tradition of legal systems, the act of traveling for the purpose of terrorism could normally be criminalized as a separate criminal offense or as a preparatory act to the main terrorist offense, or depending on the circumstances as an attempt to commit a terrorist offense.[26]

Although, the right to freedom of movement is enshrined in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as in Article 12 of the International Covenant on Civil and Political Rights of the United Nations, the seriousness of the threat posed by foreign terrorist fighters warrants a robust response which, on the other hand, should be fully compatible with human rights and the rule of law.[27] In this context, it should be emphasized that criminal offense of *traveling for the purpose of terrorism* does not contain an obligation for Member states to introduce a blanket ban on or criminalization of, all travel to certain destinations. Neither does this criminal offense oblige Member states to introduce administrative measures, such as the withdrawal of passports. The act of traveling is only concerned with criminalization under two particular conditions. Firstly, the real purpose of the travel must be for the perpetrator to commit or participate in terrorist offenses, or to receive or provide training for terrorism, in a State other than that of nationality or residence. Secondly, the perpetrator must commit the crime intentionally and unlawfully.[28] Anyway, the act of traveling to another country

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25 Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series-No. 217, p. 6. [https://rm.coe.int/168047c5ec] Accessed 22 March 2018

26 *Ibid.,* p. 9

27 International Covenant on Civil and Political Rights
[http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx] Accessed 22 March 2018

28 *Ibid.,* p. 7

should be criminalized if it can be demonstrated that the intended purpose of that travel is to commit, contribute to or participate in *terrorist offenses*, or to *provide or receive training* for terrorism. This provision also includes traveling for the purpose of *participating in the activities of a terrorist group*. Both travels to third countries and to the EU Member States are covered, including those of the nationality or residence of the perpetrator.[29]

Additionally, Directive 2017/541 prescribes *organizing or otherwise facilitating traveling for the purpose of terrorism* as a criminal offense too. Accordingly, any act of organization or facilitation that assists any person in traveling for the purpose of terrorism knowing that the assistance thus rendered is for that purpose, is punishable as a criminal offense. The term organization covers a variety of conducts related to practical arrangements connected with traveling, such as the purchase of tickets and the planning of itineraries. The term facilitation is used to cover any other conduct than those falling under organization which assists the traveler in reaching his or her destination e. g. the act of assisting the traveler in unlawfully crossing a border. In addition to acting intentionally and unlawfully, the perpetrator must know that the assistance is rendered for the purpose of terrorism.[30]

Finally, Directive 2017/541 lists criminal offense of *terrorist financing* as providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit, or to contribute to the commission of, either terrorist offences or offences related to terrorist activities. This provision implements FATF Recommendation No. 5, stating that terrorist financing should be criminalized even absent a link to a specific terrorist act as money laundering predicate offenses.[31] Moreover, this provision complements International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. According to this Convention the notion of funds describes as assets of every kind, whether tangible or intangible, movable or immovable, however, acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.[32] Anyway, the funds may come from a single source, e.g. as a loan or a gift which is provided to

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29 Voronova, *op.cit.* note 8, pp. 6-7

30 Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, *op. cit.* note 21, p. 9

31 The Financial Action Task Force, The FATF Recommendations, FATF Secretariat, Paris, 2016, 13

32 International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

the traveler by a person or legal entity, or from various sources through some kind of collection organized by one or more persons or legal entities. The funds may be provided or collected "by any means, directly or indirectly". In addition, essential elements of the criminal offense include that the perpetrator acts intentionally and unlawfully with the knowledge that the funds are fully or partially intended to finance the traveling abroad for the purpose of terrorism.[33]

3. PROVISIONS OF CRIMINAL CODE OF THE REPUBLIC OF SERBIA ON COMBATING TERRORISM AND SERBIAN CASE LAW

Before Law on amendments from 2012 had adopted, Criminal Code of Republic of Serbia made the distinction between terrorism and international terrorism. In this regard, Law on amendments from 2012 brings a number of important novelties regarding the prescription of criminal acts of terrorism.[34] First of all, Article 391 of the Criminal Code specifies the core criminal offense of terrorism (regardless whether an act was administered against the Republic of Serbia, a foreign state or international organizations) with numerous forms of execution.[35] Furthermore, when it comes to offences related to terrorist activities Law on amendments from 2012 introduces provisions on the following criminal acts: public instigation of terrorist acts (Article 391a), recruitment and training for terrorist acts (Article 391b), use of deadly device (Article 391c), destruction and damaging of a nuclear facility (Article 391d), endangering of person under international protection (Article 392), financing terrorism (Article 393), terrorist conspiracy (Article 393a). At first, glance, compares to Directive 2017/541 Criminal Code of the Republic of Serbia provides wider criminal law protection criminalizing conducts such as the use of a deadly device, destruction and damaging of a nuclear facility, endangering of the person under international protection and terrorist conspiracy. However, on the other side Criminal Code of the Republic of Serbia missed prescribing acts of traveling for the purpose of terrorism as well as organizing or otherwise facilitating traveling for the purpose of terrorism as a criminal offense too. Bearing in mind that focus of this section of the paper is on the issue whether the Criminal Code of the Republic of Serbia is in compliance with adopted EU framework on combating terrorism, the further analysis shall be limited only to those criminal offenses criminalizing by Directive 2017/541. In the Special Department for or-

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33 Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, *op. cit.* note 21, p. 8

34 Law on amendments of Criminal Code of Republic of Serbia Official Gazette of RS, No. 121/2012

35 Kolarić D., *Nova Koncepcija Krivičnih Dela Terorizma U Krivičnom Zakoniku Republike Srbije*, Crimen 1/2013, p. 57

ganized crime of the High Court in Belgrade is ongoing criminal proceedings, against seven persons for criminal offenses public instigation of terrorist acts (Article 391a), recruitment and training for terrorist acts (Article 391b) financing terrorism (Article 393) of the Criminal Code.[36]

Public instigation of terrorist acts (Article 391a) is defined as expression or dissemination ideas that directly or indirectly instigate a criminal act of terrorism. The expression of ideas should be considered an announcement of one's own beliefs, while the dissemination of ideas should be understood as the further verbalization of one's belief related to another person.[37]

In abovementioned criminal proceedings against one defendant an indictment has been filed since there was justified suspicion that this person has committed the criminal offence of *public instigation of terrorist acts* under Article 391a of the Criminal Code by continuously, publicly expressing and disseminating ideas that directly instigate a criminal act of terrorism referred to in Article 391 of the CC, during 2013 and early 2014, on its Facebook profile, in a section that is available to all users, by setting out a series of content that glorify an organization declared by the United Nations as a terrorist - the Islamic State of Iraq and Levant "Shama" (IDIL), propagate its actions, invite to fight, violence and murders and show recording of the same, display maps of the territory controlled by "IDIL" and call for suicide actions in Raska, Belgrade and Rome.

Recruitment and training for terrorist acts (Article 391b) are actually two crimes but which are prescribed in the same article. Recruitment comprises acts of recruiting another person to commit or take part in the commission or to join the terrorist conspiracy. Training for terrorist acts is considered as giving instructions on how to make and use explosive devices, firearms or other weapons or dangerous or harmful matter, or exercising another person to commit or take part in the commission of terrorism. These are two types of preparatory actions that are incriminated by Criminal Code of the Republic of Serbia. Recruitment is calling and getting someone for the execution of abovementioned acts. It can be accomplished by various actions that are similar to an act of incitement (persuasion, promise or giving money, etc.). However, in case of this crime, it is enough that a recruiting operation was undertaken and it is not necessary that someone was recruited. That is the basic difference in relation to the act of incitement.[38]

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36 Milena Rašić, *Terorizam - krivična dela u našem zakonodavstvu*, Bilten Vrhovnog kasacionog suda, broj 2/2016, Intermex, Beograd

37 *Ibid.,* p. 60

38 *Ibid.,* pp. 62-63

Accused are charged with *recruitment and training for terrorist acts* (Article 391b) in a way that they were continuously recruiting members of the Islamic religion in the Republic of Serbia, especially among younger persons, by radicalizing them through organized regular religious lectures and creating and maintaining a misconception about the circumstances concerning their fellow countrymen in Syria and in other countries, by which they were strengthening and increasing their willingness to use violence and violent struggles. Some of the defendants organized the procurement of books, propaganda material and other literature with contents that propagate and called to violence and its distribution during religious ceremonies. The defendants are charged that, with the aim to commit attacks on the life, body and freedom of others, by the use of weapons and other violent methods, by activating explosive devices, causing explosions and fires, destroy state and public facilities, and in order to intimidate the population and with the aim of violently creating a future global Islamic state - caliphate, used previously legally registered Association of Islamic Youth Sandzak "Furkan" in Novi Pazar, whose premises were used exclusively as a religious object - mesjid, and using for the same purpose as mesjid and building in Zemun - Backi Ilovik, gathered a large number of persons on a religious basis with the aim of religiously radicalizing them, and with the help of like-minded people and other extreme selafian communities, such as in Gornja Maoča in Bosnia and Herzegovina, recruited persons to join the terrorist association and organized regular meetings and a number of lectures, tribunes and seminars in religious facilities in Raska, Novi Sad, Sremcica, Zemun, Smederevo, the Furkan mesh and other places, providing the presence of leading extremist religious authorities, both from the Republic of Serbia, as well as from Bosnia, Austria and other countries.

Financing terrorism (Article 393) is prescribed as directly or indirectly giving or collecting funds with the intention to use them or knowing that they will be used, fully or partially, either for commission of terrorism or other abovementioned offences related to terrorist activities or for financing of persons, a group or organized crime group who intend to commit these acts.

Other defendants were charged that they were continuously collecting funds in order to finance the travels of persons and their residence in the Syrian Arab Republic and that they also disposed of these funds, and also planned, prepared and organized in the continuity the departure of several citizens of the Republic of Serbia and other countries firstly to camps for terrorist training, and then to the battlefield and that they organized in the premises of the mesh fur "Furkan" in Novi Pazar, a reception for resting, equipping and providing the necessary information before continuing their travel. One defendant was charged that in Istanbul, the Republic of Turkey welcomed and received persons who were headed to

Syria, and financed and organized their transfer from Turkey to camps for terrorist training in northern Syria and the other defendant was charged with organizing the reception, accommodation and military training of newcomers in the city of Azaz. Acting in such an organization from the Furkan mesh in Novi Pazar in 2013, at least 12 persons were sent to the Syrian Arab Republic in order to join the "IDIL". Some of the defendants were charged for joining the armed section of the terrorist organization "IDIL", where they took part in combat units, and one of them, according to the indictment, commanded one such unit.

According to the indictment, one of the defendants was in charge of financing the departure to Syria, by obtaining money from the members and sympathizers of the Furkan Association from abroad, and also financed his and departure of several other persons to join the terrorist organization, through a bank account. At the same time, one defendant was charged with having recruited some people for going to Syria and joining "IDIL", and, in order to strengthen their intentions and using their insufficient knowledge of religious regulations, suggested that they should go to Gornja Maoča for a discussion with a person with high religious position, who suggested and advised them that they should make a decision to leave for Syria, that a house would be provided to them in Syria in the city of Azaz, that there would be one defendant there, that he would be in touch with him and that he would consult with him about religious issues and issues of jihad, they will have to obey a head of military unit they are deployed in, they will be on the border, go through the training, to get a pancir and not to be sent immediately to the front. The same defendant was also in charge of providing telephone and personal contacts with the persons who were taking shelter at the Turkish-Syrian border, and then the reception in Syria.

4. THE SCOPE OF THE RIGHTS OF THE VICTIMS OF TERRORISM

In EU framework there is Directive which in a comprehensive manner deals with the issue of protection of all victims of crime. Precisely, it is about Directive 2012/29/EU of the European Parliament and the Council which establishing minimum standards on the rights, support, and protection of victims of crime.[39] A victim of terrorism is defined in Article 2 of Directive 2012/29/EU, namely as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, insofar as that was directly caused by a terrorist offense or a family member of a person whose death was directly caused by a terrorist

[39] Directive 2012/29/EU Of The European Parliament And Of The Council Of 25 October 2012 establishing minimum standards on the Rights, support and protection of victims of crime, OJL 315/57

offense and who has suffered harm as a result of that person's death. However, Directive 2012/29/EU allows the Member States to establish procedures either to limit the number of family members who may benefit from the rights set out in this Directive, taking into account the individual circumstances of each case or to determine which family members have priority in relation to the exercise of the rights set out in this Directive. In theory, there is a division into primary, secondary and tertiary victims. Primary victims are those who directly suffered harm from the terrorist attack, including those who experience property damage due to violent acts. The group of secondary victims consists of dependants or relatives of the deceased and first responders to acts of terrorism. Lastly, there are a group of tertiary or vicarious victims which refers to ordinary people everywhere who are afraid or intimidated by threats of indiscriminate and horrifying forms of violence directed against them.[40] The fact that terrorists use violence against direct targets to threaten, frighten and otherwise influence a wider group of indirect or vicarious victims, implies that the audience of the crime transcends the direct victims. Indeed, the effects on vicarious victims in absolute terms may outweigh those of the direct victims.[41]

Broadly speaking there are five categories of needs which are applicable to all victims of crime. The first and most fundamental need for the victim is recognition. It is widely agreed that victims need to be recognized as victims and need their suffering to be acknowledged. Secondly, victims have a range of protection needs. They need to be protected from further criminal acts by the offender, supporters of the offender or from new crimes. The victim also needs to be protected from secondary victimization through behaviors and attitudes of social service providers or government officials. Furthermore, support is fundamental to victims' recovery and their understanding of the entire system. Moreover, victims need to get full access to and be able to participate in the justice system, which encompasses the right to be heard and requires at a minimum that they are made aware of crucial decisions and key dates. Finally, victims of a violent crime should receive financial compensation. These five basic needs also constitute the foundation for the Directive 2012/29/EU and offer a framework for the large variety of needs and require a response for people that fall victim to a crime.[42]

For the most part, the needs of direct victims of terrorism are similar to those of other victims of crime, differing not in kind but rather in degree or in possibili-

40 European Commission – Directorate General Justice, Freedom and Security, *Victims of Terrorism: Towards European Standards for Assistance*, Brussels, 2008, p. 3

41 *Ibid.,* p. 5

42 Policy Department for Citizen's Rights and Constitutional Affairs, *How can the EU and the Member States better help victims of terrorism?*, Brussels, 2017, pp. 26-27

ties for implementation. However, their specific needs can be different not only in kind of needs but also in degree. The specific needs underwrite the importance of ensuring that every victim is supported, informed, compensated, and protected in the way they need to be.[43] In this context Directive 2017/541 dedicates special attention to the protection of, support to, and rights of victims of terrorism. It requires a comprehensive response to the specific needs of victims of terrorism immediately after a terrorist attack and for as long as necessary as well as the need to ensure that all victims of terrorism have access to information about victims' rights, available support services and compensation schemes in the Member State where the terrorist offence was committed. These developments are an important step in recognizing and advancing the needs and rights of victims of terrorism.[44] One of the new approaches of Directive 2017/541 is more profiled cooperation and coordination of services.

However, it can be noticed that Directive 2017/541 prescribes only three provisions on the protection of victims rights. It is about the following provisions: Assistance and support to victims of terrorism (Article 24), Protection of victims of terrorism (Article 25) Rights of victims of terrorism resident in another Member State (Article 26). Firstly, Directive 2017/541 deals with the provision of assistance and support to victims of terrorism prescribing that the Member States shall ensure that support services addressing the specific needs of victims of terrorism are available for them immediately after a terrorist attack and for as long as necessary. The services shall be confidential, free of charge, easily accessible to all victims of terrorism and may include the following assistance: emotional and psychological support, such as trauma support and counselling; advice and information on any relevant legal, practical or financial matters, including facilitating the exercise of the right to information of victims of terrorism; support with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned; adequate medical treatment and access to legal aid. In regard to some categories of victims such as victims of terrorism, it is required to make an individual assessment to identify specific needs. Therefore, this provision complements article 22 of the Directive 2012/29/EU which obliges the EU Member States to ensure an individual assessment of victims to identify possible specific protection needs, including victims who have suffered considerable harm due to the severity of the crime.[45] When it comes to protection of victims of terrorism Directive 2017/541 prescribes that particular attention shall be paid to

43 *Ibid.,* p. 27

44 *Ibid.,* p. 76

45 European Union Agency for Fundamental Rights, *Victims of crime in the EU: the extent and nature of support for victims*, Publications Office of the European Union, Luxembourg 2014, p. 77

the risk of intimidation and retaliation and to the need to protect the dignity and physical integrity of victims of terrorism, including during questioning and when testifying. This provision is of significant importance when determining whether and to what extent victims should benefit from protection measures in the course of criminal proceedings. Finally, provisions concerning rights of victims is applied only to those victims resident in another Member State. It is about the state other than that where the terrorist offense was committed. Those victims may lack access to information regarding their rights, the available support services and compensation schemes in the Member State where the terrorist offense was committed. In this respect, Member States concerned shall take appropriate action to facilitate cooperation between their competent authorities or entities providing specialist support to ensure the effective access of victims of terrorism to such information. Notwithstanding those victims have access to information regarding their rights in Member State where the terrorist offense was committed, they also have access to the assistance and support services on the territory of the Member State of their residence.

5. CONCLUDING REMARKS

Taking into account of the evolution of terrorist threats in the previous period, the EU was forced to broaden its framework on combating terrorism. Nowadays, the main terrorist risk comes from individuals so-called 'foreign terrorist fighters' travel abroad for the purpose of terrorism. Respecting Resolution 2178 adopted in 2014 by the UN Security Council as well as the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism adopted in 2015 concerning the security threat posed by foreign terrorist fighters, EU has decided to strengthen its framework by adopting Directive 2017/541 which introduces three separated categories of criminal offences relating to terrorism. Namely, it is for the following criminal offenses: 1) the mere offense of terrorism; 2) offenses related to a terrorist group; and 3) offenses related to terrorist activities. Therefore, it must be noted that by adopting of the Directive 2017/541, EU has developed a comprehensive criminal law response on preventing and combating terrorism.

When it comes to Criminal Code of the Republic of Serbia it can be noticed that our legislation is almost completely in compliance with the new EU framework on combating terrorism. However, the core criminal offenses which have lead to the adoption of new EU Directive - traveling abroad as well as organizing or otherwise facilitating traveling abroad for the purpose of terrorism - are not criminalized in Criminal Code of the Republic of Serbia. It is expected that in the process of the accession Republic of Serbia will harmonize its framework with the EU. The of-

fenses related to terrorist activities, such as abovementioned criminal offenses are of a very serious nature as they have the potential to lead to the commission of a terrorist offense. For that reason in favor of its criminalization in our legislation is not only need for harmonization with the EU framework but also heightened security threat to all European States from returning foreign terrorist fighters.

Since a terror attack can lead to a feeling of insecurity, fear, lack of self-confidence of victims, Member States are obliged to take and implement measures for their support and protection for as long as necessary. In regards to the needs of victims of terrorism, the Member States should provide immediately after a terrorist attack emotional and psychological support through access to long-term support services as well as legal and health aid. Moreover, Member State should provide special protection measures in criminal proceedings especially during questioning and be testifying. Article dealing with protection of victims of terrorism in criminal proceedings is of the significant importance in order to avoid their secondary victimization. Finally, Directive 2017/541 prescribes the provision which refers to the rights of victims of terrorism resident in another Member State. Such victims exercise all rights laid down in Directive 2017/541 on the territory of the Member State of their residence, even if the terrorist offense was committed in another Member State. Although Directive contains only three article on protection of victims of terrorism it provides specific measures for victims of terrorism. On the other side, comprehensively set of binding rights for all victims of crime, including the rights of the victim of terrorism, is prescribed in Directive 2012/29/EU.

To conclude, Directive 2017/541 represents step forward strengthening EU framework on combating terrorism, introducing new criminal law approach to terrorist offenses as well as specific measures for victims of terrorism. The only thing that remains is the need for its proper implementation. There are a few significant recommendations for acceleration of the implementation of adopted measures on combating terrorism. One of them is a promotion of effective practical cooperation in intelligence services between the Member States and national police including Europol and Eurojust. The second one should be realized by a comprehensive screening of travel movements by citizens crossing EU borders and thus ensuring their security but also democratic values. Finally, minimalization consequences of a terrorist attack by introducing and implementing services to deal with the needs of victims is considered as a crucial measure for acceleration of the implementation of adopted Directive 2017/541.

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Topic 4

EU civil law and procedure

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THE RIGHT TO A HOME IN THE CASE-LAW OF ECHR *VS.* THE RIGHT TO A HOME IN THE CASE-LAW OF CROATIAN COURTS[1]

ABSTRACT

The legal concept of the "right to a home" reflects the principle of social solidarity. It is rooted in modern philosophical and theoretical humanistic school of thought, but also in the secular sense of avoiding social Darwinism. Nevertheless, this principle can, as any other, turn into its own opposite. Its realisation can also result in consequences that challenge its meaning. However, this does not diminish its value. The emphasis here is on the modalities of its application. Therefore, the author shall analyse the practice of the European Court of Human Rights (hereinafter: ECHR) in proceedings concerning the right to a home and its implementation in the Croatian legal system. He assumes that these findings could be a key to understanding the subject of the paper based on ECHR case-law. The complexity of the research topics and the set tasks of this paper determined the choice of methods. Consequently, the author used normative legal methodological approach in the analysis. It is important to note that the scope of this paper does not allow for a detailed analysis of this topic; we are therefore forced to limit our analysis exclusively to some aspects/issues of the new enforcement legislation.

Keywords: *the right to a home, case-law of the ECHR, case-law of domestic courts*

1. DISCUSSION FRAMEWORK

Doctrinal discussions as well as the experience of Croatian courts indicate that the issue of "the right to a home" is a sensitive subject for a number of economic, social, and political and legal reasons. The case-law of the ECHR also provides a new dimension to this problem. Namely, acknowledging the fact that the ECHR and its concept of the right to a home affirms the precedent principle and thus jurisprudence as a formal source of law, the question is whether our case-law can transform itself from the practice of "positivism" into the practice of "creativism and court activism"?

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1.1. THE RIGHT TO A HOME IN THE NORMS AND PRACTICES OF THE ECHR

The author believes that Croatian reforms, primarily those of enforcement law, have created a conceptual confusion about the legal nature and the function of the concept "the right to a home". The reason is primarily the fact that the right to a home as a constitutional and convention right[2] and as a civil legal basis for the use of a home, the right of ownership, may appear in certain situations as contradictory rights in court proceedings. Namely, in civil proceedings in which the owner, non-possessor, (or the supposed owner–non-possessor) demands from the owner–possessor to surrender a particular real-estate and the possessor objects referring to the right to a home, the question can be raised before a civil court (or enforcement court in an enforcement procedure) which of these rights has advantage, but also according to which criteria.[3] Therefore, it seems that the key to overcome this potential problem is in the analysis of ECHR jurisprudence.

1.1.1. The concept of home within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR)

The concept of home is an autonomous term within the meaning of Article 8, paragraph 1 of the ECHR. The French version of the ECHR text uses the term *domincile* that has a much wider meaning than the English term home. According to the practice of the European Court of Human Rights (hereinafter: ECHR), home is considered a physically defined area where private and family life develop.[4] In the case *Oluić v Croatia*[5], the ECHR referred to the very broad scope of the term:

"Article 8 of the Convention primarily protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be a place, a physically defined area, where private and family life develop. The individual has the right to respect for his home, meaning not just the right to the actual physical area, but also to quiet enjoyment of that area. Violations of the right to respect of the home are not confined to actual or physical violations, such

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2 European Convention on Human Rights, OG-IT, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06 and 2/10, hereinafter: European Convention

3 Kontrec, D., *Pravo na dom u praksi Europskog suda i domaćih sudova*, Pravo u gospodarstvu, Zagreb, vol. 56, 2017, no. 5, p. 1061-1099

4 Harris, D. J., O´Boyle, M., Warbrick, C., *Law of the European Convention on Human Rights,* Oxford, Oxford University Press, 2009, p. 376

5 *Oluić v Croatia*, judgment, 20/05/2010, no. 61260/08

as unauthorised entry into a person's home, but also those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious violation may result in the breach of a person's right to respect their home if it prevents them from enjoying the amenities of their home..."". Therefore, the assessment of whether a certain area of residence is covered by Article 8 (1) depends on factual circumstances, particularly the existence of permanent and sufficient links to that area. For example, in the judgment of *Paulić v Croatia*,[6] the ECHR ruled: "The term home is an autonomous notion that does not depend on classification within domestic law. Whether certain premises are to be defined as a home, which is protected under Article 8, paragraph 1, depends on factual circumstances, such as the existence of permanent and sufficient links to a particular area.[7] Accordingly, whether property qualifies as a home is a matter of fact and does not depend on the legality of use within domestic law". As with most other substantive convention rights, when it comes to the right to a home, the ECHR conducts the so-called "test of applicability" to determine whether the facts of a particular case fall within the scope of Article 8. As evident from the Paulić judgment, there is a requirement for sufficient and permanent links with a certain area or property, which must always be specific and persistent.[8]

1.1.2. Interfering into the right to a home

With respect to the right to a home, Article 8, paragraph 1 gives the right to: access the home, home use, and its peaceful enjoyment. However, the rights guaranteed by Article 8 fall into the category of rights that may be restricted. All the rights that can be restricted function in the same manner. The right is guaranteed in the first paragraph of the article. If there is interference into the rights under the first paragraph, that interference can be justified by invoking the second paragraph. If the criteria set out in the second paragraph are fulfilled, interfering will be granted by the law. Therefore, restrictions or interference in the right will be legitimate.

The burden of proof that there has been interference with someone's rights is on the person claiming that there has been a violation of Article 8. The burden of

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6 *Paulić v Croatia*, judgment, 22/10/2010, no. 3572/06

7 See, *Gillow v United Kingdom*, judgment, 24/11/1986, no. 9063/80; *Buckley v United Kingdom*, judgment, 25/09/1996, no. 20348/92, *Wiggins v United Kingdom*, decision, 08/02/1978, no. 7456/76, *Prkopovich v Russia*, judgment, 18/11/2004, no. 58255/00 and *McCann v United Kingdom,* judgment, 13/05/2008, no. 19009/04

8 Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava*, *strasburški* acquis, Novi informator, Zagreb, 2013, p. 936

proof is then transferred and must be justified by those who have participated in the interference.[9]

The ECHR has made it clear that it always applies a similar methodological approach when examining whether there has been any interference with the rights protected by Article 8. It is a judicial review technique called "step by step". Taking into consideration the broad scope of free assessment in the application of Article 8, paragraph 1, the main part of this examination will always include the issue of justification of disputed interference in a protected right in the centre of which is the conduct of a test of "necessity in a democratic society". "Necessity" implies an "urgent social need" and a comprehensive analysis of that test requires its reading in terms of general features of the principle of proportionality and necessity.[10]

The stages of determining whether there has been a violation of Article 8 are the following:

1. Is the area in question home within the meaning of Article 8?The applicant is required to state the right in question.

2. Has there been any interference from state or public authorities in exercising the applicant's right to his home? The applicant must prove that there had been an interference.

3. Was the interference justified? In order to determine whether the interference was justified under Article 8 (2), the ECHR must examine whether it was in accordance with the law, whether it had a legitimate aim under that paragraph and whether it was necessary in a democratic society for achieving the foregoing goal.[11]

    a) Was the interference in accordance with the law? The burden of proving the legality of interference is on the state.

    b) Is there a legitimate goal? Article 8, paragraph 2 allows for interference based on one or more of the following grounds: national security, public security or economic benefit of the country, in order to prevent riots or crimes, in order to protect the rights and freedoms of others. These are the legitimate goals which the article and the ECHR accept as a justification for interfering. The state must identify justification for interfering.

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9 Interights, *Pravo na poštovanje privatnog i obiteljskog života, doma i dopisivanja*, Priručnik za izobrazbu odvjetnika/ica, p. 13-14

10 Omejec, *op. cit.* note 8, p. 950

11 *Exempli causa, Blečić v Croatia*, judgment, 29/07/2004, no. 59532/00

c) Is interference necessary in a democratic society? Based on objective considerations, is there an urgent social need to limit rights and does this urgent social need pursue a legitimate aim? Essentially, what this criterion demands is a very good reason to interfere with the right. This very good reason must be in line with democratic values. The proof of this criterion is on the state.

4. Was the imposed limitation proportional?[12]

1.1.2.1. Is the area in question home within the meaning of Article 8?

In the framework of this issue, the ECHR examines whether the disputed act or the act of the respondent State is challenged by the applicant under the Convention, i.e. a right protected by the European Convention. This is a preliminary examination of the compatibility of the applicant's request with the article of the European Convention to which the *ratione materiae* is referred.[13]

1.1.2.2. Has there been interference from state or public authorities in exercising the applicant's right to a home?

Article 8, paragraph 2 begins by stating "public authority will not interfere in the exercise of this right ... except ...". The ECHR always starts its considerations in relation to Article 8 by determining whether there has been any real interference of a public authority with any of the rights contained in Article 8 (1). In most cases, the answer to that question will be completely obvious.[14] The respondent state usually does not even try to dispute the allegations of interference, e.g. when a person is prevented from living in their home, disabling a person's access to their home,[15] accessing another home for which that person is very emotionally attached[16] or destroying a person's home.[17]

Because of its focus on individual autonomy, the rights under Article 8 are, more than any other, related to complex issues of judgment of personal and social morality. All modern states would accept absolute ban on torture, even if they in practice bypass this ban. However, when it comes to the rights guaranteed by Article 8 of the European Convention, there is no such unanimity. States, each in its

12 For more see, Omejec, *op. cit.* note 8, p. 950-951

13 *Ibid.*, p. 1255

14 Interights, *op. cit.,* note 9, p. 16

15 *Gillow v United Kingdom*, judgment, 24/11/1986, no. 9063/80

16 *Demades v Turkey*, judgment, 31/07/2003, no. 16219/90

17 *Akdivar v Turkey*, judgment, 16/09/1996, no. 21893/93

own way and taking into account their cultural, ethical, religious, social, and other environment, try to impose restrictions on how people live, where they live, how they regulate their lives and how they relate to other family members. Therefore, judgments related to Article 8, i.e. personal autonomy, do not rest on formalised standards. They are always contextualised. They are often concerned with socially controversial issues and many are perceived as underminers of social cohesion. It is often pointed out that these rights are a matter of choice, so their acceptance at the national and European level usually requires subordination to the presumed will of the majority.[18]

The source of positive obligations of the States Parties under Article 8 derives from the normative expression "the right to respect". However, that term is not precisely defined. Thus, the ECHR has determined that in each particular case it is necessary to take into account diversity of practice in the States Parties, which is why the requirement of respect(for home, private life, etc.) differs from case to case.[19] The primary obligation of the state and public authorities under Article 8 is to refrain from interfering with the right to respect for private and family life, home and correspondence of an individual. The ECHR has interpreted the right to respect as an order to the State to take positive steps to ensure the protection of the enjoyment of the rights under Art. 8, paragraph 1. In the case *Marckx v Belgium*,[20] the ECHR noted that:"it is the basic purpose of an article to protect an individual against arbitrary interference from public authorities. However, not only does it oblige the state to refrain from such interference but, apart from that primary negligence, there may be positive obligations inherent in effective respect for family life."[21]

Positive obligations of the states should not be interpreted as imposing an impossible or disproportionate burden on national authorities. They should not be used as a mechanism to limit the rights of others. Within these limits, positive obligations from the material aspect of Article 8 primarily require establishment of a legal framework providing effective protection of the rights protected by Article 8. National legislation must ensure that any interference with these rights is properly regulated. In order to achieve this, the country has different means on its disposal, but a law that does not meet this requirement leads to violation of Article 8, paragraph 1, and there is no need to examine it under Article 8, paragraph 2.[22] On

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18 Omejec, *op. cit.* note 8, p. 931

19 *Ibid.*

20 *Marckx v Belgium*, judgment, 13/06/1979, no. 6833/74

21 Interights, *op. cit.* note 9, p. 10

22 *Marckx v Belgium,* judgment, 13/06/1979, no. 6833/74

the other hand, in certain circumstances, a positive obligation may require active taking of measures to prevent violation of the rights protected by Article 8, even when it implies regulating the relationship between individuals. In the aforementioned *Oluić v Croatia* case,[23] the ECHR determined: "While it is essentially the goal of Article 8 to protect the individual from arbitrary interference from public authorities, it may also include (obligation) for the authorities to take measures aimed at ensuring respect for private life even in the sphere of relations between individuals.[24] Irrespective of whether the case is being considered in terms of the State's positive obligation to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1, Article 8 or in the sense of interference by the public authorities which should be justified in accordance with paragraph 2, the applicable principles are quite similar. In both contexts fair balance that has to be achieved between the competing interests of the individual and of the community as a whole must be taken into consideration. Furthermore, even in relation to the positive obligations arising from the first paragraph of Article 8, in achieving of the required balance, the aims mentioned in the second paragraph may be of certain relevance...".[25]

In addition to the positive obligations, Article 8 also imposes negative obligations on the States Parties. Thus, in the case *Abdulaziz, Cabales and Balkandali v United Kingdom*,[26] the ECHR reminded that the objective of Article 8 was to protect an individual against arbitrary interference of public authorities. "This is a fundamental negative aspect of Article 8, i.e. the obligation of the States to refrain from any interference, detention or exploitation of the protected rights of individuals which would be contrary to Article 8 (2).[27]

As mentioned above, Article 8 is essential for the functioning of a democratic society, but it may legitimately interfere with these rights. Therefore, the ECHR most frequently applies the doctrine of free assessment when it decides on interfering with the rights under Article 8. This term was introduced for the first time in the case *Handyside v United Kingdom*.[28] It allows states a certain level of freedom when deciding whether a restriction is necessary, bearing in mind the circumstances in a certain country, the issue at hand, as well as its background. However, the ECHR

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23 *Oluić v Croatia*, judgment, 20/05/2010, no. 61260/08

24 See, *Stubbings and others v United Kingdom*, judgment, 22/10/1996, no. 22083/93, 22095/93 and *Surugiu v Romania*, judgment, 20/04/2004, no. 48995/99

25 Omejec, *op. cit.,* note 8, p. 945

26 *Abdulaziz, Cabales and Balkandali v United Kingdom*, judgment, 28/05/1985, no. 9214/80, 9473/81, 9474/81

27 Omejec, *op. cit.,* note 8, p. 944 *et seq.*

28 *Handyside v United Kingdom*, judgment, 07/12/1976, no. 5493/72

reserves the right to determine whether the State has in any case exceeded its discretionary powers.[29]

1.1.2.3. Was the interference justified?

1.1.2.3.1. Legality

The first obligation imposed by the human rights standards is the requirement that any interference concerning human rights must have a clear legal basis. This means that the sued State may justify its interference in the protected right referred to in Article 8 only if it is based on a law or another regulation that justifies such interference.[30]In the ECHR practice, the term "law" is interpreted autonomously. Thus, all powers of authorised law-enforcers must be founded in the law. Secondary and delegated legislation is also taken into consideration while based in primary legislation.[31] The concept of the law encompasses both written and customary law[32] as well as judicial practice. Also, the concept also covers the law of the European Union[33] and international law[34] if it meets the criteria laid down by the ECHR case-law, which, depending on a particular case, arises under that term.

In the case *Sunday Times v United Kingdom*,[35] the ECHR has set out two criteria under which certain provision is regarded as law: "First, the law must be available: the addressees must know under what circumstances the law applies. Second, the law must be sufficiently precise to enable the addressees to behave according to it".[36]Therefore, there must be a legal basis for interference in national legislation, and the law must be accessible and sufficiently precise. The purpose of this requirement is to avoid the dangers of state arbitrariness. As a result of the widespread application of Article 8 and the fact that it deals with many controversial issues, it is crucial that potential interference is allowed and that it has a clear legal basis. Since Article 8 is applicable to many aspects of everyday life, the law must effectively regulate the activities of public bodies that may interfere with them.

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29 Interights, *op. cit.,* note 9, p. 11

30 *Groppera Radio AG v Switzerland*, judgment, 28/03/1990, no. 10890/84

31 *Barthold v Germany*, judgment, 25/03/1985, no. 8734/79

32 *Sunday Times v United Kingdom*, judgment, 26/04/1979, no. 6538/74

33 See, *Bosphorus Airways v Ireland*, judgment, 30/06/2005, no. 45036/98, *Ignaccolo Zenide v Romania*, judgment, 25/01/2000., no. 31679/96, *Iglesias Gil and AUI v Spain*, judgment, 29/04/2003, no. 56673/00 and *Bianchi v Switzerland*, judgment, 22/06/2006, no. 7548/04

34 *Svlienko v Latvia*, judgment, 09/10/2003, no. 48321/99

35 *Sunday Times v United Kingdom*, judgment, 26/04/1979, no. 6538/74

36 Harris, O´Boyle, Warbrick, *op. cit* note 4, p. 344-345

Non-compliance in this respect, from supervision to adoption, ultimately leads to the ECHR establishing violations of Article 8 on grounds that interference was not in accordance with the law, which would meet the criterion of legality.

As a general principle of human rights regulations, the requirement for lawfulness means the acceptance of the rule of law. The human rights regulation and the rule of law are therefore inseparable concepts. When it comes to the application of Article 8, it cannot be observed only in the context of protection of fundamental human rights, but also in the sense that protection of human rights is in conformity with the rule of law. Hence, broad discretionary powers of decision-makers are contradictory to the rule of law. This means that decision-makers must not have unlimited power but make decisions according to existing laws. These laws must be in line with the human rights standards. The possibility of changing existing laws must not be too easy. Stable laws are also an aspect of the rule of law.[37]

1.1.2.3.2. Legitimate Aim

This criterion calls for the possibility of justification for interference by referring to acceptable grounds or legitimate aims and purposes for limiting the rights referred to in Article 8. The sued State must set the grounds for interference in accordance with the protection of individual rights. However, the grounds that justify state interference in the rights of individuals are broadly set. These legitimate restrictive targets include national security, the rule of law and security, protection of the rights and freedoms of others, prevention of disorder or crime, protection of health and morals, and economic well-being of the country. If such a legitimate limitation objective cannot be identified, the attempt of restriction will be unlawful. Therefore, if the restriction cannot be justified by reference to one or more of the five grounds set out in Article 8, paragraph 2,it cannot be considered to have a legitimate aim and will be considered a violation of Article 8. All that is required at this stage is to examine the facts in order to ascertain whether the interference was legitimately aimed. The current practice of the ECHR[38] shows that it most commonly accepts that the manner in which the state had acted has been directed towards a legitimate aim, because the grounds for legitimate interference are very wide. Once found that interference does indeed pursue a legitimate aim, a balance between competing interests is established.[39]

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37 Interights, *op. cit.,* note 9, p. 17-18

38 See for example, *Moscow Branch of the Salvation Army v Russia*, judgment, 05/10/2006, no. 72881/01, *Barfod v Danske*, judgment, 22/02/1989, no. 11508/85 and *Observer and Guardian v United Kingdom*, judgment, 26/11/1996, no. 13585/88

39 Interights, *op. cit.,* note 9, p. 23

1.1.2.3.3. Necessary in a democratic society

The ECHR has found that it is not enough for the state to invoke some of the reasons to interfere with the rights of individuals and achieve the appropriate aim. It must prove that such interference was necessary in a democratic society. In the case *Handyside v The United Kingdom*,[40] the ECHR explained the concept of necessity as follows: "The ECHR notes ... that the term necessary ... is not synonymous with needful or acceptable, usually, useful, reasonable or desirable." It signifies an urgent social need to limit rights and that such need must be in line with the requirements of a democratic society. In the case *Olsson v Sweden*,[41]the ECHR added that such urgent social need must be proportionate to the legitimate pursued aim.[42]

1.1.2.3.4. Proportionality

The proportionality of the request requires the existence of a reasonable relationship between the measures used and the aim pursued. Essentially, proportionality requires determining whether a measure aimed at promoting legitimate public policy and interfering with the rights under Article 8: 1.) is unacceptably broad in its application or 2.) imposes excessive or unreasonable burden on certain individuals. Factors that need to be taken into consideration when deciding whether an activity is disproportionate are: 1. whether relevant and sufficient reasons substantiating it were outlined; 2. whether there was a less restrictive measure; 3. whether there was a certain measure of fairness of the procedure during the decision-making process, 4.) whether there were any protection measures against abuses, and 5.) whether the restriction eliminated the very essence of the right. Therefore, a decision made in the respect of the proportionality principle should undermine the right in question to the least possible extent. It should also be carefully formulated to meet the aims pursued and should not be arbitrary, unfair or based on irrational circumstances.[43]

The very fact that the measure itself is sufficient to achieve the intended purpose, such as the protection of public order, is not necessarily sufficient to satisfy the criterion of proportionality. In the context of Article 8, proportionality demands that the interference in the law is indeed necessary to protect national security and public order and that the accepted approach is a less restrictive method among

40 *Handyside v The United Kingdom*, judgment, 07/12/1972, no. 5493/72

41 *Olsson v Sweden*, judgment, 24/03/1988, no. 10465/83

42 Harris, O´Boyle, Warbrick, *op. cit* note 4, p. 349 *et seq.*

43 See, *Golder v United Kingdom*, judgment, 21/02/1975, no. 4451/70 and *Hatton v United Kingdom*, judgment, 08/07/2003

those that could not achieve the desired effect. Diversity always requires the balance between the burdens placed on an individual whose rights are restricted and the interest of the public in achieving the objective that has to be protected.[44]

1.2. THE RIGHT TO A HOME IN NORMS AND JUDGMENTS OF CROATIAN COURTS

It can be argued that Article 8 of the Convention was not sufficiently recognised in domestic jurisprudence, or rather, that there has been lack of knowledge about the Convention and the content of its rights. Moreover, the doctrine states that, due to the traditional way of thinking, it has been inconceivable to deny the owner legal protection in terms of ownership in relation to the possessor – non-owner, unless there were objections that, for example, the possessor gained ownership of the real-estate in question.[45] As the reception of ECHR practice does not have a long tradition, at the institutional level the conflict will have to be resolved primarily by the legislator and then by the courts.

1.2.1. The Enforcement Act and the right to a home

It seems that the legislator has not exercised its right, or rather failed to fulfil its obligation until the amendment of the Enforcement Act in 2017[46] and did not prescribe that in the process of foreclosure the real estate that constitutes the only home of the debtor is to be considered an exempted property. Therefore, in 2017, primarily due to social reasons, the provisions of the Novel of the Enforcement Act sought to strengthen the legal position of the debtor in relation to the creditor. First of all, in 2017, the legal protection of a property considered to be a home was recognised in the enforcement procedure. Other major changes in the real estate enforcement procedure from the 2017 Novella of the Enforcement Act relates to: protection of the debtor who is a natural person (Article 75, paragraphs 5, 6, 7, and 8), special conditions for determining the enforcement procedure on real-estate (Article 80 (b)), stay of enforcement procedure (Article 84 (a)), the position of debtor as a lessee (Article 127, paragraphs 2, 3, 4, and 5) and social housing of the foreclosed debtor (Article 131, 131b, and 131 (c)).[47] Naturally, a creditor

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44 Interights, *op. cit.,* note 9, p. 25-26

45 Kontrec, *op. cit.,* note 3, p. 1061-1099

46 OG, no. 112/12, 25/13, 93/14, 55/16, 73/17

47 It should be pointed out that the mentioned issues are a part of broader problem matter. Namely, today most of EU Member States have satisfactory housing laws. In some, the right to housing is a constitutional category (*exempli causa,* Belgium, Slovenia, Spain, Greece, Portugal, and Sweden) or governed by appropriate laws (*exempli causa,* France, Denmark, Great Britain, and Germany). However, in all housing policies, it is common understanding that housing is not only understood as standard "roof

who holds a valid enforcement title has the right to enforce his claim through the enforcement order. Returning to the topic at hand, the most important novelty is the fact that the EA for the first time determines what is to be considered the only home of the debtor and how it is protected in the enforcement proceedings. Thus, the only property of a civil debtor within the meaning of paragraph 5 of Article 75 of the EA is the one in which the debtor resides and that is necessary to satisfy the basic living needs of him and the persons he is legally obliged to support. Therefore, such property, as a place where the private and family life of the enforced person is conducted, is usually exempt from the enforcement procedure.

1.2.2. The Consumer Bankruptcy Act and the right to a home

Implementation of the Consumer Bankruptcy Act[48] in the Croatian legal system introduced the possibility of conducting bankruptcy proceedings over the assets of all natural persons. Until this reform, the bankruptcy proceedings could only be carried out on the property of legal persons and the property of individual debtors according to the rules regulated by the Bankruptcy Act.[49]Regarding the right to a home, the CBA states that after the initiation of court proceedings, the consumer may request by submitting a reasoned proposal to the court that, by the end of the conduct verification period, the real estate that he needs for housing, does not go on sale under the assumption that he has no other property in his ownership, other available accommodation, and that he is unable to obtain one. Upon such request, the court is obliged to invite privileged creditors to provide an opinion within a period of eight days about the consumer's proposal and to declare whether they give their consent. The court decides on the consumer's proposal within 15 days from the date of submission of the proposal or expiration of the deadline for the declaration of creditors who have secured right over the property, taking into account that the property must be proportionate to the basic housing needs of the consumer. Therefore, the court has discretionary power to decide not to sell the property until the end of the conduct verification period, after which it will assess

over the head", but as a civilization standard. The housing policy is a too complex issue, temporally and spatially, politically-economically, and institutionally too sensitive for the scope of this paper and would make it impossible to provide final or more specific answers to the raised questions. However, a part of the issue of adequate housing policy is also the issue that is in most countries governed by the laws on housing and maintenance of residential buildings. Thus, since one of the key problems posed by positive regulation is the insufficient or outdated legal framework that would regulate housing, the legislator should regulate this issue through the *lex specialis* Housing Act, which would also regulate the so-called "social housing"

48 OG, no. 100/15, hereinafter: CBA

49 The Bankruptcy Act, OG, no. 44/96, 29/99, 129/00, 123/03, 82/06, 116/10, 25/12, 133/12, 45/13. and the new Bankruptcy Act, OG, no. 71/15 and 104/17, hereinafter: BA

the appropriateness of selling the property, taking into account the scope of settlement of all creditors who will settle from the property sale price. Creditors and consumers can appeal against the decision on sale within three days of delivery. In any case, if the sale of the property is assessed by the court as appropriate, it will *ex offo* initiate the enforcement procedure in order to collect a monetary claim and order enforcement of the consumer's home.[50]Property sale is carried out by FINA, whose jurisdiction is determined by Art. 132 a of the EA according to which the request for sale and other documents in the process of property sale are submitted to the regional centres of the Agency, whose local jurisdiction is determined according to the jurisdiction of the enforcement court, i.e. the court in the area of which the real estate is located. In the said enforcement procedure, a trustee participates with the powers of the creditors, the sale costs are settled from the paid purchase, and the creditors settle according to the rules on settling the bankruptcy creditors (Article 64 of the CBA).[51]

1.2.3. The realisation of the concept of right to a home in the practice of Croatian courts

Regarding the above-mentioned regulations, it should be pointed out that until the completion of this paper there has been insufficient practical experience and judicial procedures to analyse the aforementioned novelties from a critical point of view. Nevertheless, we consider that the application of the above-mentioned provisions in the analysed segment should achieve a fair balance between competitive interests of the debtor and the creditor in the case of enforcement on the only property of the debtor or in situations where an insolvent consumer can potentially lose his home, and this situation, due to its psychological, social and economic sensitivity, also includes appropriate actions and court measures. Thus, it is indisputable that judicature will greatly contribute to the shaping of new insights into the "right to a home" institute.[52]

1.2.3.1. The concept of home

The current viewpoint of the Supreme Court of the Republic of Croatia is that a filed lawsuit with a vindication claim in civil proceedings, in the situation where

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50 See, Mihelčić, G. in collaboration with Kontrec, D. *Komentar Ovršnog zakona s opsežnom sudskom praksom i abecednim kazalom pojmova,* Organizator, Zagreb, 2015, p. 350-500

51 See Bodul, D., Grbić, S., *Kratka prolegomena „o pravu na dom" u Zakonu o stečaju potrošača,* Revija za socijalnu politiku, vol. 25, 2017, br. 2., pp. 169-189

52 See, Kunštek, E., *O pravu na dom – recentna događanja, Novela Ovršnog zakon*a - 2017, Inženjerski biro, 2017, p. 162-172

the defendant complains referring to the "right to a home", the concept of "home" should be a matter of fact for the court in which it decides according to the criterion of durability and factual connection, taking into account the circumstances of the particular case and legal considerations contained in the decisions of the Constitutional Court and the ECHR.[53] Moreover, the violation of the right to a home, in the event of forced eviction of the debtor and his family, is the most common constitutional right whose violation stands out in the constitutional complaints lodged with the Constitutional Court of the Republic of Croatia. Practice analysis shows that the views of the court's decisions are in line with ECHR standards.[54]

1.2.3.2. Time to file a complaint and its content

However, the "right to a home" is not an absolute and unquestionable right, since it must meet certain substantive legal and procedural legal criteria. Thus, it is on the debtor to prove that the disputed decision concerns his "right to a home", i.e. that there has been interference with his "right to a home ". In this regard, the Supreme Court of the Republic of Croatia states that the debtor - possessor, has the right to file a complaint based on the "right to a home" until the conclusion of the main hearing before the first instance court[55] (Article 352, paragraphs 1 and 2 of the Civil Procedure Act).[56]The Constitutional Court notes that the courts are obliged to examine these allegations although the party in question has not

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53 Conclusions of the Supreme Court of the Republic of Croatia from the meeting of the President of the Civil Department of the Supreme Court of the Republic of Croatia with the Presidents of the Civic Courts of the County Courts, held on 16 and 17/09/2015, no: Su-IV-246/15, Conclusion no. 1. (Objection to the right to a home in civil proceedings concerning Art. 8 of the European Convention)

54 Decision no. U-III-46/07 of 22/12/2010, OG, no. 12/11; U-III-405/08 of 21/02/2012, OG, no. 38/12; U-III-2073/10 of 04/03/2014, OG, no. 41/14. Available on the website: [www.usud.hr] Accessed 12 January /2018

55 Conclusions of the Supreme Court of the Republic of Croatia from the meeting of the President of the Civil Department of the Supreme Court of the Republic of Croatia with the Presidents of the Civic Courts of the County Courts held on 11 and 12/04/2016, no: Su-IV-155/16, Conclusion no. 7 (highlighting the right to a home in litigation procedure)

56 OG, no. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/0, 123/08, 57/11, 148/11, 25/13, 89/14."…although the above-mentioned failure was made by the Šibenik County Court because the objection of interference with the applicant's right to a home was first raised in the appeal, the Constitutional Court also abolished the first instance verdict since that court, as the first instance court, is obliged to consider and determine all the facts and derive evidence for their determination, in order to start from the particular circumstances of the case, to assess those crucial for making a decision on the merits of the case. In other words, that court has the greatest knowledge of the facts of a particular case. Subsequently, based on the facts established in this manner, the Šibenik Municipal Court must examine the proportionality and necessity of the proposed measure with regard to the relevant principles that make up the content of the right to a home and are in accordance with the fundamental standards contained in the decision no: U-III-2073/2010 of 04.03.2014, Decision of the Constitutional Court of the Republic of Croatia, U-III/869/2014 of 29/08/2014

explicitly stated the relevant constitutional or convention provision (Article 34 of the Constitution or Article 8 of the Convention), but this stems from its allegations which in itself constitute a reference to the right to a home (for example, staying in the apartment for many years, paying the rent regularly, constitutes an existential issue for the outcome of the litigation).[57]The views of Croatian courts are also in line with the view of the ECHR that enforcement proceedings (which are by their nature extraordinary and whose primary purpose is to ensure effective enforcement of a judgment) is not, unlike ordinary civil proceedings, designed or appropriately equipped with procedural means and protection measures for thorough and contrastive examination of such complex legal issues.

1.2.3.3. Implementation of the proportionality test and the viewpoints of the Supreme Court

The courts are obliged to protect the convention rights of individuals and to implement the so-called "proportionality test" that provides the answer to the question does the order to evict an unauthorised user of the apartment constitute unjustified interference in his right to a home. It is implemented through three elimination questions - is the interference based on the law, is it aimed at achieving a "legitimate aim" and is it necessary in a democratic society? A negative answer to any of these questions means that the eviction is contrary to the Convention, i.e. unjustified.[58] The power to implement the proportionality test is on the court conducting regular civil proceedings in which it has been decided on a civil claim demanding forced eviction.[59] On the other hand, the burden of proof on whether the interference is directed at achieving a legitimate aim and whether forcible eviction is necessary in a democratic society is on the plaintiff.

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57 Decision of the Constitutional Court of the Republic of Croatia, U-III/869/2014 of 29/08/2014. For example, the defendant's objection to the claim of the plaintiff who is property owner and who wants to evict the defendant, who claims he has nowhere to move because he has no other real estate and that, if the plaintiff's request were accepted, he would be thrown out on the street together with his children, who live with him in this home, in fact makes the content of a complaint concerning the right to a home. To be able to accept the plaintiff's request, the court must discuss and assess whether the property is home of the respondent and whether the interference is disproportionate or a necessary measure for achieving the legitimate aim (protection of the right of ownership) of the plaintiff

58 The Zagreb County Court,Gž-1423/16-2 of 10/05/2016; the Rijeka County Court, Gž-121/17-2 of 19/07/2017

59 *Paulić v Croatia*, judgment, 22/10/2009, no. 3572/06

1.2.3.4. Some Specificities

It is important to point out that public legal entities (the state, local and regional government, legal entities owned by local and regional government) may appear on the side of creditors while on the side of debtors is always a natural person-possessor claiming that certain real-estate is his/her home. This becomes an issue considering the fact that in some cases the individuals occupy a residential area owned by public authorities. This defines the position of public authorities in such manner that "... the legitimate interest of the public authorities to control their property is ancillary compared to the tenants' right to their home.[60]

2. INSTEAD OF A CONCLUSION

We live in times of rapid social changes in all areas of human activity whose alleged purpose is to create better living conditions. In such circumstances, it is extremely important for legal science and practice to provide appropriate explanations on how to interpret and develop court practice. In a specific case, on the one hand, legal certainty requires that the law and the rights of third-parties are respected in the general and public interest. On the other hand, losing a home by foreclosure is not, nor will it ever be, just for the debtor, although enforcement procedure is in accordance with the law (it must be). It is therefore quite legitimate, and from a practical point of view justified and useful to analyse the practice of ECHR in the proceedings under Art. 8. The purpose of the paper was to gain insight into the legal and logical mechanism of decision-making of the ECHR by examining the legal institution of the right to a home, which is the result of the ECHR's long-standing practice, and to examine and analyse domestic judicature in order to gain insights into the problems domestic judiciary needs to "work on". For now, we can argue that domestic courts have started discussing, problematizing and implementing the concept of the right to a home only after they had started receiving ECHR decisions. The above-mentioned decisions required a review of domestic court practice, both in regular courts and the Constitutional Court of the Republic of Croatia, which is now in line with ECHR practice. Therefore, the accepted point of view is that the complaint of the right to a home is a matter of fact, in which in each case it should be determined whether there is a lasting and

[60] The Constitutional Court of the Republic of Croatia, no. U-III-2073/10 of 04/03/2014. In this regard, see the practice of the Šibenik County Court: Gž 932/2015-2 of 13/02.2017/ Therefore, the First Instance Court correctly ruled that the plaintiff, as a legal person owned by the state, requesting the defendants to evict the apartment in question, violated their right to a home protected by Art. 8 of the Convention because the plaintiff failed to provide valid reasons for the reasonableness of the measure, i.e. that eviction of the debtor from the apartment would be justified by the necessary and legitimate interest of the plaintiff

immediate connection between the debtor and the property he considers to be his home.

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29. *Olsson v Sweden*, judgment, 24/03/1988, no. 10465/83
30. *Oluić v Croatia*, judgment, 20/05/2010, no. 61260/08
31. *Paulić v Croatia*, judgment, 22/10/2009., no. 3572/06
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33. Rijeka County Court, Gž-121/17-2 of 19/04/2017
34. *Stubbings et al. v United Kingdom*, judgment, 22/10/1996, no. 22083/93, 22095/93
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36. *Surugiu v Romania*, judgment, 20/04/2004, no. 48995/99
37. *Svlienko v Latvia*, judgment, 09/10/2003, no. 48321/99
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NATIONAL REGULATONS, ACTS AND COURT DECISIONS

1. Conclusions of the Supreme Court of the Republic of Croatia from the meeting of the President of the Civil Department of the Supreme Court of the Republic of Croatia with the Presidents of the Civic Courts of the County Courts, held on 16 and 17/09/2015, no: Su-IV-246/15, Conclusion no. 1. (Objection to the right to a home in civil proceedings concerning Art. 8 of the European Convention)
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MUTUAL RECOGNITION OF JUDICIAL DECISIONS AND THE RIGHT TO A FAIR TRIAL WITH SPECIAL FOCUS ON THE ECHR'S FINDINGS IN THE CASE OF *AVOTIŅŠ V. LATVIA*

ABSTRACT

In Avotiņš v. Latvia, the European Court of Human Rights (from now on: ECHR; Court) was questioning whether the Conventional right to a fair trial applies in cases of mutual recognition of judicial decisions on EU level. Without dealing with errors of fact or law allegedly made by a national court, the Court found it necessary to determine whether the national court has infringed the rights and freedoms protected by the Convention. Although the applicant claimed that the national court breached the Brussels I Regulation and thus violated the right to a fair trial, the ECHR concluded that it is not up to the Court to decide on the compliance of national law with international treaties and EU law. As it can be understood from the judgment, the ECHR holds that interpretation and application of the provisions of the EU regulations fall under the jurisdiction of the national courts and the Court of Justice of the European Union (from now on: the CJEU). However, the ECHR reaches a conclusion that the Contracting States are obliged to take care of the parties' procedural rights when applying the EU law for the reason that provisions of the EU law must not be applied mechanically, without bearing in mind the duty of taking into account the rights protected by the Convention.

In this paper, the authors shall analyze the relationship between the ECHR and the CJEU taking into account and resorting to the ECtHR's findings in the case of Avotiņš v. Latvia.

Keywords: *The European Court of Human Rights, the Court of Justice of the European Union, the right to a fair trial, mutual recognition and enforcement of judicial decisions*

1. INTRODUCTION

All Contracting States of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] (from now on: European Convention) are compelled to guarantee the respect of the fundamental human rights. Procedural human right guarantees should be applied in all cases, not only those of domestic nature but also in all legal matters of cross-border nature. Article 6/1 of European Convention has a leading role in this as it represents one of the most fundamental guarantees for the respect of procedural human rights and the rule of law.[2] In short, art. 6/1 compels the States to ensured that in all civil proceedings the parties have access to an independent and impartial tribunal, that their procedural rights are duly protected during the proceedings as well as that a decision on their rights is effective and made without unnecessary delays.[3] On the other hand, the need to create an area of freedom, security, and justice as an area without internal frontiers, sometimes requires a waiver of absolute control of procedural guarantees embodied in the Convention in favor of realization of the principle of mutual trust between the EU Member States.[4]

In Europe, the free movement of judicial decisions is the key element of cooperation between national courts in civil matters. Therefore, the general assumption that fundamental rights are properly respected throughout Europe is of utmost importance. From this assumption - the principle of mutual trust - arises the principle of mutual recognition.[5]

The principle of mutual recognition requires that a judicial decision is recognized and executed regardless of the fact that it has been brought by a court of another

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1 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Treaties, No. 18/97, 6/99 – consolidated version, 8/99 – correction

2 *Cf.* with Rozakis, C., *The Right to a Fair Trial in Civil Cases,* Judicial Studies Institute Journal, Vol. 4, No. 2, 2004, p. 96-106, p. 96

3 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice* (Art. 6/1 of European Convention)

4 *See* Mitsilegas, V., *Mutual Recognition, Mutual Trust, and Fundamental Rights after Lisbon,* in: Mitsilegas, V., Bergström, M., Konstadinides, T. (eds), Research Handbook on EU Criminal Law, Edward Elgar, 2016, pp. 148-167

5 Tulibacka, M., *Europeanization of Civil Procedures: In Search of a Coherent Approach*, Common Market Law Review, 46.5, 2009, pp- 1527–1565, p. 1542; CJEU in Case C-168/13. - *Jeremy F*, C-491/10, *Zarraga*, 30 May 2013

Member State and accepted as a decision of a domestic court.[6] What it does is that it enables the free movement of judicial decisions as a necessary consequence of creating an area without internal borders in which people can move, live and work freely, knowing that their rights are fully respected.[7] Encouraging the free movement of judgments enhances the proper functioning of the internal market which would otherwise be the subject of long-lasting court proceedings for granting recognition and enforcement of a judicial decision in another Member State.[8]

Before analyzing the circumstances in *Avotiņš v. Latvia,*[9] it is important to emphasize the presumption of equivalent protection developed by the ECHR in the *Bosphorus* case. According to this presumption, the state will not violate human rights when implementing the obligations arising from its membership in the international organization if that organization provides equal protection of those rights.[10] In *Avotiņš v. Latvia,* the Court was for the first time examining the application of the right to a fair trial under Article 6/1 of the European Convention in the context of mutual recognition of judicial decisions. In one of the core paragraphs of the decision, the Court stated that if the courts of a certain state, which is party to the Convention and member of the European Union, apply the principle of mutual recognition, but before them a serious allegation is raised that the protection of a fundamental right has been manifestly deficient and that this can not be remedied by the EU law, they cannot avoid examining that complaint only on the basis that they are applying EU law.[11]

2. MUTUAL TRUST AND THE PRINCIPLE OF MUTUAL RECOGNITION

A long time ago the EU recognized that it would be hard to apply the principle of mutual recognition of decisions (the principle which serves as the very basis of judicial cooperation between the Member States) without developing the principle of mutual trust. The latter has been for the first time presented in 1999 in Tampere, as one of the measures that should serve the intention of implemen-

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6 Kramer, X. E., *Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, Vol. 2, 2011, pp. 202-230, p. 218

7 See more in: Janssens, C., *The Principle of Mutual Recognition in EU Law,* Oxford University Press, Oxford, 2013

8 Beaumont, P., Johnston, E., *Can exequatur be abolished in Brussels I whilst retaining a public policy defence*, Journal of Private International Law, Vol. 6, No. 2, 2010, pp. 249 –279, p. 249

9 *Avotiņš v. Latvia,* Application no. 17502/07 of May 23, 2016

10 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim* Şirketi *v. Ireland*, Application no. 45036/98, of June 30, 2005, par. 155

11 *Avotiņš, op. cit.* note 9, par. 116

tation of the principle of mutual recognition.[12] The basis for future European procedural law was already launched with the Treaty establishing the European Economic Community.[13] This Treaty provided the opportunity for the Member States to engage in negotiations on adoption of instruments that will ensure mutual recognition and enforcement of decisions (former art. 220.). With the Treaty of Amsterdam,[14] signed in 1997, preconditions for creating the area of freedom, security, and justice as areas without internal frontiers have been achieved, which only confirmed that the European Union is no longer exclusively devoted to fulfilling the economic goal of the single market.[15] With the entry into force of the Treaty of Lisbon, the principle of mutual recognition got its place in the Treaty. Today, it is explicitly mentioned in Articles 67, 70, 81, and 82 of the Treaty on the Functioning of the European Union (hereafter: TFEU).[16] Therefore, the principle of mutual recognition today presents a constitutional principle that supports the area of freedom, security, and justice.[17]

Over the last few years in the European Union, a whole series of legal instruments that regulate the matter of procedural law in civil, commercial and family affairs as well as the matter of succession have been researched, blueprinted and adopted. Besides regulating the cross-border relations between the states of the European Union, the goal of these instruments is to protect the human rights in all kinds of cross-border relations between individuals and enterprises. Certainly, one of the most prominent such instruments is the Brussels Convention[18] which later turned into the Brussels I Regulation,[19] again later revised by Brussels I bis Regulation.[20]

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12 Tampere European Council, 15.-16. X. 1999, Presidency Conclusions, [http://www.europarl. eu.int/summits/tam_en.html] Accessed January 31, 2018

13 Treaty establishing the European Economic Community, signed on March 25, 1957. in Rome and effective from 1 January 1958

14 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, in force since May 1, 1999

15 Lenaerts, K., *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University Of Oxford, January 30, 2015 [https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf] Accessed January 31, 2018

16 Treaty on the Functioning of the European Union 2012/C 326/01, *OJ C 326, 26.10.2012,* p. 47–390

17 Herlin-Karnell, E., *Constitutional Principles in the EU Area of Freedom, Security an Justice*, in: Acosta, D., Murphy, C. (eds), EU Security and Justice Law, Hart Publishing, Oxford, 2014, p. 36

18 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968, Sl. l. L 299/32, 1972

19 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 – 0023

20 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20. 12. 2012, p. 1–32

Even though the representatives of the Member States have consistently tried to overcome the issue of national law heterogeneity,[21] it soon became obvious that the Member States were not ready to give up on certain protective measures, primarily the notion of the grounds for refusal of enforcement.[22] Neither the reference to the mutual trust did not convince the Member States to completely give up their control over decisions coming from the States of origin. Therefore, Brussels I bis Regulation abolished exequatur but continued to provide the reasons for refusal of recognition.[23] Of course, it is easy to explain this loosening to the demands of states by defending the right of the states to protect their fundamental values.[24]

By its nature, the principle of mutual trust is based on the values that are common to the Member States of the EU. Those values are freedom, democracy, and respect

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21 The Presidency Conclusions of the European Council on 10–11. December 2009 relating to the Stockholm Programme have the following general objective in para 28: "A Europe of law and justice: The achievement of a European area of justice must be consolidated to move beyond the current fragmentation. Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union. Cooperation between public professionals and their training should also be improved, and resources should be mobilized to eliminate barriers to the recognition of legal decisions in other Member States", [http:// www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111877.pdf] Accessed 31 January 2018

22 Beaumont, *op. cit.* note 8, p. 250

23 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 45.: 1. On the application of any interested party, the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed; (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed; (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or (e) if the judgment conflicts with: (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or (ii) Section 6 of Chapter II. 2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction. 3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction. 4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4

24 Storskrubb, E., *Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice*, in: Gerard, D., Brouwer, E. (ed.), Mapping Mutual Trust: Understanding the Framing the Role of Mutual Trust in EU Law, EUI Working Paper, MWP, 2016/14, p. 18

for human as well as the trust that each Member State protects fundamental rights equivalently but not necessarily in an identical way.[25]

The Court of Justice of the European Union in the case of *Zarraga*[26] stated that the system for recognition and enforcement of judgments is based on the principle of mutual trust between the Member States given the fact that their national legal systems are capable of providing an equivalent level of protection of fundamental rights recognised at the European level, particularly those from the EU Charter of Fundamental Rights[27] (hereinafter: Charter of Fundamental Rights; Charter[28]).

As a result, in the area of human rights protection, the law of the European Union takes for granted that the fundamental human rights (including the right to a fair trial) are always respected and taken into account by the courts of the Member States, and that is why the States, except in exceptional cases, need not check whether in particular case the other Member State respected the fundamental human rights guaranteed by EU law.[29]

3. PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

The protection of fundamental human rights is regulated on several levels, in the European Union primarily in the Charter of Fundamental Rights and on a wider, better to say – Pan-European level, by the European Convention. The European Convention was drafted in 1950 by the Council of Europe, an international organization whose main tasks are strengthening democracy, human rights protection and the rule of law on the European continent. On the other hand, the Charter of Fundamental Rights was, until the entry into force of the Lisbon Treaty presented a non-binding document. Given the fact that it incorporates the provisions of the Convention, we may say that the Charter itself is based on the Convention. However, it is worthy to note that it also makes an upgrade of some rights.[30] Thus,

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25 Janssens, *op. cit.* note 7, p. 157

26 CJEU in Case C-168/13. - *Jeremy F,* C-491/10, *Zarraga,* 30 May 2013

27 *Ibid*., par. 70

28 Charter of Fundamental Rights of the European Union 2000/C 364/01

29 More see: Kuipers, J. J., *The Right to a Fair Trial and the Free Movement of Civil Judgments,* Croatian Yearbook of European Law and Policy, Vol. 6, 2010, pp. 23-51

30 In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection (Charter of Fundamental Rights of the European Union, Art. 52/3.)

the Charter sets the Convention as the lower limit, while the determination of the upper limit is left to the European Union itself, all to avoid different ECtHR and CJEU jurisprudence.[31]

The Human Rights Court in Strasbourg is not an institution of the European Union, but of the international organization - the Council of Europe. While its task is to decide on the violations of human rights and fundamental freedoms which the parties to the European Convention committed to the individuals,[32] the task of the CJEU from Luxembourg (which is divided into two courts) is to rule on actions for annulment brought by individuals, companies and, in some cases, the governments (the General Court) as well as to deal with requests for preliminary rulings from national courts, certain actions for annulment and appeals (the Court of Justice).[33]

3.1. CJEU - Opinion 2/13

The relationship between the ECHR and the Court of Justice was many times put forward, especially in the context of the relationship between the EU regulations and the protection of human rights under the Convention. There was an idea of the accession of the EU to the Convention. However, on December 18, 2014, the CJEU brought a negative Opinion on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms[34] because such an Agreement could affect the specific characteristics and autonomy of Union law.[35] Also, the CJEU also considered problematical some protocols to the Convention including the Protocol no. 16,[36] signed on October 2, 2013. because it provides for the highest courts and tribunals of the contract-

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31 Blackstoke, J., *The EU Charter of Fundamental Rights Scope and Competence,* [https://eutopialaw.com/2012/04/17/the-eu-charter-of-fundamental-rights-scope-and-competance/] Accessed 30 January 2018

32 European Court of Human Rights, official website, [http://echr.coe.int/Pages/home.aspx?p=home] Accessed 5 February 2018

33 The Court of Justice of the European Union, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en] Accessed 5 February 2018

34 Opinion 2/13 of the Court, 18 December 2014

35 *Ibid*., par. 194; for overview of the judgment see: Mohay, A., *Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case Note*, Pécs Journal of International and European Law, 2015, pp. 28-36

36 About Protocol 16 see more in: Knol Radoja, K., *Treba li nam Protokol broj 16 Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda?* in: Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična dostignuća: zbornik radova s međunarodnog savjetovanja, (Rijavec, V., *et. al.*) Split, 19. i 20. studenog 2015, pp. 331. – 356

ing parties to be able to request the ECHR to give advisory opinions on issues concerning the interpretation or application of the rights and freedoms defined in the ECHR or the protocols to it. For the reason that, in a case of the EU accession to the ECHR, the ECHR would start to form an integral part of EU law, it was envisaged that the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.[37] The CJEU considered that it could not be ruled out that a request for an advisory opinion made under the Protocol no. 16 by the national courts could trigger the procedure for the prior involvement of the CJEU, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented.[38]

Particularly critical of the accession is the paragraph no. 192 of the Opinion. In this paragraph the CJEU states that when implementing the EU law, the Member States may be required to assume that other Member States duly observes fundamental rights, so that not only may they not demand a higher level of protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not even check whether other Member State has actually observed the fundamental rights guaranteed by the EU.[39]

However, from the jurisprudence of the ECHR it is clear that limiting the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could go against the requirement imposed by the Convention – that the court in the State addressed must be empowered to conduct a review of possible violations of fundamental rights in the State of origin, all in order to ensure that the protection of those rights is not manifestly deficient.[40]

3.2. ECHR - the presumption of equivalent protection

According to the Convention and jurisprudence of the ECHR, all Contracting States are obliged to guarantee that human rights are duly protected. This applies to cross-border cases also. All courts must regard the Convention: the court of the state of origin in proceedings that end with a decision, and the court of the requested state when executing the decision of the foreign court. But then, this double control does not exist in the EU law. The principle of mutual trust

37 Opinion 2/13, *op. cit.* note 34, par. 197

38 *Ibid*, par. 198

39 *Ibid*, par. 192

40 *Avotiņš, op. cit.* note 9

provides that an initial control should be taken on only in the Member State of origin. Therefore, the question is whether and to what extent the requested State is obliged to ensure that the conventional fundamental rights and guarantees are respected. The answer to this question was given by the ECtHR in the case *Bosphorus*[41] and later furtherly developed in the case *Michaud*.[42]

In the *Bosphorus* judgment the Court found that the protection of fundamental rights within the scope of European Union law is, in principle, equivalent to the protection of the fundamental rights guaranteed by the Convention. Namely, the Court considers that the Convention must be interpreted in a way that will not prevent the contracting States to offer the protection of human rights to the level provided in the Convention.[43] In other words, if the international organization such as the EU protects human rights in an equal manner to the protection provided by the Convention, it is assumed that the state will not violate human rights when implementing the acts developed by the EU.[44] Nevertheless, in each particular case, it can be proven that the protection is inadequate and that the protection of the Convention's rights and freedoms was manifestly deficient. As said in *Matthews v. The United Kingdom*,[45] the Convention does not prohibit the transfer of some of the Member States' competences to an international organization such as the European Union, but the Convention rights must remain protected and the responsibility of the Member State continues to exist even after such a transfer.[46] Furthermore, in *Michaud* the ECHR emphasized that the findings from *Bosphorus* apply *a fortiori* from December 1, 2009, the date of entry into force of Art. 6. of the Treaty on European Union, which ensured that the fundamental rights have the status of the general principles within the EU law.[47]

4. CASE *AVOTIŅŠ V. LATVIA*

The ECHR repeatedly expressed its willingness to support the judicial cooperation in civil matters, but with a warning that the creation of the area of freedom, security, and justice in Europe should not lead to violations of the rights guaranteed by the Convention. Restricting the rights of the requested Member State (the State from which the recognition or enforcement of a foreign judicial decision

41 *Bosphorus, op. cit*. note 10

42 *Michaud v. France,* Application no. 12323/11 of 6 December 2012

43 Bosphorus, *op. cit.* note 10, par. 155

44 *Ibid*., par. 156

45 *Matthews v. The United Kingdom*, Application no. 24833/94 of 18 February 1999

46 *Matthews v. United Kingdom, Reports of Judgments and Decisions*, 1999-I, para. 32

47 *Michaud, op. cit.* note 42, par. 106

is sought) to monitor compliance of the procedure in which the decision was brought with Conventional human rights could be contrary to the requirement under which the courts of the requested state must be able to ascertain that the protection of Conventional rights was not manifestly deficient.[48]

In *Avotiņš v. Latvia* the ECHR has for the first time examined the application of the right to a fair trial in the proceedings of mutual recognition of judicial decisions under the EU law.

The circumstances of the case were next: the applicant and F.H. Ltd., a company incorporated under Cypriot law, signed an acknowledgment a deed to secure debt. In the contract, the applicant's Latvian address was mentioned.[49] In 2003. F.H. Ltd. brought proceedings against the applicant in the Limassol District Court (Cyprus), claiming that he had not repaid his debt.[50] The applicant claimed that he had not received a court call since the address in the contract was not his address. As the applicant did not appear, the Limassol District Court ruled in his absence acknowledging that the applicant had been regularly notified about the hearing.[51] On February 22, 2005. F.H. Ltd. applied to the Riga City Latgale District Court claiming recognition and enforcement of that judgment.[52]

In further proceedings, the applicant filed an appeal against the decision on recognition and enforcement of the Cypriot judgment delivered by the Latvian court of the first instance. In his appeal, the applicant insisted that the recognition and enforcement of the Cypriot court judgment in Latvia constitutes a violation of the Brussels I Regulation and the rules of the Latvian Civil Procedure Act.[53] The applicant claimed that he had not been duly informed of the proceedings before the Cypriot courts and that because of that it was impossible for him to prepare a statement of opposition and participate the proceedings.[54] The Regional Court quashed the challenged order and rejected the request for recognition and enforcement of the Cypriot judgment. The Cyprian enterprise later appealed that decision. The Supreme Court reversed the decision of the Regional Court and ordered the recognition and enforcement of the Cyprus judgment. The Supreme Court held that the applicant's argument that he was not properly informed of proceed-

48 *Bosphorus*, *op. cit.* note 10, par. 156

49 *Avotiņš, op. cit.* note 9, par. 14

50 *Ibid,* par. 15

51 *Ibid.,* par. 20

52 *Ibid.,* par. 21

53 *Ibid.,* par. 29

54 *Ibid.,* par. 30

ings before the Cypriot court was irrelevant since he did not file an appeal against the judgment in Cyprus.[55]

The applicant has complained before the ECHR that the enforceability of the Cypriot judgment is illegal because the procedure violated his right to defense while the Latvian Supreme Court violated his right to a fair hearing.[56]

The ECHR found that in this case, it is necessary first to ascertain whether the Supreme Court acted by the requirements of art. 6/1 of the Convention. Also, the Court emphasized that art. 19 of the Convention only determines whether the State Parties are acting in accordance with the obligations undertaken by the Convention and does not deal with the factual and legal issues in the disputed cases.[57] The Court also noticed that the recognition and enforcement of the Cypriot judgment was in line with Brussels I Regulation, which was applicable at the relevant time. Therefore, although the applicant claimed that the Supreme Court had breached the article 34(2) Brussels Regulation and the Latvian Civil Procedure Law, the Court repeated that its jurisdiction is limited to reviewing compliance with the requirements of the Convention and that it is not competent to rule on compliance with domestic law, international treaties or the EU law. The task of interpreting the EU law falls within the competence of the CJEU, primarily *via* the preliminary ruling proceedings, and secondly to the domestic courts when they adjudicate in their capacity of the courts of the EU.[58]

However, it is particularly important to highlight that the ECHR has stated that the Contracting States when applying the EU law are bound by the obligations put on by the Convention. Those obligations must be estimated in accordance with the presumption set by the Court in the *Bosphorus* and in the *Michaud* judgments. The Court notes that the application of the presumption of equal protection depends on two conditions: the impossibility of discretionary action (margin of maneuver) of the domestic authorities and the use of the full potential of the supervisory mechanism envisaged by the EU law.[59]

Regarding the first condition, the Court found that the contested provisions are contained in the Regulation, which is directly applicable, and not in the directive which leaves the choice of ways to achieve its goal. Therefore, contested provisions did not leave to the domestic courts any discretion in considering the request for

[55] *Ibid.,* par. 34
[56] *Ibid.,* par. 69
[57] *Ibid.,* par. 99
[58] *Ibid.,* par. 100
[59] *Ibid.,* par. 105

recognition and enforcement of foreign judicial decisions. Consequently, Latvian Supreme Court did not have any margin of maneuver in this case.[60] Regarding the second condition, the Court noted that in the *Bosphorus* case it has recognized that the supervisory mechanisms established within the EU provided a level of protection equivalent as that of the Convention.[61]

The Court has also mentioned that the Latvian Supreme Court acted in accordance with the obligations arising out from the Latvian membership in the European Union and concluded that the presumption of equal protection applies in this case.[62] Regulation Brussels I is based on the principle of mutual recognition of judicial decisions which has its basis in the principle of mutual trust between the EU Member States. In addition, the provision of art. 34 (2) of the Regulation Brussels I explicitly provide that the defendant may invoke the above-mentioned reasons only if he has initially instituted proceedings to challenge the contested judicial decision. The Court held that the applicant, after learning of the judgement rendered in Cyprus, should have investigated the availability of remedies, but he did not do so.[63] This is a precondition which follows the aim of ensuring the proper administration of justice in a spirit of procedural economy and which is based on an approach like the rule of exhaustion of domestic remedies set forth in Art. 35/1 of the Convention. Hence, the Court didn't see any indication that the protection afforded was manifestly deficient in this regard and concluded that in this case there was no violation of Art. 6/1 of the Convention.[64]

5. CONCLUSION

The EU law stands behind the principle of mutual trust expecting that all Member States should recognize a judgment given in another Member State shall without any special procedure being required and, except in exceptional circumstances, without examination of potential human rights violations.

On the other hand, the ECHR believes that Member States should retain an active role in the protection of fundamental rights, even when the EU legislation obliges domestic courts to automatically recognize and enforce a decision coming from another Member State.[65] The ECHR has thus indicated that there are clear limits

60 *Ibid.,* par. 106

61 *Ibid.,* par. 109

62 *Ibid.,* par. 112

63 *Ibid.,* par. 118

64 *Ibid*.

65 Gragl, P., *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case: ECtHR May 23, 2016, Case No.*

to the principle of mutual trust in human rights protection. What this means is that, although this kind of violation has not been determined in *Avotiņš v. Latvia*, the parties may be responsible for the violation of the Convention if there is an indication that an apparent violation of fundamental rights has occurred.[66] As Gragl concludes, the ECHR's conclusions in *Avotiņš* case can be interpreted as extending an olive branch to Luxembourg, but he also justly suggests that the ECtHR might be ready to change its stance on *Bosphorus* or to undo this presumption in the future EU-related cases.[67]

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67 *Ibid*., p. 567

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REFORM OF CONSUMER SALES LAW OF GOODS AND ASSOCIATED GUARANTEES – POSSIBLE IMPACT ON CROATIAN PRIVATE LAW

ABSTRACT

This paper discusses novelties proposed in a new Sales Law Directive Proposal. Firstly, explanation is given regarding the main reasons for the reform and how the higher level of consumer protection in sales contracts could be achieved. It has been noticed that the European legislator was focused on four important questions: the time frame for the burden of proof, notification on lack of conformity, the hierarchy of goods and the legal guarantee period. All these new solutions would be given through a new maximum harmonization directive which would appeal Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Although the sales law reform is still in the legislative process phase, it was possible to discuss how the novelties would affect Croatian private law.

Keywords: *sales law reform, Directive 1999/44/EC, Proposal of Sales Law Directive, consumer protection, lack of conformity*

1. INTRODUCTION

Although the free movement of goods, persons, services and capital on the Single Market already exists, the European Commission has seen that its full potential still has not been achieved. Among other reasons, it was an inspiration to a Digital Single Market Strategy for Europe published in May 2015.[1] One of the legislations which meant to be its legal base was introduced by the European Commission on 31 October 2017 under the name "Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods amending Regulation (EC) No 2006/2004 of

[1] European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM (2015) 192 final, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN] Accessed 07 February 2018

the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council (hereinafter: The Sales Law Directive Proposal)".[2] The first part of the article would point out the reasons for amendments to the first Sales Law Directive Proposal, main purposes and its possible impact on consumer rights.

Since it has already been seen what is the main focus of the Sales Law reform, it is possible to discuss the impacts on Croatian Private Law but with reservations since this reform is still in a proposal phase. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: Directive 1999/44/EC)[3] is already transposed into the Obligations Act (hereinafter: OA)[4]. Having in mind that this directive was a minimum harmonisation directive, it has to be discussed whether the transposition of a new directive would ensure better protection of consumer's rights or not. Also, the question is whether it will be possible to keep, with or without changes in Croatian Private Law special solutions introduced through the extended harmonisation for protection of traders as buyers and for their protection in all contracts with consideration.

2. WHY IS A REFORM OF CONSUMER SALES LAW AND GUARANTEES REQUIRED?

2.1. Steps between the Directive 1999/44/EC and the Sales Law Directive Proposal

A Digital Single Market is meant to be built on three pillars. They would be: "better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish and maximising the growth potential of European Digital Economy".[5] To accomplish

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2 Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, Brussels, 31.10.2017., COM/2017/0637 final - 2015/0288 (COD), available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:0637:FIN] Accessed 07 February 2018

3 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L 171, 07/07/1999 P. 0012 – 0016

4 Obligations Act, Narodne novine 35/05, 41/08, 125/11, 78/15

5 Digital Single Market Strategy, *op. cit.* note 1, p. 3 and 4

these objectives European Commission already started with legislative activities in December 2015 by proposing a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods (hereinafter: The First Proposal of the Sales Law Directive).[6] It was stated that the scope of this proposal were "certain requirements concerning distance sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies".[7]

The first proposal emphasized the benefits of cross-border online and other distance sale of goods. It has been noticed that 39% of businesses selling online only sell in their own country.[8] Also, according to the European Commission statistical information, only 18% of the consumers in the European Union buy online from traders from other Member State countries, while in Croatia only 12% of them do.[9] This showed that there are barriers that influence on consumers confidentiality to shop online cross-border which is directly in relation with consumers' uncertainty about their contractual rights.[10] This results in a fact that buying in their own country limits consumers from more competitive prices and wider choice of goods.[11]

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6 Proposal for a directive of the European and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 9.12.2015, COM (2015) 635 final, 2015/0288(COD), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A635%3AFIN] Accessed 07 February 2018; Also see: Commission staff working document – Impact assessment: Accompanying the document Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 9.12.2015, SWD(2015) 274 final, available at: [https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/SWD-2015-274-F1-EN-MAIN-PART-1.PDF] Accessed 07 February 2018

7 As it was also stated in art. 1 of the first proposal of the directive that from application would have been exempted distance contracts for the provision of services and any durable medium incorporating digital content where the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer.

8 The first proposal of the Sales Law Directive, *op. cit.* note 6, p. 2

9 European Commission brochure: "*Jedinstveno digitalno tržište – stranica pojedinačne države*", available at [https://ec.europa.eu/commission/sites/beta-political/files/croatia_hr.pdf] Accessed 07 February 2018

10 See more: The first proposal of the Sales Law Directive, *op. cit.* note 6, page 2, 3

11 See: Rafael, M. R., *The Directive proposals on Online sales and Supply of Digital Content (Part 1): will the new rules attain their objective of reducing legal complexity?.* Revista de Internet,Derecho y Politica, IDP No. 23, December 2016, available at: [https://idp.uoc.edu/articles/10.7238/idp.v0i22.3082/galley/3200/download/] Accessed 07 February 2018

Consumers' rights in sale contracts have already been in member states harmonized by transposition of the Directive 1999/44/EC.[12] This directive provided consumers with a minimum level of protection through regulation of rights in case of nonconformity with sale contract, possible remedies and guarantees. Minimum harmonization approach influenced the new differences of regulation of sales law between member states, which caused new barriers[13] and seems to be one of the main obstacles for proper functioning of online sale of consumer goods.[14] This was taken as the main argument for the preparation and content of the first proposal of the Sales Law Directive. The main changes proposed through the First proposal of the Sales Law Directive aimed to achieve maximum harmonization and proper functioning of the e-commerce as a crucial element of the Digital Single Market.[15]

As it was already stated, the European Commission published the amended proposal of the Sales Law Directive in October 2017. Two main reasons for amendments could be found in different documents given through discussion with the Council and preparatory bodies but also in "Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive (hereinafter: Fitness Check Report)"[16] from May 2017, which are taken into account through possible impacts of fully harmonized rules on contracts for the sale of goods.[17]

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12 The first proposal was not the first attempt of the sales law reform after Directive 1999/44/EC. European Commission published in 2011 a proposal for a Regulation on a Common European Sales Law - CESL (Brussels, 11.10.2011., COM (2011) 635 final, 2011/0284, COD) but it was withdrawn

13 For example, traders have to adapt to different obligations which arise for them from other member states regulations which causes even more costs. See: The first directive proposal, *op. cit.* note 6, p. 5

14 See more: The first proposal of the Sales Law Directive, *op. cit.* note 6, p. 3, 4; Schulte-Nölke, H., Twigg-Flesner, C., Ebers, M., *EC Consumer Law Compendium - The Consumer Acquis and its transposition in the Member State*. Sellier, European Law Publishers, 2008, pp. 407-471

15 See more on the content of the first proposal: The first proposal of the Sales Law Directive, *op. cit.*, note 6, p. 17-31

16 Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive, available at: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332] Accessed 08 February 2018

17 Commission staff working document on the Impacts of fully harmonised rules on contracts for the sales of goods supplementing the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods Accompanying the document Amended proposal for a Directive of the European Parliment and of the Council on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) N°2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, SWD/2017/0354 final - 2015/0288 (COD), available at:

2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal of the Sales Law Directive

Directive 1999/44/EC was, among some other consumer protection directives, one of the main focuses of the Fitness Check Report. Part of this report is a "Study on the costs and benefits of minimum harmonisation[18] under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels"[19] (hereinafter: Study on Directive 1999/44/EC). The main objective of the Study on Directive 1999/44/EC were possible consequences of full harmonization of consumer sales law and guarantees which are discussed through benefits and costs having in mind possible impact of this kind of harmonization on different sales channels (both online and offline). Study on Directive 1999/44/EC was mostly focused on four elements already harmonized which are the obligation to notify the seller of a defect within the certain period of time, the hierarchy of remedies, the reversal of the burden of proof and the legal guarantee period.[20]

Directive 1999/44/EC regulates in art. 5. p. 2. that "Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity". Study on Directive 1999/44/EC has shown that in seven Member States such obligation does not exist.[21] [22] It has been pointed out that not having obligation of notification could have benefits such as lower number of disputes, especially disputes about the exact time when the consumer discovered the defect, but could also lower the burden which is put on consumers,

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[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017SC0354] Accessed 12 February 2018

18 See more on harmonization: Josipović, T., *Izazovi harmonizacije građanskog prava putem direktiva*. in: Civil Law Forum for South East Europe Collection of studies and analyses, First Regional Conference, Cavtat 2010 – Volume I; Beograd, 2010, pp. 291-306

19 European Commission: Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels, March 2017, available at: [ec.europa.eu/newsroom/document.cfm?doc_id=44638] Accessed 14 February 2018

20 Study on Directive 1999/44/EC, *op. cit*. note 19, p. 19

21 Study on Directive 1999/44/EC, *op. cit*. note 19, p. 30

22 Possibility to choose between regulation of notification or an option not to have one in the process of transposition of Directive 1999/44EC, was in academia argued with a fact that „for consumers shopping abroad, this can be a dangerous trap", which came true. See: Magnus, U., *Consumer sales and associated guarantees.* in: Twigg-Flesner, C (ed.), The Cambridge Companion to European Union Private Law, Cambridge University Press, Cambridge, 2010, p. 254

which increases overall consumer protection.[23] But on the other side, it might lead to the abuse of consumer right.[24]

Article 3, p. 2 of the Directive 1999/44/EC regulates that "in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods". Also, it states that "in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate (art. 3, p. 3 Directive 1999/44/EC). Study on Directive 1999/44/EC has pointed out that five Member States, including Croatia, have chosen to provide a consumer with a free choice of remedies, but in two Member States consumers have the right to directly reject a product within 30 days from the purchase.[25] The study furtherly discussed a free choice of remedies along with the right to reject. According to given opinions, it seems that a short period of time for a rejection could increase competition and product quality but also that a free choice of remedies is better for the on-line cross-border trade.[26] On the other hand it was noticed that a free choice of remedies might lead to a dispute between consumers and traders.[27]

Timeframe for reversal of burden of proof is regulated in art. 5, p. 3 of the Directive 1999/44/EC in a way that "unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity". At the moment there are three Member States with a longer time period for reversal of burden of proof.[28] It has been suggested that a longer period could give consumers a higher chance of obtaining an effective remedy or even quality or durability of the product.[29] Having in mind the traders, it is possible that such change could cause additional costs.[30]

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23 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 30, 31

24 See more on that aspect: Study on Directive 1999/44/EC, *op. cit.* note 19, p. 31, 32

25 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 21, 22, 34

26 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 34

27 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 34, 35

28 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 27. Also see more on national court decisions: Patti, F. P., *The Effectiveness of Consumer Protection in Sales Contracts – Some Observations from Recent European Case Law*, Journal of European Consumer and Market Law, issue 5, 2015, p. 183

29 See more: Study on Directive 1999/44/EC, *op. cit.* note 19, p. 27. 28

30 See more along with figure 5 in Study on Directive 1999/44/EC, *op. cit.* note 19, p. 29

The fourth important topic of the Study on Directive 1999/44/EC was on legal guarantee period. Directive 1999/44/EC regulates liability of seller where the lack of conformity becomes apparent within two years as from delivery of the goods according to art. 5, p. 1. In the same article is stated that "if, under national legislation, the rights laid down in art. 3,p. 2 are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery". At the moment, only five countries have either longer limitation period or there is not a fixed time limit.[31] "Increasing the possibility of obtaining redress when a product is faulty"[32] was pointed out as a benefit of a longer period. From the aspect of costs it was discussed that it may lead to higher consumers' goods prices.[33]

It can be concluded that absence of notification and a longer period both for legal guarantee and in case of timeframe for reversal of burden of proof could, along with the regulation of hierarchy of remedies, mean benefits to consumers. Study on Directive 1999/44/EC has shown many of them. Some of them concern consumers personally such as their confidence and overall better protection but they also affect them indirectly through better quality and longer durability of products.

2.3. CONSUMER SALES LAW DIRECTIVE PROPOSAL – CURRENT MAIN FOCUSES OF THE REFORM OF THE SALES LAW

2.3.1. General remarks

Reform of the consumer sales of goods law proposed by The Sales Law Directive Proposal would through its implementation effect private systems of sales law of all Member States. Repealing of the Directive 1999/44/EC could be taken as a crucial change imposed by the reform. Also, this proposal is considered to be a supplement to existing consumer protection given by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.[34]

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31 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 20-22

32 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 22

33 See more on costs: Study on Directive 1999/44/EC, *op. cit.* note 19, p. 26, 27

34 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p.64. See more on connection between The Sales Law Directive Proposal and other legal sources: The Sales Law Directive Proposal, *op. cit.* note 9, p. 5

Solutions of The Sales Law Directive Proposal were the result of already explained differences between consumer protection regulation between Member States caused by implementation of a Directive 1999/44/EC which was a minimum protection directive. Since it was clear that existence of the minimum protection still has not prevailed differences and eliminated cross border sales barriers, it was not a surprise that a new reform is based on a maximum and targeted harmonization directive. The Sales Law Directive Proposal clearly states that "Member States shall not maintain or introduce provisions diverging from those laid down in this Directive including more or less stringent provisions to ensure a different level of consumer protection" (art. 3 of the second proposal).[35]

Maximum harmonization approach and reform of only online cross border sales law according to the first directive proposal of Sales Law Directive also was not considered as an appropriate way of reform. It was considered with a reason that such approach would lead to a new fragmentation of sales law regulation and consumer protection because it will lead to a higher level of protection of consumers in online cross border sales than in face-to-face sale.[36] The Sales Law Directive Proposal was necessary to ensure the same level of consumer protection both for online and offline sales of goods.

2.3.2. The scope of application and subject matter of the Sales Law Directive Proposal

As it was already briefly stated, the purpose of this directive would be the harmonization of sale of goods in order to establish functional internal digital market. This special regulation proposal focuses on a specific contract, contract of sales with explicitly determined subjects[37] who conclude these contracts concerning particular objects.

The Sales Law Directive Proposal sets out rules for sales contracts between traders and consumers regardless of whether the contract is concluded online or "face to face". Furthermore, it defines sales contract as "any contract under which the seller transfers or undertakes to transfer the ownership of goods, including goods which are to be manufactured or produced, to the consumer and the consumer

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35 The same level of harmonization with a different scope was introduced in the first proposal. See a discussion on that in: Havu, K., *The EU Digital Single Market from a Consumer Standpoint: How Do Promises Meet Means*. Contemporary Readings in Law and Social Justice 9(2), 2017, p. 156

36 The Sales Law Directive Proposal, *op. cit.* note 2, p. 9

37 See definitions of terms consumer, trader and producer in art. 2. of the Sales Law Directive Proposal, *op. cit.* note 2

pays or undertakes to pay the price thereof" (art. 2. (a) of the Sales Law Directive proposal).[38]

The proposed directive does not regulate all aspects and effects of sales contract. It focuses only on areas which are shown as barriers to normal functioning of internal digital market. That is the reason why the rules set out in the directive proposal are focused on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies (art. 1, p. 1 of the Sales Law Directive Proposal). On the other hand it doesn't provide rules on pre-contractual information requirements, the right of withdrawal for distance contracts and delivery conditions have already been fully harmonised.[39] It is explicitly stated that "this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract" (art. 1 p. 5 of the Sales Law Directive Proposal).

It is proposed that new directive would not apply on contracts for the provision of services[40] and to any durable tangible medium incorporating digital content where the durable tangible medium has been used exclusively as a carrier for the supply of the digital content to the consumer (for example CD or DVD, art. 1, p. 2 and 3 of the Sales Law Directive Proposal). It means that the directive would apply only to sale of tangible movable items, but also to one "where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods" (for example toys and household appliances with integrated digital content).[41]Movable tangible items sold by way of execution or otherwise by authority of law, and as well water, gas and electricity unless they are put up for sale in a limited volume or a set quantity, would not be covered by this directive (art. 2 (e) of the Sales Law Directive Proposal).

Having in mind those particular goods as objects of sales contract it has to be added that each Member State can decide whether consumer protection will exist or not in cases of second-hand goods sale at public auctions (art. 1, p. 4 of The Sales Law Directive Proposal).

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38 Compare with art. 1 of Directive 1999/94/EC. On this see more: Rafael, R. M., *Intercambios digitales en Europa: La propuestas de Directiva sobre compraventa en linea y suministro de contenidos digitales*. Revista CESCO de Derecho de Consumo, Nº 17/2016, p. 18

39 See more introduction of the directive, the Sales Law Directive Proposal, *op. cit.* note 2, p. 12

40 It might apply in cases of sale contracts providing both for the sale of goods and the provision of services but then only to the part relating to the sale of goods (see art. 1. p. 2. of the Sales Law Directive Proposal, *op. cit.* note 2). This is the same approach given by Directive 2011/83/EU, *op. cit.*, note 34

41 See more introduction of the directive, the Sales Law Directive Proposal, *op. cit.* note 2, p. 14

2.3.3. Conformity of goods

Proposing solution for conformity of goods, the European legislator had in mind both material and legal[42] defects. To assure consumers protection and their expectations, it combines objective and subjective criteria to specify when conformity of goods exists.

The seller has to ensure that the goods are in line with the contract and / or precontractual statement regarding "quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer the goods shall possess the quality of and correspond to the description of this sample or model (art. 4, p. 1 of The Sales Law Directive Proposal)". Also, in consideration of subjective consumer expectations, goods should be "fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted (art. 4. p. 1 The Sales Law Directive Proposal)".[43] Art. 5 of the Sales Law Directive proposal provides special rules on requirements for conformity of the goods.[44] Bearing in mind that there are some goods which require installation made by consumer before using goods directive proposal sets out further rules on possible lack of conformity which might result from an incorrect installation of the goods.[45]

Special provision with important novelty could be noticed in proposing solution for regulation of relevant time for establishing conformity with the contract. Liability of the seller for the lack of conformity would exist if such lack existed in two different moments in time. Firstly, it would be at the moment of acquisition of the physical possession of the goods by consumer or a third party indicated by

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42 See the Sales Law Directive Proposal on third party rights proposed, *op. cit.* note 2, art. 7

43 See more: introduction of the directive, the Sales Law Directive Proposal, *op. cit.* note 2, p. 14, and Rafael, *op. cit.* note 38, p. 21, 22

44 The goods shall, where relevant: be fit for all the purposes for which goods of the same description would ordinarily be used, be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive and possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer (art. 5 of the Sales Law Directive Proposal, *op. cit.* note 2). This would apply unless seller shows that he was not, and could not reasonably have been aware of the statement in question, either by the time of conclusion of the contract the statement had been corrected or the decision to buy the goods could not have been influenced by the statement

45 See art. 6. of the Sales Law Directive Proposal (*op. cit.* note 2) on incorrect installation. For interpretation of consumers position it might be useful to remind on European Union Court of Justice judgment of 16 June 2011, C-65/09, Gebr. Weber GmbH v Jürgen Wittmer (C-65/09) and Ingrid Putz v Medianess Electronics GmbH (C-87/09), ECLI:EU:C:2011:396

the consumer[46] or secondly, when the carrier chosen by the consumer gains possession of the goods. Higher level of consumer protection is meant to be achieved through longer timeframe for reversal of burden of proof.[47] It is presumed that any lack of conformity existed in above mentioned moments in time in case it becomes apparent within two years from the time the consumer or carrier gained possession of the goods.[48] Reasons for this time frame extension could be found in European legislator aspiration to achieve impact on production of consumer goods in order to achieve better quality of consumer goods or even better control of goods imported from non-Member States.[49] Possible negative aspect could not be easily set aside. One can argue that having such a long period might acquire a better determination of possible lack of conformity. It could be achieved for example through exclusion of consequences of usual use of goods. Another novelty of the reform of sales law is the absence of obligation of consumers to notify the seller of existence of any lack of conformity.[50]

2.3.4. Consumer's remedies

In case of the lack of conformity with the contract, consumers would have the same rights as under Directive 1999/44/EC but the way of invoking the rights would be changed.[51] The Sales Law Directive proposal has introduced hierarchy of the remedies which can be considered as an important novelty for achieving removal of barriers on Internal Market. Remedies can be realized in a time limit of two years.[52]

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46 See more on a case where the goods were installed by the seller or under the seller's responsibility in art. 8. p. 2. od the Sales Law Directive Proposal, *op. cit.* note 2

47 More on timeframe for reversal of burden of proof in this article under 2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal

48 See art. 8.p. 3. of the Sales Law Directive Proposal, *op. cit.* note 2. In comparison to Directive 1999/44/EC (art. 2. p. 5) under which the timeframe was only 6 months which means that now it would be much longer. See also: Rafael, *op. cit.* note 39, p. 28

49 See: introduction of the directive, the Sales Law Directive Proposal, *op. cit.* note 2, p. 15 and Study on Directive 1999/44/EC, *op. cit.* note 3, p. 27. 28. along with this article under 2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal

50 See: introduction of the directive, the Sales Law Directive Proposal, *op. cit.* note 2, p. 15., this article under 2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal and Rafael, *op. cit.* note 39, p. 28. On contrary, which is in line with authors opinion that such obligation should exist see: Kröll, S., Mistelis, L., Viscasillas P. P., *UN-Convention on the International Sales of Goods (CISG)*, 1. Auflage 2011, CISG art. 39 (www.beck-online, accessed on: 01 March 2018); Rn 7-9

51 See more under this article under 2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal

52 See art. 14. of the Sales Law Directive Proposal along with introduction of the directive proposal, *op. cit.* note 2, p. 16

In order to preserve existing contractual relationship, the first two main remedies from which consumer might choose would be both equally right to replacement and right to repair, all free of charge for the consumer[53] (according to art. 9. p. 1. along with art. 10. and 11.of the Sales Law Directive Proposal).[54]As an addition to the first remedies, "a repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods (art. 9. p. 2. of the Sales Law Directive Proposal)".

The next step in choosing the remedies can be taken if a repair or replacement are impossible or unlawful, if the seller has not completed repair or replacement within a reasonable time, when a repair or replacement would cause significant inconvenience to the consumer or when the seller has declared, or it is equally clear from the circumstances, that the seller will not bring the goods in conformity with the contract within a reasonable time (according to art. 9. p. 3 of the Sales Law Directive Proposal). In such situations consumer would have a right to a proportionate reduction[55] of the price or to terminate the contract.

European legislator has chosen a more detailed approach on regulation of termination of the contract then in Directive 1999/44/EC. First of all, if the consumer chose to terminate the contract he would be obliged to notify the seller. In cases where the lack of conformity with the contract relates only to some of the goods, consumer will be entitled to terminate the contract only in relation to those goods and any other goods which the consumer acquired as an accessory to the non-conforming goods (art. 9. p. 2. of the Sales Law Directive Proposal). Regardless of whether the termination relates to a part of the contract or to the entire contract, the Sales Law Directive Proposal provides detailed legal effect of termination.[56]

If consumer would use his right to terminate the contract the seller will have an obligation to "reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement (art. 13. p. 3 of the Sales Law Directive Proposal)". On

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53 To be clear on consumers position it was additionally regulated that „The consumer shall not be liable to pay for any use made of the replaced goods in the period prior to the replacement (art. 10. p. 3. of the Sales Law Directive Proposal, *op. cit.* note 2)

54 Special rule on consumer's choice between repair and replacement can be found in art. 11. of the Sales Law Directive Proposal, *op. cit.* note 2

55 See more art. 12. of the Sales Law Directive Proposal, *op. cit.* note 2

56 It has to be reminded that the Directive 1999/44/EC didn't regulate details on effect of termination which usually lead to the application of rules which already existed on legal effect of termination of contract. In authors opinion, implementation of this rule might in some Member States lead to indirect change of the position of consumers

the other hand, the consumer will be obligated "to return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination (art. 13. p. 3 of the Sales Law Directive Proposal)". "Where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract (art. 13. p. 3 of the Sales Law Directive Proposal)".[57] Also it is proposed that the consumer will pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use but that the payment for decrease in value will not exceed the price paid for the goods.[58]

The Sales Law Directive Proposal does not say anything about the right to damages in cases when the damage was made on other consumer's things beside bought goods.[59] Although it does not directly propose solution for damages on the bought goods it can be said that the consumer will have to satisfy with adequate price reduction or new or replaced product. Also, in comparison to Directive 1999/44/EC new Sales Law Directive Proposal does not restrict remedies in case of minor material defect which means that a consumer may terminate a contract in such cases.[60] [61]

2.3.5. Guarantees

The last crucial area of the reform could be found in rules of the Sales Law Directive Proposal on commercial guarantees. To remove the barriers which have been noticed and provide transparency in consumer protection rights it is necessary through maximum harmonization to introduce special rules for commercial guarantees.

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57 If the European legislator has decided to keep the notification of seller about the existence of any lack of conformity that exact day might have been taken as a day for determination of the value of the goods

58 See art. 13. p. 3. of the Sales Law Directive Proposal, *op. cit.* note 2

59 See more: Zoll, F., *The Remedies in the Proposals of the Online Sales Directive and the Directive on the Supply of Digital Content*. Journal of European Consumer and Market Law, Volume 5, Issue 6, 2016., p. 252

60 See: introduction of the Sales Law Directive Proposal, *op. cit.* note 2 p. 16 and art. 3. p. 6. of Directive 1999/44/EC, *op. cit.* note 3

61 Maybe such approach could prevent in future cases already seen in judgement of the European Court of Justice, C-32/12, Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA, ECLI:EU:C:2013:637

The Sales Law Directive Proposal sets out three possible ways of giving statement on the guarantees or gaining information on the guarantees. Consumer could be informed on guarantees during pre-contractual phase, through advertisement or the guarantee statement. If there are any differences between them, seller would be bind to those guarantee statement which is the best for the consumer.[62]

According to Sales Law Directive Proposal it will be expected from Member States to implement rules on a form of the guarantee statement. The directive proposal sets out that "the guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language (art. 15. p. 2 of the Sales Law Directive Proposal)".[63] Additionally it has to be noted that the Sales Law Directive Proposal similarly to the Directive 1999/94/EC also sets a rule for the content of the guarantee in art. 15. p. 2. On the other hand, the Sales Law Directive Proposal allows Member States to provide additional rules on other aspects concerning commercial guarantees as long as those rules do not reduce the protection set out in directive proposal (art. 15. p. 5 of the Sales Law Directive Proposal).

Proposing new solutions for approximation of laws concerning the guarantees, the European legislator did not take into account another possible solution already seen as a way of achieving maximum level of consumer protection. It could be argued that guarantees should be given to every consumer in every Member Sate in the same form and with the same effect, and maybe with the same content. This could be possible through standardized guarantees (information) form.[64]

3. POSSIBLE IMPACT OF SALES LAW DIRECTIVE PROPOSAL ON CROATIAN PRIVATE LAW

3.1. Transposition of the directive in general

Directives could be transposed in private national laws in order to prevail barriers between Member States, to achieve functioning of the Internal Market and consumer protection. For that purposes, Directive 1999/44/EC has been implement-

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62 See art. 15. p.1 of the Sales Law Directive Proposal, *op. cit.* note 2

63 See more about this in art. 15. p. 2 and p. 3. of the Sales Law Directive Proposal, *op. cit.* note 2

64 Standardized information forms aren't something new, they are already well known in consumer protection law. See for example Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, Official Journal of the European Union, L 33, 03 February 2009 and Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance, Official Journal of the European Union, L 060, 28 February 2014

ed in Croatian private law through new OA which came into the force on January the 1st 2006[65] but also through additional changes of the OA in 2008[66] which have provided complete transposition of the Directive 1999/44/EC. Aims of the Directive 1999/44/EC are achieved through art. 400 – 429 of the OA on liability for material defects and 430 – 437 of the OA on liability for the legal defects.[67]

Although the main idea of the Directive 1999/44/EC was consumer protection, the Croatian legislator has decided to implement this directive as a general rule[68] (art. 357 OA)[69] which led to an extended harmonization. Firstly, the transposed rules are applicable to all contracts with consideration and secondly they apply not only to trader-consumer relation (B2C) but also to all other situations such as relations between traders (B2B) and between consumers (C2C).[70] This means that rules on the lack of conformity apply to all relations except in those segments where the OA regulated explicitly otherwise for B2B[71] relations or B2C[72] relations.

Usually when a new directive is transposed in the national law the question where it should be implemented arises. In case of Sales Law Directive Proposal, it is questionable should it be transposed in a completely new regulation, in the Consumer Protection Act since it aims to protect consumer or in the OA as Directive 1999/44/EC already is. The first two should not even be considered because new regulation would lead to a new fragmentation of the private law and the second

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65 Obligations Act, Narodne novine, 35/05

66 Obligations Act, Narodne novine, 41/08

67 See more: Gorenc, V. *et al.*, *Komentar zakona o obveznim odnosima*. Narodne novine, Zagreb, 2014, p. 681-734; Klarić, P., Vedriš, M., *Građansko pravo*, Narodne novine, Zagreb, 2014, p. 414 – 426; Petrić, S., *Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima*. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 27., No. 1. ožujak 2006., pp. 87 –127

68 Baretić, M., *Prava kupca u slučaju materijalnih i pravnih nedostataka na prodanoj stvari*, Aktualnosti hrvatskog zakonodavstva i pravne prakse. 22, 2015, p. 25., Ernst, H., *Odgovornost za materijalne nedostatke*. in: Nuni, A. *et al.* (ed.), Forum za građansko pravo za jugoistočnu Evropu: Knjiga II, GTZ, Skopje, 2012, p. 333

69 Article 357 of OA regulates:
(1) In case of a contract with consideration each contracting party is liable for material defects in its performance.
(2) Each contracting party is also liable for legal defects in its performance and it is obliged to protect the other contracting party from any third party rights and claims that might eliminate or reduce the rights of the other contracting party.
(3) The provisions of this law relating to the liability of the seller for material and legal defects in its performance shall apply accordingly to the obligations of the transferor, unless otherwise provided for certain cases.

70 See definitions of these relations: art. 402. p. 3. OA, art. 14. p. 2. OA. See also: Baretić, *op. cit.* note 68, p. 31-36

71 For example, see: art. 403. p. 1. OA, art. 404. p. 1-3 OA, art. 406. p. 1. OA

72 For example, see: art. 402. p. 3. of the OA, art. 403. p. 4. of the OA, art. 408. p. 2. OA

would create two legal ways of protection in case of material and legal defect, one for consumers and one for the others which has already been seen by the Croatian legislator[73] as a non-acceptable solution through the implementation of Directive 1999/44/EC. The Sales Law Directive Proposal, under condition that it becomes a directive, since it aims to change already transposed directive should be transposed in OA through the changes of existing rules for the liability of the seller for material and legal defects. Having in mind that the Sales Law Directive Proposal aims for maximum protection of consumers, the Croatian legislator will not have many options for deviation except for possible special provisions for consumer and non-consumer contracts. Some of the main goals of the reform of the sales law will be furthermore discussed from the aspect of possible change of Croatian legislation.

3.1.1. Liability for material and legal defects of performance as a general rule

If the legislator choses the option of changing existing rules of the liability of the seller for material and legal defects in OA, the first and main question in process of the transposition of the Sales Law Directive Proposal will be the existence and content of the above mentioned general rule set out in art. 357 of the OA. It can be argued that a general rule in art. 357 of the OA should be kept but maybe with additional changes. The Sales Law Directive Proposal excludes service contract and contracts for the supply of digital content.[74]

The first question is whether art. 357 of the OA should exclude application of responsibility for lack of conformity in case of service contracts. Service contracts are not in Croatian law regulated explicitly as a special contract. Rules on lack of conformity would apply to all contracts with consideration including services contract no matter who are the contracting subjects. On the other hand, in case of service contracts, consumers are protected by rules of the Consumer Protection Act (hereinafter: CPA)[75] which are in line with Directive 2011/83/EU but it has to be mentioned that there are not any special rules on lack of conformity for service contracts. It could be said that choosing an option not to explicitly exclude service contracts should not be taken as a deviation from the Sales Law Directive.

Much more important question will be the exclusion of contracts for the supply of digital content. This solution of the Croatian legislator will depend of the fact whether another directive now also in phase of proposal - Proposal for a Directive

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73 This was not only the opinion of Croatian legislator, see more: Schulte-Nölke, Twigg-Flesner, Ebers, *op. cit.* note 14, pp. 407–471

74 See more in this article: 2.3.2. The scope of application and subject matter of the Sales Law Directive Proposal.

75 Consumer Protection Act, Narodne novine, 41/14, 110/15

of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content[76] - will be transposed or not at the moment of transposition of the Sales Law Directive Proposal. That is of high importance since both directives regulate lack of conformity – one for goods and the other for digital content. It is still unknown how the Directive on Digital Content will be implemented, will it be possible to implement this directive along with changes of existing regulation for material and legal defect or our Croatian legislator will decide on a specific regulation of a contract for the supply of digital content along with solution for lack of conformity. All those questions are still open for a discussion in another research paper.

If Directive on digital content will not yet be implemented at the moment of transposition of the Sales Law Directive, then art. 357 OA will have to exclude the application for consumer contracts for the supply of digital content since the Sales Law Directive Proposal is not applicable to such contracts. On the other hand, if the Directive on certain aspects concerning contracts for the supply of digital content will be already implemented, then the content of art. 357 OA will depend on the manner of transposition of that directive which without further research cannot be predicted in this article. Having in mind both of the directives it could be argued that if it will be possible due to the deadlines for the implementation of both directives, it would be a good solution to propose their transposition through balanced changes of OA at the same time.

3.1.2. Timeframe for reversal of burden of proof

It can be stated that the most important change of the OA might result from obligation to implement a longer timeframe for reversal of burden of proof from six months to two years.[77] This would clearly affect art. 400 p. 3 of the OA, which now regulates this presumption.

New solution will clearly contribute to a better protection of Croatian consumers but it is questionable if such protection is needed in all relations especially in relations between traders. It can be discussed whether this imbalance between contracting parties which aims to protect the weaker party – consumer – should also exist between traders. The main reason for longer timeframe of burden of proof is

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[76] Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final, 2015/0287(COD), hereinafter: Directive on digital content , Brussels, 9.12.2015, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0634&from=HR] Accessed 18 March 2018

[77] See more in this article under: 2.3.3. Conformity of goods

to make it even easier for the consumers. This means that consumers do not have to prove the existence of a material defect thanks to a presumption that it actually existed at the time when consumer for example acquired the physical possession of the goods. This is relevant under condition that the defect became apparent within two years. On the other hand, the trader could try to prove that the material defect did not exist at that time. Position of the trader while proving the existence of the material defect is not the same as the position of the consumer. European Union Court of Justice has in case C-497/13, *Faber* explained "that relaxation of the burden of proof in favour of the consumer is based on the determination that where the lack of conformity becomes apparent only subsequent to the time of delivery of the goods, it is 'well-nigh impossible for consumers' to prove that that lack of conformity existed at the time of delivery, whereas it is generally far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer".[78] On the other hand, not only that traders as professionals could easily prove that the lack of conformity doesn't exist, they could easily prove that the lack of conformity exists.

This all leads to a conclusion that the same presumption which is in favour of the consumer should not be in favour of traders in relationships between traders. It can be argued that the presumption should exist in favour of trader in relation between traders, but that should be kept as it is -with the timeframe of six months.

3.1.3. Notification of lack of conformity

Higher level of consumer protection is aimed to be achieved by absence of notification of lack of conformity.[79] For Croatian consumers such obligation exists in case of both visible and hidden material defects (art. 403 and 404 OA).[80]The same obligation, but under different conditions, exists in relations between traders. This sales law reform might be a good opportunity to discuss changes concerning trader's obligation of notification in B2B relations.

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78 See judgment of the European Court of Justice of 4 June 2015, C-497/13, Froukje Faber v Autobedrijf Hazet Ochten BV, ECLI:EU:C:2015:357, p. 54

79 See more in this article under: 2.3.3. Conformity of goods

80 For comparison of abovementioned articles see Croatian legislation before transposition of OA: art. 481 and 482 of Obligations Act from 1978, Official Journal SFRJ 29/1978, 39/1985, 46/1985, 57/1989, Narodne novine 53/1991, 73/1991, 3/1994, 111/1993, 107/1995, 7/1996, 91/1996, 112/1999, 88/2001, 35/2005 (hereinafter: OA 1978). More on this obligation see: Baretić, *op. cit.* note 68, p. 42-45

It can be argued that obligation of notification in relations between traders, as in relations between consumers and traders should not exist. The research has already shown that there are many Member States that have decided during the implementation of Directive 1999/44/EC not to obligate buyer to notify seller about the material defect.[81] For example, such obligation doesn't exist in German Civil Code both for consumers and traders as buyers which was explained by the fact that such an obligation has never existed in German Sales Law.[82] It can be reminded that Croatian Sales Law has exactly the opposite regulation even since the OA 1978. But also, such long period has through the practice of the Croatian Courts[83] shown that the lack of notification in a particular way or within a certain time frame or even a lack of acceptable proof of notification caused loss of traders' rights in many cases.

It has to be reminded that the Study on Directive 1999/44/EC has shown some negative aspects of the absence of notification even in B2C relations. For example, German business association is concerned that "having no notification obligation can lead to situations where consumers could keep using a product and ask for remedies for a defect which was partly caused or worsened by using it".[84] Also, the European business associations[85] argued that such approach leads to costs and losses for sellers. If sellers are notified in time, there is a higher possibility to repair goods or even in case of replacement to sell repaired goods as second-hand goods. All those problems might be even bigger in B2B relations, especially having in mind possible higher value of the goods.

Another argument might be taken into account. It can be argued that the care in the course of performing obligations and exercising rights is not the same for traders as it is for consumers. In obligations higher level of care is expected from traders.[86] Besides that, it is expected from the parties in obligational relations to act in line with the principle of good faith (art. 4 OA). It can be said that the prin-

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81 Schulte-Nölke, Twigg-Flesner, Ebers, *op. cit.* note 14, p. 432. See also more in this article: 2.2. Fitness Check and Directive 1999/44/EC as an impact on the amended proposal

82 Rott, P., *German Sales Law Two Years after the Implementation of Directive 1999/44/EC*. German Law Journal, Issue 3, March, 2004, p. 251

83 See for example: Judgement of Higher Commercial Court, 23.01.2007., Pž 8224/04-3; Judgement of Higher Commercial Court, 23.10.2008., Pž 2223/06-5; Judgement of Higher Commercial Court, 01.06.2016., Pž 4584/2012-2; Judgement of Higher Commercial Court, 18.01.2017., PŽ 804/04-4; Judgement of Higher Commercial Court, 16.05.2006., Pž 7419/03-3

84 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 31

85 Study on Directive 1999/44/EC, *op. cit.* note 19, p. 31. and 32

86 See: Gorenc, *et. al.*, *op. cit.* note 67, p. 23, 24; art. 10. p. 1. OA and art. 5. p. 19 CPA which regulates term "professional care"

ciple of good faith also requires from the trader as buyer to notify the other party on lack of conformity.

Either our legislator in implementation of the Sales Law Directive stays consistent with legal tradition of notification or it could propose a change. Reforming Croatian Sales Law by completely omitting obligation of notification in B2B relations might be seen too radical.

3.1.4. Right to terminate the contract

Consumer's rights in case of material defect would be according to the Sales Law Directive Proposal precisely put in order through hierarchy between them.[87] This will probably lead to a change of art. 410 and art. 419 of the OA. The right to terminate the contract would be the last remedy for buyers (art. 13. of the Sales Law Directive Proposal). Although the intention of the European legislator was not to interfere with the legal effects of the termination of contract in national law, implementing this right through change of art. 419 of the OA will evidently affect the existing solution in Croatian national law regulated in art. 368 of the OA. [88]The main rule in case of termination of the contract is that after termination of the contract both parties are released from their obligations except the obligation to pay damages (art. 386. p. 1 OA). Each party has a right to restitution if parties have fully or partially preformed their obligations (art. 386. p. 2 OA). When it comes to termination generally, art. 368 of the OA would apply but this will not be the case if the contract is terminated because of the lack of conformity New and changed article on effects of termination of contract in case of lack of conformity would have precedence over general rule set in art. 386 of the OA. This does not mean that art. 386 of the OA would be excluded.

Comparing existing article on effects of termination and the solution proposed in the Sales Law Directive Proposal the following can be concluded. Firstly, the proposed solution could be considered wider in scope than art. 368 OA while it will regulate more specifically deadlines for returning of what is already received. Secondly, art. 368 p. 4 of the OA could be, on the other hand, considered wider in the scope because it obligates buyer to "compensate for the benefits that it enjoyed in the meantime from whatever it is obligated to return or compensate".[89]Application of this rule wouldn't be against the aims of the Sales

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87 See more this article under: 2.3.4. Consumer's remedies

88 The Sales Law Directive Proposal sees this effect as general and side effect of termination, see proposal introduction, *op. cit.* note 2, p. 16, along with. art. 1. p. 5

89 Application of this rule would also be in line with interpretation of the European Court of Justice stated in judgement of 17 April 2008, C-404/06, Quelle AG v Bundesverband der Verbraucherzentralen

Law Directive Proposal since it clearly states that any unreasonable enrichment of consumer should be prevented.[90]

Reform of the right to terminate the contract will in Croatian law bring to another important novelty, a new rule opposite to one already existing in art. 410 p. 3 of the OA. In situation where lack of conformity is minor, buyer is not entitled to terminate the contract but he is entitled to all other rights (art. 410 p. 3. of the OA). If there will not be any further change of the Sales Law Directive Proposal, Croatian buyers would be able to terminate the contract even in cases of minor conformity.[91]

4. CONCLUSION

With no doubt, the Sales Law Directive Proposal would achieve higher level of consumer protection, which will be an important step for the functioning of the Digital Single Market. At this phase of legislation procedure, the most important changes are a longer period of the burden of proof in favour of consumers, hierarchy between consumer's rights, detailed regulation of legal effect of termination of the contract, possible termination of the contract in case of a minor material defect and an absence of notification on material defect. For now, all thes solutions would be introduced through a maximum harmonization directive.

It is expected that new changes would influence legal certainty of consumer's rights, rise of their confidentiality to buy from sellers in other Member States along with a better access to a wide range of goods and overall decrease the number of disputes between traders and consumers. It is possible to argue that imbalance of the relation between traders and consumers, which exists to protect consumers as a weaker party, could have some negative effects. On the one hand, the idea is to encourage the cross border trade and to secure its growth, but on the other hand, if all proposed solutions stay as they are they might burden traders and even producers and importers, which could lead to higher prices of consumer's goods.

Along with other Member States, Croatian legislator will be faced with new changes of legislation, primarily the OA, in order to implement new sales law directive. Transposition could be conducted through changes of rules on lack of conformity,

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und Verbraucherverbände, ECLI:EU:C:2008:231

90 This is primarily intended to achieve through already mentioned art. 13., p. 3 (d) od the Sales Law Directive proposal, *op. cit.* note 2, p. 16, see more in this article under: 2.3.4. Consumer's remedies. Application of these two solutions might lead to a situation that buyer will have to pay compensation for the use of the use of goods and one for a decrease in the value of the goods

91 See more this article under: 2.3.4. Consumer's remedies and the introduction of the Sales Law Directive Proposal, *op. cit.* note 2, p. 16

which exists as seller's obligation along with art. 357 of the OA which sets rules on lack of conformity as a general institute of obligations law. This research has shown that possible change of art. 357 of the OA will depend on the moment of transposition of Directive on certain aspects concerning contracts for the supply of digital content since the Sales Law Directive proposal excludes digital content from its scope. The most difficult task for the Croatian legislator will be whether to apply consumers's rights even for traders, which act as buyers in B2B relations, or not. This question especially arises when it comes to a longer period of burden of proof and an obligation to notify the seller on the lack of conformity.

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Topic 5

EU and Economic challenges

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THE ROLE OF SPACE IN EU POLICIES AND THE REGIONALIZATION PROCESS

ABSTRACT

Space is one of the most debated issues related to the European Union policies. In terms of space, EU perpective is mainly focused on regions. Regions are, more or less succesfully the core of spatial approach of European project. The debate moves around different approaches. In a constitutive perspective, regionalization process aims to create more homogeneus partitions. Anyway, the inequalities are more often inside the regions than among regions. To overcome this limit of the traditional top-down regionalization many scholars propose different approaches, from the place-based (Barca, 2009) to the relational (Celata & Coletti, 2014).

As it is proposed by Capello (2016), aspects of regional space should be studied in terms of location choices, productive and innovative capacity, competitiveness and relations with the local system. Some scholars (Stimson, Stough & Roberts, 2006) mention different traditional tools for measuring and evaluating regional economic performance. On the other hand there are some other approaches as well, for instance, Capello & Camagni (2008) give insight into forecasting as a way of implementing quantitative foresight (i.e. the MASSST model).

Looking at the space in a performative perspective, according with the critical geography, regionalization has a pivotal role in many fields of social activities, such as identity and migration. So, in the European Union the regionalization can't be considered as a collateral effect of economic or social goals.

This paper aims to reconceptualize the controversial relation between EU policies and space. Go further to an iconic slogan "The Europe of Regions", the article propones to contestualize how the space was included in the EU programmes. At the same time, it aims to analyze how space organization can be included in the EU activities, also in terms of relationship with the parameters often used to analyze regionalization.

Keywords: *Regionalization, regional economy, EU regions*

1. INTRODUCTION

Regionalization and regionalism are constantly increasing their importance in terms of relationships between politics and space. Whereas many social activities, such as economical and political, were mainly based on the national scale and driven by national actors, it's possible to note a significant return of different partitions. The meanings of a region are not the same in different contexts. Different concepts are behind the same word, and it can easily create misunderstandings and radical mistakes. With regions in current use it is possible to indicate a sub-national dimension – such as in the rescaling of power inside any State –, a sovra-national, but also a multi-national – as in the case of transnational regions in the EU context. In this way, talking about regions is also useful in a discussion about different spatial grammar[1] of politics. In this process, European Union still has an important role. EU relations with regional policies create the framework for regionalization process in many EU and EU candidate countries. As many scholars suggest, it also contributes to create and modify some social elements as a part of identity of those countries. At the same time, the debate about the role of space and communities in the regionalization process, from a strict top down process to a more inclusive and place-based approach, suggests different perspective to all debate about regions and regionalization. In any case, those terms can have a different meaning in different cultural spaces. They can be defined in term of analytical framework, made by the different conceptual perspective, but also according to different cultures. In this way the article aims to provide its contributions to the debate. The paper will mostly persue a teoretichal approach to the themes analyzed, focusing on the different perspective adopted in considered approaches. The authors come from different backgrounds. Katarina Marosevic and Andrea Giansanti mostly deal with regional economy while Daniele Paragano is a geographer. Moving from this point, the research idea is primarily to compare different scientific experiences on the same topic. Concepts related to region, regionalization and regionalism will be explored from two main but dif-

[1] Amin, A., Massey, D., Thrift, N., *Decentering the nation: A radical approach to regional inequality*, Catalyst, London, 2013

ferent perspectives (economic and the geographical), looking into how these two approaches use and analyze those themes[2]. At the same time, two different experiences of regionalization will be confronted. Croatian and Italian regionalization processes will be explored mainly from a historical perspective, looking for the role that space had in different periods and how European policies and strategies contribute to modify those processes. The paper constitutes the first part of a research project in progress, focused on the role of space in the regionalization process of EU countries. According with the complete research progress, the paper aims to create the theoretical background for the future steps of research. So, it will mainly have focused on a literary review which will be used to analyze, in the following part of the research, the empirical evidence of the introduced themes.

In this framework, the expected result of the paper, which constitutes the first part of a research project in progress, is to underscore the differences much more than define the commons between analyzed cases and the adopted perspective. According with the role of paper in the research project, it will not reach defined conclusions. Rather, the article aims to promote a research strategy which can be included in a multidisciplinary approach and enable different perspectives to create a common result.

2. ECONOMICAL OVERVIEW: REGION AND REGIONALIZATION

One question, in this case regions, may be looked at from different perspectives. In economic view of regions, Capello[3] for example speaks of bond between regions and space, because productive resources are mostly concentrated in specific places, usually a region or a city. Besides, economic activities are usually dependent on space in terms of growth and development. With respect to development, geographical distribution and potentials are only minimally determined by exogenous factors, and mostly the result from factors such as human capital, social fixed capital, the fertility of the land and accessibility. As Capello explains: "*It is a source of economic advantages (or disadvantages) such as high (or low) endowments of production factors. It also generates geographical advantages, like easy (or difficult) accessibility of an area and high (or low) endowment of raw materials.*"[4] When emphasizing the importance and the field of study of the regional economy, it should be said that it is not the study of the economy at the level of administrative regions,

[2] According with the limitations of this paper, what will have exposed can't be consider an exhaustive representation of the huge debates about those topics. It's mainly the proposal of some key points for a multidisciplinary debate

[3] Capello, R., *Regional Economics*, Routledge, London and New York, 2016

[4] *Ibidem*, p. Introduction

but should be bonded in analysis with the dimension of space and its effects on the market.

When taking into consideration regions and regionalization, certain authors, f. i. Storper[5], speak in favour of importance of regions and regionalization in everyday economic life that became one of the really important question and economic and social factors from the 1980's.

Certain types of capital have a really important place in contemporary economy. Camagni & Capello[6] highlight the importance of the concept of territorial capital. Through the empirical application of MASST as a macro-econometric regional growth model, they confirmed the role of territorial capital on regional growth. Results confirmed that the overall performance of the region is higher where there is an important role given to territorial capital assets. Capello[7] gives deeper explanation of this model, whose acronym is made out of different dimensions, macroeconomic, sectoral, social and territorial. Furthermore, this model integrates different theories which are crucial macroeconomic aspects and endogenous territorial assets, and the model is able to take into account macroeconomic trends and policies. It can also interpret regional growth differentials through supply elements that generate different effects at the regional level. Territorial structures in MAAST take into consideration propulsive forces of regional growth and the factors that give explanation for exogenous aggregate trends. Camagni[8] highlights the need for multidimensional perspectives of spatial aspects and claims that economic, social, environmental and cultural dimensions should also be taken into consideration. Toth[9] gives theoretical and empirical results but also critical remarks of territorial capital. Camagni[10] gives proposals on using adequate policies for spatial development.

No matter where the economic activity is made, economists are usually concerned with its (financial) effects. In broader context, usually the stage of being successful is measured in comparison to other regions or urban areas of a country. Ascani,

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5 Storper, M., *The Regional World, Territorial Development in a Global Economy*, The Guilfor Press, New York – London, 1997

6 Camagni, R., Capello, R., *Territorial Capital and Regional Competitiveness: Theory and Evidence, Part A: Spatial Competitiveness*, J-STAGE Vol. 39 No. 1, 2009, p. 19-39

7 Capello, *op. cit.* note 3

8 Camagni, R., *Territorial Impact Assessment for European regions: A methodological proposal and an application to EU transport policy*, Evaluation and Program Planning Vol 32 Is 4, 2009, p. 342-350

9 Toth, B. I., *Territorial Capital: Theory, Empirics and Critical Remarks*, European Planning Studies 23 (7), 2014, p. 1-18

10 Camagni, R., *Policies for spatial development*, in: OECD (Eds.), *Territorial Outlook*, Paris : OECD, 2001, p. 149-174

Crescenzi & Iammarino[11] provide an insight in the main concepts explored in the regional and local economic development and they also highlight the fact that disparities have being increasing within a number of cases of countries, although on the other hand there is some evidence of the convergence between countries. According to the same author, greater differences between country suggest that distance and geography are important in a global world and that economic development is impacted by strong spatial concentration at the regional level. Furthermore, most of economic activities are related and concentrated to urban areas where there is geographical proximity and therefore frequent interactions and flows of ideas appear.

3. REGION AND REGIONALIZATION FOLLOWING A GEOGRAPHICAL PERSPECTIVE

Regions, regionalism and regionalization are some of the most relevant themes in geographical debates. Every phase of geographical thinking evolution is characterized by a different approach to regions and region-related issues. Anyway, the diffusion of these themes is not constant; periods with a strong theoretical debate alternate between less intensive phase of the debate[12]. Often, also in the more critical approach, the terms are used without a clear theoretical definition and conceptualization. In this framework, this section of the article aims to introduce some of the main topics related to regions, regionalism and regionalization processes. In accord with the introduction, the main purpose of this section is to point out some elements of the geographical perspective in these subjects. Especially it aims to analyze differences among these related issues. The following part does not long to be an exhaustive dissertation about the topics.

Looking at a region it is possible to include many elements in a geographical perspective. A region is mainly defined as a homogeneous part of territory with similar characteristics where the individuation of characteristics is a crucial part of the determination of the individuation of a region. Using different parameters, we can have many regions. Without a reference to different regions defined in the geographical debate, the focal point is the choice of parameters adopted to define regions. Usually common debate moves from a hypothetical defined set of regions (often the administrative ones) where spatial organization can be considered

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11 Ascani, A., Crescenzi, R., Iammarino, S., *Regional Economic Development: A Review*, Search Working Paper WP1/03, 2012. Available at [http://www.ub.edu/searchproject/wp-content/uploads/2012/02/WP-1.3.pdf] Accessed 27 April 2018

12 Paasi, A., *Europe as a Social Process and Discourse: Considerations of Place, Boundaries and Identity*, European Urban and Regional Studies, 8.1, 2001, p. 7-28

unique in time and space. The same spaces can be organized in different regions in different times but also at the same time. Different factors can have different configurations of regional boundaries. It becomes important to extend the analysis to the process of creation of the regions to analyze how spatial and social elements are (or not) involved in it. At the same time, it is important to deeply analyze how the organization of (economic) activities in a space can be differently oriented and managed by the different managers working in the same territories. To do that, it is necessary to move from a traditional approach, which refers also to Gambi's approach[13], between regionalism and regionalization.

Talking about regionalism and regionalization usually refers to different approaches in determination and creation of the regions. This dichotomy is also related – and sometimes overlapped - especially in terms of EU programs, to different regionalization processes at sub-national or sovra-national scale[14]. At the same time, region-building and regional protection are often used to refer to the same approach to regionalism and regionalization process[15].

In the first approach, usually classified as regionalism[16], a region "is generally conceived as a territorial container of functional, or cultural, or historical, or administrative, or physical attributes, or at times all of these things together"[17]. This approach is strictly related to a traditional approach to regions and regional production which directly comes from regional approach of French geographers such as Vidal de La Blanche and key Vidalian concepts such as *genre de vie*, *genius loci*, and *personnalité*. From this perspective, a region *exists itself* and "is also often presented as a sort of spontaneous, 'organic' container, produced by the working of local communities, their histories and mundane geographies"[18]. The main purpose of social actors is to *define* the boundaries of these regions, according to the parameters used to define them. The creation of regions pursues – and at the same time reveal – the approach used to analyse spatial relations and activities. In the recent period, also related to the globalization process and the role of formal and infor-

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13 Gambi, L., *Le "Regioni" italiane come problema storico*, Quaderni storici, XII, 34, 1977

14 Bialasiewicz, L., Giaccaria, P., Jones, A., Minca, C., *Re-scaling 'EU'rope: EU macro-regional fantasies in the Mediterranean,* European Urban and Regional Studies, Vol 20, Issue 1, 2013

15 Amin A., *Regions unbound: towards a new politics of place*, Geografiska Annaler, Series B, Human Geography, 86:1, 2014

16 Spagnoli, L., *«Regionalizzazione» o «Regionalismo»: I termini di un dibattito ancora in corso*, Bollettino della società Geografica Italiana - Serie XIII, vol. IX, 2016

17 Bialasiewicz, Giaccaria, Jones, Minca, *op. cit.* note 14, p. 61

18 Ivi.

mal networks[19], many scholars pay attention to the relational spaces. According to the Doreen Massey reflections about "relational sense of place and space"[20] a different perspective to region in which spatial continuity is replaced by the networks among places as key point of region classification is suggested. It follows from "the political challenges of these two spatial registers of place respectively as the *politics of propinquity* and the *politics of connectivity (or transitivity)*"[21]. In the framework of relational approach, many scholars propose "to substitute fixed, bounded, nested and geometric imaginations which are typical of the new regionalism, with a geographical imaginary that is networked, open and topological"[22].

The regionalization process follows a more performative approach to geography. This approach has grown in the furrow of critical approach to geography which characterizes geographical analysis from the '90s. The critical geography, which refers to some philosophers like Focault, Deridda and Said, deeply focuses on the political role of geography, according with the Focault theory of power/knowledge, which becomes "geography means power" in O'Thuatail seminar work Critical Geopolitics[23]. As Elena dell'Agnese summarizes, in this approach geography "is not only a name (*geography*) but a verb which indicate an action (*geo-graphy*): make geography a means to, in some ways, geo-graph the world"[24]. According with this approach, the geographical elements – the geography – of the places do not exist in itself but are production of human activities; especially the attention is posed on the social and dialectical activities that produces spaces and places. Regions, in this perspective, result from a regionalization process which *creates* regions. Allen et al. note that regions are not 'out there', waiting to be discovered, rather they are our (and others') constructions[25]. According with some scholars "region-making projects now, as then, are fundamentally about the (power-full) making of spaces for political action"[26]. With regionalization there is the creation of new geographical categories[27]. This process, as it will be showed in the following parts of the article, can pursue many different purposes. Anyway, the process of

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19 Celata, F., *L'individuazione di partizioni del territorio nelle politiche di sviluppo locale in Italia: ipotesi interpretative*, Rivista geografica italiana, 115-1, 2008

20 Amin, *op. cit.* note 15, p. 37

21 *Ibid.,* p. 36, italic in original

22 Celata, F., Coletti, R., *Place-based strategies or territorial cooperation? Regional development in trasnational perspective in Italy*, Local Economy, Vol. 29 (4-5), 2014, p. 399

23 O'Thuatail, G., *Critical Geopolitics*, Routledge, London, 1996

24 Dell'Agnese, E., *Fare Geopolitica critica*, Guerini Editore, Milano, 2005, p.10, italic in original

25 Paasi, *op. cit.* note 12

26 Bialasiewicz, Giaccaria, Jones, Minca, *op. cit.* note 14, p. 62

27 Celata F., Coletti R., *Cross-border cooperation in the Euro-Mediterranean and beyond: between policy transfers and regional adaptations*, International Journal of Euro-Mediterranean Studies, 9(2)

regionalization can radically define the evolution of the territories in all of its characteristics. Despite the main reasons of regionalization process, and the aspects which drive it, social structure, identity, culture and all the others social elements can be modified by this process[28]. In the regionalization process a leader role belongs to formal institutions, both at national and sovra-national scale, but often other social, formal or informal, such as chambers of commerce, enterprises or communities promote spontaneous process of new regionalization[29] and collaborate in "rather informal multi-actor coalitions"[30]. At the same time is important to emphasize the role of narratives in the creation of geographical imaginaries[31] and, in this case, a territorial invention called region[32].

In terms of regions, the analysis could move, according with these approaches, in a perspective that is both dichotomous and integrated. Following a regionalism perspective, it is possible to analyse the region inside and in relations to other regions of the same territory (or created in the same process). Concepts like homogeneity, cohesion, uniformity and consistency of the components analyzed become crucial in evaluation of the region. Anyway, according to regionalization process, attention can be posted on the process itself, how regions are created and which social and cultural transformations can be generated. These approaches are only apparently dichotomous. Looking at the regionalization process, the role of the actors involved is also to participate and to emphasize the structure of regions and the possible evolutions.

The EU regionalization is actually one of the most interesting cases in which the two perspectives of region creation/definition can be used. According to Luisa Bialasievicz, Stuart Elden and Joe Painter[33], in the constitution of EU territory it is possible to include two regionalization approaches among the "ways of reading the changing political geographies of Europe". The same authors' words can be used to describe two ways of EU regionalization:

> "The first of these refers to the European Union (EU) as a regional bloc in a multi-polar economic world along with NAFTA, Japan, ASEAN and

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28 Paasi, *op. cit.* note 12; Paasi A., *The region, identity, and power, Regional Environmental Governance: Interdisciplinary Perspectives, Theoretical Issues, Comparative Designs (REGov),* Procedia Social and Behavioral Sciences 14, 2011

29 Celata, Coletti, *op. cit.* note 27

30 Söderbaum, F., *Introduction: theories of new regionalism*, in: Söderbaum, F., Shaw, T. (eds), Theories of New Regionalism, Palgrave-Macmillan, London, 2003, pp. 1-2

31 Bialasiewicz, Giaccaria, Jones, Minca, *op. cit.* note 14

32 Gambi L., *Le "Regioni" italiane come problema storico*, Quaderni storici, XII, 34, 1977

33 Bialasievicz L., Elden S., Painter J., *The Constitution of EU Territory*, Comparative European Politics, 2005, p. 333

so on (Gibb and Michalak, 1994; Frankel, 1998). Regionalization in its second sense refers to the strengthening of regions below the level of the nation-state and to the emergence of cross-border regions (Jones and Keating, 1995; Jeffery, 1997; Keating, 1998; Bialasiewicz, 2002). The promotion of such regions has long been associated with European integration and regional development has been an important element of EU policy for at least 30 years. The Treaty of Rome contains an explicit commitment to the reduction of inter-regional disparities, a commitment that gained institutional expression in the formation of the European Regional Development Fund in 1975. The EU has also promoted political representation at the regional level, although the rather patchy development of autonomous or devolved regional governance scarcely matches the expansive rhetoric of a 'Europe of the regions' that became popular in the early 1990s"[34]

In the EU policy is possible to define a process of creation of macro-regions above the national scale and micro-regions inside the single states. At a supra-national scale, regionalization process includes the creation of geographical categories such as the EU neighborhood[35] but also the EU itself and its relations with other geographies such as the Mediterranean[36]. This process can't be distinct to the creation of Europe of regions. The region as a reference scale, more important than the state, is an EU idea that is extended to the new member countries or all the neighborhoods as a spatial organization. At the same time, the creation of many cross-country regions is often based on the proximity[37] and suggests a new perspective to the spatial organization of European spaces. As some scholars like Celata and Coletti[38] suggest, it implies a rescaling of regionalization because the "polycentric, multi scalar and not isomorph" (Brenner, 2004, p. 4) political space which characterizes multilevel governance model adopted by the EU is 'exported' on the other side of the union borders". Anyway, all of these regionalization processes suggest many reflections about the implications of how it can be related to the other regionalization process inside the European countries, if there is consistence or alternative, and, at the same time, how it can influence geographical trajectories of the spaces involved.

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34 *Ivi.*

35 Celata, Coletti, *op. cit.* note 27

36 Bialasiewicz, Giaccaria, Jones, Minca, *op. cit.* note 14

37 Celata, Coletti, *op. cit.* note 27

38 *Ibid.*, p. 378

4. REGIONALIZATION PROCES IN CROATIA

Geographical aspect on the development of the beginning of regionalization process is not exclusively, but is greatly, as it is quoted by Magaš[39] related to geographical regionalization of Croatia from author Rogić from the early sixties of 20th century, taking into account not only theoretical approach, but also practical application of two geographical regionalization models - "physiognomic" and "functional" one.

When speaking of modern nodal-functional or gravitational regionalization of Croatia, Magaš[40] arises from flexible and changeable circumstances of interaction between central settlements in the country, meaning that spatial differentiation model also takes into account their flexibility and changeability. As Koprić[41] points out, in the period from 1992-2001 Croatian counties have served for centralization of the country while the county territorial structure was tailored according to political and not administrative or technical criteria and were used for bureaucratization and unfortunately not for economic, cultural or social development. But, on the other hand in 2000 there were changes of Constitution that gave a good base for development of counties as regional self-management units supported by further legal changes.

In 2009 when there of Regional development law was adopted (NN 153/2009), first steps were made toward regional development changes. This was one of the biggest institutional frameworks regarding regional development ever made in Croatia, after which there were some changes regarding institutional regional development framework, f. i. the regional development law from 2014 (NN 147/2014) and regional development law from 2017 (NN 123/2017).

According to Magaš[42], contemporary regional development process is manifested in direct consequences of uneven development and present process of polarization, which is usually more pronounced at the periphery of administrative regions. One of the direct consequences is usually related to the disparity of the Croatian administrative and territorial system and the principle of geographical regionalization. Magaš[43] highlights the following: *"This discord that is insufficient scientific ap-*

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39 Magaš D., *Contemporray Aspects of the Geographical Regionalization and Administrative – Territorial Organization of Croatia*, Geoadria Vol. 8/1, 2003 p. 128

40 *Ivi.*

41 Koprić I., Uloga županija u hrvatskom sustavu lokalne samouprave i uprave 1990-ih i perspektive regionalizacije nakon promjene Ustava iz 2000. godine, *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave* Vol. 3 No.1, 2001, p. 63-87

42 Magaš D., *op. cit.* note 39, p. 127-147

43 *Ibid.,* p. 135

proach to the regionalization especially from geographical and economic point of view characterizes not only present-day administrative-territorial division of the country, it was typical for older divisions too." It is emphasized that in Croatia polarization of the regional system is the biggest error of them all. Furthermore, Magaš[44] states that in the last few decades, practices was based on a model for defining regional perspective according to four macro-regions, considering their continuous, functional and economic development as well as some other indicators, but contemporary situation regarding development stagnated in certain areas and that actually changed the actual nodal-functional system. Nowadays, distinguishing regional centers with gravitational influences within their counties as well as in neighboring counties and those that do have nodal-functional significance within their own counties is of the greatest importance.

Kleibrink[45] (according to Rokkan and Urwin 1982; Flora et al. 1999:7) emphasizes the importance of center-periphery relations because of their importance to all organizations and institutions of a political system. The same author, Kleibrink[46], mentions that the process of decentralization in Croatia was accompanied with little political willingness to accommodate any particularities of historical regions. Koprić[47] cites the need to implement decentralization as it emphasizes centralized management of the entire system, reflected in a number of levels, such as the impossibility of effective action or regulation. Furthermore, one of the most important preconditions for the decentralization of affairs and the autonomy of local and regional self-government units is considered to be a change of territorial organization. Some other authors, f. i. Klarić[48] want to investigate if decentralization of local self-government in Croatia improves quality of local public services in local government units. The same question can be asked regarding counties and regional level. As Klarić[49] states, Croatian local-self-government is organized in two levels - local self-government units, cities and municipalities as polytypic local government units and counties which are responsible for many of decentralized public services on the local level, f. i. coordination between local government units on their own territory after contemporary division of counties in Croatia is made

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44 *Ivi*

45 Kleibrink A., *Political Elites and Decentralization Reforms in the Post-Socialist Balkan, Regional Patronage Networks in Serbia and Croatia*, Palgrave Macmillan, 2015, p. 1

46 *Ivi.*

47 Koprić I., *Problemi s decentralizacijom ovlasti u Hrvatskoj*, HKJU-CCPA Croatian and Comparative Public Administration God 14 br. 1, 2014, p. 133-148

48 Klarić M., *Problems and Development in the Croatian Local Self-Government*, Zbornik radova Pravnog fakulteta u Splitu, God. 54, 4/2017, p. 807-823

49 *Ibid.*

with 20 counties and one more special county for the capital city of Croatia, City of Zagreb.

All afore mentioned is in area of action of the regional policy. Regional policy of Croatia is highly present contemporary question regardless of scientific aspect, but unfortunately there are a lot of unsolved questions. Some scientific aspects, f. i. the one from Kordej-De Villa and Pejnović[50], say that regional policy is one of the most complex public policies and its priority is to create homogenous development of national territory. On the other hand, there are a lot unsolved questions regarding uneven regional development which probably result from broadness of the issue. A lot earlier than European Union (EU) accession, Bogunović[51] highlights the importance of regional policy in the context of development and existence for the EU integration because of its multidimensional regional perspectives, and also a way of achieving convergent regional organization and regional economic policy.

It is evident that certain changes regarding institutional level were made and a great number of laws and lower institutional regulations as well, but unfortunately a great number of them exist just on paper, without adequate implementation. So, although the importance of regional policy has changed, there is still a big gap between theory and reality.

5. REGIONS AND REGIONALIZATION IN ITALY

The attention to the subdivision of space, within the Italian territory today can be traced back, even conceptually, to the Roman era. One of the first examples of subdivision of the Italian territory, the one adopted by Cesare Augusto, was based on a functional criterion linked to the urban element, but also kept in mind ethnic, environmental and structural factors[52]. Only after the creation of a unitary state, however, there was an effective reconceptualization of the national space. The regional division of Italy that, despite some changes over time constitutes the structure of the current one originates from the grouping of the existing provinces, operated in 1864 for statistical purposes by Pietro Maestri. Those compartments had to be of a temporary nature according to the same author, as they were aimed at illustrating the results of the first census, carried out in 1861, of the newborn Kingdom of Italy. The establishment of a new state entity therefore corresponds

[50] Kordej-De Villa Ž., Pejnović D., *Planska područja Hrvatske u kontekstu regionalne politike*, *Hrvatski Geografski Glasnik 77/1*, 2015, p. 47-69

[51] Bogunović A., *Regionalna politika EU I Hrvatska [Regional Policy of the EU and Croatia]*, Ekonomska istraživanja (1331-677X) 17, 2004, p. 58-73

[52] Salvatori F., *La geografia di Augusto: durevolezza e discontinuità nella regionalizzazione del territorio italiano*, Bollettino della Società Geografica Italiana, Roma, Serie XIII, vol. IX, 2016

to the subdivision of the territory into functional partitions, which however over time assume an identity nature, maintained until today, creating centers and peripheries in itself. Those partitions were free of geographical, economic, ethnic or environmental reasons to motivate the aggregation, however, they found their space in schoolbooks as sub-state divisions, favoring the strengthening of the identity process. Compartments assumed the name of Regions in 1912: they resisted until the approval of the Italian Constitution[53], which institutionalized this division - slightly modified by some splits made by Ferdinando Targetti - despite the proposals linked to a more modern conception of rationality, such as those of Gaetano Salvemini or Adriano Olivetti[54]. The idea of Salvemini, in particular, was based on municipal federalism that led to the determination of the Regions as free associations of Municipalities and Provinces, while Olivetti considered the Community - as a geographical space delineated on natural or historical grounds - the primary level onto which the Region is defined and planned as a regional State for its independence and amplitude of powers, having also the function of connecting with the Federal State[55].

The attention of the Italian geography towards regional articulation proved to be weak: only on the occasion of the Geographical Congress of Bologna in 1947 - following the determination of the regional section approved by the Constituent Assembly the previous year[56] - Aldo Sestini proposed a definition of the concept of the region based on the integration between environmental and anthropic elements, suggesting a revision of the regional partitions to be more responsive to the territorial localization of collective interests[57]. The work of Sestini aroused interest in Gambi, since it placed the attention on the idea of a functional integral region[58]. This is also in line with the evolution of the debate on the regions that was developing at international level. Leading elements in the regional structure were almost exclusively administrative needs. The effective exercise of the administrative functions and of the legislative powers entrusted by the Constitution to the Regions began only in 1970: close to this phase, the debate on territorial

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53 Lando F., *Le regioni da Piero Maestri alla Costituzione,* in Muscarà C., Scaramellini G., Talia I., Tante Italie una Italia. Dinamiche territoriali e identitarie. Vol. 1 Modi e nodi della nuova geografia, Franco Angeli, Milano, 2011

54 Treves A., *I confini non pensati: un aspetto della questione regionale in Italia*, ACME - Annali della Facoltà di Lettere e Filosofia dell'Università degli Studi di Milano, Volume LVII, Fascicolo II, Maggio-Agosto 2004

55 Olivetti A., *L'ordine politico delle Comunità*, Nuove Edizioni, Ivrea, 1945

56 Novacco D., *L'officina della Costituzione italiana, 1943 – 1948*, Feltrinelli, Milano, 2000

57 Sestini A., *Le regioni italiane come base geografica della struttura dello Stato*, Atti del XIV Congresso geografico italiano, Bologna, 8-12 aprile 1947, Zanichelli, Bologna, 1949

58 Treves, *op. cit.* note 54

cropping resumed in view of the fact that the transfer of functions from the central state to the local authorities should have encouraged, on one hand greater efficiency in the public administration and on the other, responded to the requests for participation prompted by the cultural movements developed at the end of the 1960s[59]. During '70s the regions were considered executors on the territory of the policies promoted by the central state, but starting from the following decade - also because of the European Structural Funds, which included the principle of partnership between the European Community, the Member States and Sub-state authorities - a process of progressive increase of regional autonomy began. In the nineties, hand in hand with the new regionalism widespread in Western Europe[60] - also as a consequence of the end of the Cold War, which had contributed to a substantial immobility of the political-administrative system - in Italy reformative movements speeded that were aimed at restoring the attention on the territory and on the redistribution of powers, attention nurtured by the fact that regional identities were not determined only in relation to the national state, but also by virtue of supranational factors, including economic and political integration in the European Community. A first outcome of this change occurred in 1995 with the direct election of the presidents of the regional councils, which was completed in 1999 with the first constitutional reform in a federalist direction, which granted the regions full statutory autonomy, and with the Bassanini reforms in 1997 that were based on the decentralization of powers. In 2001, the Italian Constitution was modified in an even more markedly federal way, with the expansion of the legislative, administrative, organizational and fiscal functions of the Regions with the aim of strengthening the decision-making power of citizens in the determination of political guidelines and to bring public power to the specific situations and needs of citizens[61].

In fact, however, we had to wait until the 2000s for the territorial dimension to have a relevant role in regional policies as well as in relation to the different behavior of regional actors in relation to the cultural, social and economic globalization which is accompanied by a process of Europeanisation of public policies[62]. In 1999, in conjunction with the first federalist reform of the Constitution, a study by the Italian Geographic Society on the territorial Reorganization of the State,

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59 Groppi T., *Lo stato regionale italiano nel XXI secolo, tra globalizzazione e crisi economica*, Revista d'estudis autonòmics i federals, n. 21, aprile 2015

60 Keating M., *The new regionalism in Western Europe*, Cambridge University Press, 1998

61 Cecchetti M., *Le riforme costituzionali del 1999-2001 sulla forma di Stato dieci anni dopo*, Nuove Autonomie, n. 1, 2010

62 Conti S., Salone C., *Il Nord senza bussola: dinamiche spaziali e strategie territoriali a centocinquant'anni dall'Unità*, Semestrale di Studi e Ricerche di Geografia, Roma, XXIII, Fascicolo 2, luglio-dicembre 2011

in collaboration with the CNR, on the basis of a reasoning at European level on the simplification and reduction of sub-state administrative levels proposed the abolition of the existing Regions and Provinces and replacing them with a single intermediate body between the Municipality and the central State. This body should have contained within it the necessary resources to ensure adequate connections to the European urban network, rearranging the territorial organization hand in hand with a reconfiguration from the model of local governance that focuses on the theme of municipal cooperation. The spirit of the proposal, which transcended the previous administrative subdivisions, was drawn on an organizational idea founded upon new localization factors which were able to identify a plurality of strategic centralities. The elements on which the subdivision of 36 new regional authorities, in place of the 20 Regions and 103 Provinces existing at that time[63], was based was the unavoidability of urban functions relating to metropolitan systems with greater settlement density, a delimitation of the physical space functional to the reference gravitational system from a residential, productive or free time, infrastructural accessibility on the basis of connection networks and the enhancement of relational, cultural and social capital. The proposal envisaged self-sufficiency of the region, which were to be able to exercise within itself the greatest possible number of functions and was considered to be the new crop as the result of an inter-municipal aggregation and not of a consolidation of the existing provinces[64].

This study followed the work done by the Giovanni Agnelli Foundation which, between 1992 and 1996 - in the period in which more political space was given to the suggestions linked to federalism, even with secessionist hypotheses - had imagined an Italy subdivided into 12 regions, mostly deriving from the aggregation of existing ones[65]. In 2012, with the approval by the Government of the Law Decree that reduced to 51 the Italian Provinces in the Regions with ordinary statute - also in this case uniting some of the already existing Provinces - the geographers went back to the issue, starting from the 1999 proposal. The reflection launched in the last five years has explored several of the factors examined so far. The industrial districts were the spur for the creation of new provinces during the nineties, but there haven't been counterpoint considerations on the decline of the existing districts, nor were the provincial coordination plans reinforced for a more current management of the collective services. The Territorial Pacts and the Integrated

63 At present, the Italian administrative division consists of 20 Regions, 80 Provinces and 14 Metropolitan Cities

64 Archibugi, F. (eds.), *Una proposta di riorganizzazione urbana e di riequilibrio territoriale e ambientale a livello nazionale-regionale*, Gangemi Editore, Roma, 1999

65 Pacini, M (eds.), *Un federalismo dei valori*, Edizioni della Fondazione Giovanni Agnelli, Torino, 1996

Programs have fueled the proliferation of entities placed at an intermediate scale between Municipalities, Provinces and Regions, which also include other subjects such as the Health Authorities, the Mountain Communities and the Optimal Territorial Areas, for a set of subdivisions that risk causing overlapping of skills and dysfunctions in the use of services by citizens as a consequence of an intricate administrative mechanism. In recent years, in fact, other forms of administrative partition have arisen, such as the Metropolitan Cities - included in the Constitution with the 2001 reform - or the Unions of Municipalities. However, it was a matter of processes imposed from above, according to a top-down approach: when literature questions the place-based approach with a view to greater involvement of the territory, the Italian reality sees an almost null involvement of citizens in the continuous changes of the overlying administrative system, to the point of causing confusion in the identification of institutions of reference - who does what - and difficulties in the continuity of the provision of services.

5.1. Beyond the administrative partitions: other forms of regionalization

Next to the administrative dimension, the Italian territorial structure was also based on the creation of other types of partitions. These often followed different motivations with respect to administrative ones, sometimes also linked to specific functional needs and management of economic and financial resources. The thrust dictated by the possibility of access to resources deriving from European funds has identified, starting from the nineties, new forms of territorial partition, such as those determined by territorial pacts and integrated territorial projects, with which it attempted to take into consideration the specific features of the territories[66]. These methods of subdivision took the form of industrial districts, which according to Fabio Sforzi[67] had to enhance the work of Giacomo Becattini taking into account the local communities, the "socio-cultural and institutional milieu within which the individual enterprises and constitutes a condition of life"[68]. From the district identification methodology proposed by Fabio Sforzi[69], we have moved on to a model established by Istat which is based on objective statistical indicators that refer to local systems of work without taking into account the administrative boundaries of Regions and Provinces, thus creating trans-regional districts: this system however deprived large areas of districts, particularly in the South. Indicators were therefore predetermined differently for the southern regions, but the areas so identified often did not correspond to perceptions of local

66 Celata, *op. cit.* note 19

67 Sforzi F., *Il distretto industriale: da Marshall a Becattini*, Il pensiero economico italiano, 16, 2, 2008

68 *Ibid.*, p.74

69 *Ibid.*

actors and directors' expectations[70]. For these reasons, the task of identifying the districts has been entrusted to a political decision-maker, i.e. the Regions, which led to an increase in the areas identified, their average size and the portion of covered territory, reinterpreting the meaning of the district, in one case as a supply chain, in another as a local production system, in another as a meta-district. This resulted in difficulties in adopting methods of partition based on objective and uniform criteria in favor of broad indications that offer spaces for an ideological approach to the overarching political project, and allow to modify the boundaries, in a concerted manner, according to specific cases[71].

The forenamed aggregation of the territory, determined by the local labor systems, is based on the socio-economic elements of the individual territorial areas: the SLL can therefore be considered a sort of statistical translation of economic theories on the segmentation of the labor market of the seventies. Their cropping is based on algorithms of regionalization, whose task is to identify homogeneous labor markets, i.e. areas in which - on the basis of the data available and input into the algorithm - an overlap between demand and supply of labor is determined[72]. According to the aforementioned definition of Gambi, local labor systems are also a form of regionalization based on statistical elements called upon to identify portions of territory on which there is a sufficient number of activities able to offer employment and services to the resident population, based on of the principle according to which work is the structure the territorial configuration of the communities.

From an administrative point of view, local labor systems consist of the aggregation of two or more adjacent municipalities, based on self-containment, i.e. the ability of an area to include the greatest possible amount of human relations between workplaces and those of residence[73], creating a territorial grid that completely depletes the national space[74].

As far as the territorial pacts are concerned, their introduction into the Italian legal system did not contemplate the identification of the reference areas, which follow those of the Municipalities that signed the memorandum of understanding. This aspect determines a process of voluntary aggregation which, although rare in re-

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70 Celata. *op. cit.* note 19

71 *Ibid.*

72 Coppola C., Mazzotta F., *I sistemi locali del Lavoro in Italia: aspetti teorici ed empirici*, MPRA Paper, Quaderni di Ricerca, 2, novembre 2005

73 Sforzi F., Wymer C., Gillard A. A., *I sistemi locali del lavoro nel 1991*, Istat, I sistemi locali del lavoro 1991, Roma, 1997

74 Barbieri, G., Pellegrini, G., *I Sistemi locali del lavoro: uno strumento per la politica economica in Italia e in Europa* in Atti del Convegno Uval-DPS. Ministero del Tesoro, Roma, 2000

gional development policies, reflects on constitutional principles for the revision of administrative boundaries. A procedure established at central level and imposed as a condition for access to funding but which leaves local actors the right to freely determine the areas of intervention, offers margins to the geography of the places - as for historical-geographical regions, functional areas or local production systems - and encourages cooperation, although lending itself to possible discontinuity or forms of exclusion from access to finance[75].

The integrated territorial projects, established in 2003 within the framework of the Community cohesion policy, were born with the intention of introducing forms of collaboration between public and private actors which are able to transform the existing institutional contexts[76]. The need to understand most of the territories has conditioned the methods for identifying the areas, entrusted to the Regions or the concertation among local authorities and excluding the selectivity in access to the funds since the valorization of the quality of local processes appears incompatible with the inclusion of (as wide as possible) territorial portions, in addition to ensuring that these areas rarely coincide with those of territorial Pacts, giving rise to yet another geographical sub-division founded on the modalities of management interventions[77].

5.2. The Italian administrative partition in the light of the European framework

If in fact in the first phase of its history the European Union did not adequately consider intermediate territorial levels because of the state structuring of the EEC - so much so that, in the Treaty of Rome of 1957 establishing the Community there is no mention to the sub-state entities - the cohesion policy and the tendency towards decentralization that characterized the Member States' approach in the 1980s made the regions visible in the European debate.

Another element considered was the geographical distribution of the territory of the European Union on the basis of the NUTS, on which the redistribution of the Community structural funds is built. In Italy NUTS 3 territories correspond to the Provinces, the NUTS 2 to the Regions, and only the NUTS 1 belong to macro-regional allocations that do not correspond to administrative entities, but which substantially follow European electoral constituencies. The increase in the

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75 Celata, *op.cit.* note 19

76 Lefebvre C., La Nave M., *Competitività e pubblica amministrazione. Il ruolo degli enti locali nei processi di sviluppo agli inizi del Terzo Millennio* in Muscarà, C., Scaramellini, G., Talia, I., Tante Italie una Italia. Dinamiche territoriali e identitarie. Vol. 1 Modi e nodi della nuova geografia, Franco Angeli, Milano, 2011

77 Celata, *op. cit.* note 19

third level territorial units that occurred in Italy between 1992 and 2004, with the province number rising from 95 to 110, is found only in Spain, while the opposite process took place in Denmark, Sweden, Great Britain and Germany in spite of the unification[78]. The novelty of the approach lies in consideration for the provisional nature of changes in administrative boundaries "because it is impossible that, despite intelligence and comprehension of all the requirements, an administrative découpage - inevitably made based on the needs of a precise historical moment - can maintain its effectiveness through the mutability of the decades"[79].This also highlights the need for the involvement of different disciplines beyond geography in the delimitation of the areas. On this basis, the recent proposal for territorial reorganization issued by the Italian Geographical Society is founded upon the combination of three principles: the functional dimension of the cropping, the territorial identity - where the justification of the community "place based" approach is - and the physiognomy of eco-systems set on their geomorphological dimension[80].

5.3. Some consideration about Italian regionalization process

The overcoming of the fixed administrative boundaries takes up the considerations of Gambi[81] on the need to update the regional articulations according to the evolution of the economy, society and culture. The reflections made highlight the ability of geography, in the various historical moments, to propose alternative solutions to the *status quo*[82]. Some scholars[83] question the feasibility of this hypothesis because functional criteria that should represent one of the factors of updating the territorial design have changed in a relevant and sudden way since the fifties: the redefinition of the boundaries that would derive from it would have caused evident problems of stability and administrative continuity to the regional authorities. Another issue is related to the difficulty of providing a single

78 Società Geografica Italiana, *Per un riordino territoriale dell'Italia*, Roma, giugno 2013

79 Castelnovi M. (eds.), *Il riordino territoriale dello Stato, riflessioni e proposte della geografia italiana*, Società Geografica Italiana, Roma, 2013

80 Società Geografica Italiana, *Oltre le regioni: aree metropolitane, poli urbani, comunità territoriali*, Caire, Reggio Emilia, 2014

81 Gambi L, *Questioni di geografia*, Edizioni scientifiche italiane, Napoli, 1964; Gambi L., *L'irrazionale continuità del disegno geografico delle unità politico-amministrative*, in Gambi L., Merloni F., *Amministrazione pubblica e territorio in Italia*, Il Mulino, Bologna, 1995; Gambi L., *Le "Regioni" italiane come problema storico*, Quaderni storici, XII, 34, 1977

82 Luca D., Salone C., *Teorie regionali e regioni istituzionali. Per un'ontologia del rapporto tra spazi di governo e spazi di azione collettiva*, Rivista Geografica Italiana, 122, 2013

83 Desideri C., *Regionalism and territorial politics in Italy*, Acts of Convention Federalism, Regionalism and Territory, IACFS e ISSIRFA-CNR, Roma, 19-21 settembre 2012

region dimension, albeit provisional and limited in time, able to summarize all the functions and criteria that would be considered. Finally, if on the one hand - as Mennini recalls[84] - the weakness of the idea of Italy is reflected in the lack of coincidence among the people-soil link and the connection between political entity and territory – then on the other hand for Nevola those regions born as statistical compartments "have consolidated over time as such and institutionalized in the collective imagination, in political culture, in political and administrative practice and sometimes even in the daily life practices of citizens. Transmitted from one generation to the next, these "invented regions" have become "realities", social reality, contexts of political and territorial life. They have become elements of the landscape of national collective memory, containers defined by events and characters, of myths and stereotypes or "regional" characters of the Italian nation".

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LEGAL REGULATION OF CREDIT INSTITUTIONS ACTIVITIES IN THE REPUBLIC OF CROATIA AND THE EUROPEAN UNION

ABSTRACT

Credit institutions are financial institutions which main activities are taking deposits from those who have surplus of money and to grant credits to those who have deficit of money and who needs money for investment or spending. By providing its services, credit institutions perform an important social function which is transferring money from people or corporations who has surplus to the people who has deficit of money. In addition to these core banking services, credit institutions provide other services such as payment services, exchange services, investment services etc. By providing their services, credit institutions manage significant amounts of money collected from the public. In order to protect depositors and investors, credit institutions' operations are heavily regulated by a number of legal rules and regulations.

In this paper it will be presented an overview of the EU legal system which regulates the activities of credit institutions in European Union. Those rules and regulations also apply in the Republic of Croatia as one of the member of the European Union. It will be presented a single rulebook that is a legal base of EU Banking Union. In brief, the Regulation (EU) No. 575/2013 and Directive 36/2013/EU, which regulates access to the activity of credit institutions, prudential requirements for credit institutions and the prudential supervision of credit institutions. Also it will be presented the Directives 2014/49 / EU and 2014/59 / EU which regulates deposits insurance and recovery and resolution of credit institutions. Finally, an overview of the regulation development in Croatia starting since 1990 up to today will be given, including the laws transposing the above-mentioned EU directives.

Keywords: *Credit institutions, EU, EU Banking Union*

1. DEFINITION OF A CREDIT INSTITUTION AND SERVICES THAT CREDIT INSTITUTIONS PROVIDE

A credit institution can be defined as an institution which provides services of collecting deposits and granting credits or loans from these deposits and which provides other financial market assisting services such as payment services, bank account managing services, credit card issuing and managing services, investment services and other similar services. [1]

A credit institution, by providing its services, performs a very important social function of transferring monetary surpluses from people who spend less than their income and save money (depositors, investors, etc.) to the people who wants to spend more that they currently have for investment or for consumption (loan users).

Of all aforementioned services that credit institutions provide, the most important one is collecting deposits from the public. Credit institutions are the only financial institutions authorized to collect deposits from the public and no other institution can collect deposits from public. Because of that feature we often call them deposit institutions. However, in the EU regulations, for the institutions that are authorized to collect deposits is used the term credit institution[2]. It is not quite clear why EU legislators have opted for the term credit institution, when we know that credits and loans can be offered and granted by any other financial institution and by any other legal or natural person. Logical term for an institution that is authorized to collect deposits is deposit institution instead of credit institution. However, legislators in the European Union have opted for the concept of credit institutions, so the term credit institution is used in the legal regulations and other documents of the European Union and all EU Member States, including the Republic of Croatia.

For reasons of simplicity, credit institutions are often identified with banks. Credit institutions are broader term but at least of 90% or more of credit intuitions are banks. In Croatia, more that 98% of credit institutions are banks and other, less than 2%, are saving banks and housing saving banks.

In regulations it can be finded a legal definition of a credit institution. In Croatia and the European Union, a credit institution is defined in Article 4, paragraph 1,

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1 Rose, P. S. *Commercial Bank Management*. 4th ed. Singapore: The McGraw-Hill Companies, p. 10

2 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013., Further in the text: Regulation (EU) No 575/2013)

item 1 of Regulation (EU) No. 575/2013 and credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

In Croatia, a credit institution can be established as a bank, a savings bank or a housing saving bank. At the end of 2016, we had 25 banks, 1 savings bank and 5 house saving banks operated in Croatia. At that time banks had approximately than 390 billion HRK, which is about 98% of the total assets of credit institutions in Croatia.

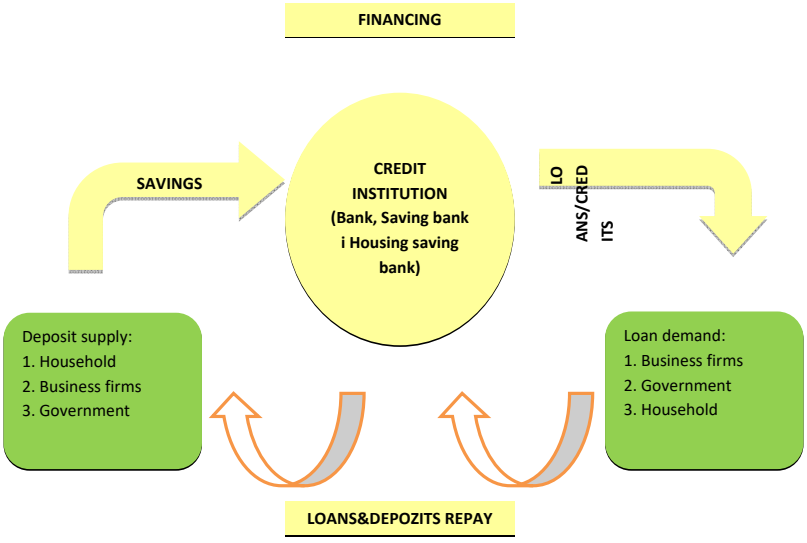
Table 1: Credit institutions in Croatia at the end of 2016 (in 000 HRK)

Credit institutions	Number	Total Assets	% of Assets
Banks	25	388.718.279	98,02%
Saving banks	1	3.643	0,01%
Housing saving bank	5	7.811.079	1,97%
Total	31	396.533.001	100,00%

Source: Croatian National Bank statistics, 2018

A Bank is a credit institution that can provide all banking and financial services in Croatia and outside the territory of Croatia while savings banks, and housing savings banks can provide only a limited number of banking and financial services.

Figure 1: Flows of Funds



Source: Adjusted according with Mishkin F.S, Eakins E.G., *Financial markets and institutions*, Mate d.o.o. 2005, p. 16

As mentioned earlier credit institutions collect deposits and transfer it to those who need funds and this activity is extremely important for the whole economy. People who save money and spend less then earn are usually not entrepreneurs and they do not know how to invest their funds. Credit institutions act as intermediaries between those two groups. They offer an opportunity to earn an interest with low risk to the people with surpluses of money, and they offer fund to the people who need it. If there were no credit institutions acting as intermediaries, people with money surpluses would have to find profitable business themselves and take the whole risk of investing or not invest at all. Not investing would have a significant negative impact on economic activity, because entrepreneurs need money for new projects and consumers need money for consumption. Without the loans economic activity would shrink.

The graph shows how the money comes from depositors/creditors through credit institutions to borrowers/consumers based on lending and after a certain period of time the loans will be repaid and the depositors claim their savings. And the cycle can start all over again.

In general, household and individuals save more money than they use loans but entrepreneurs and business firms need funds for investments and they use more loans than they save.[3] As it is shown from the figure, depositors invest their money in credit institutions. Credit institutions grant loans to business firms, government and individuals. Doing that credit institutions take all the risk that can arise from non-payment of debtors.

2. REASONS WHY CREDIT INSTITUTIONS ARE REGULATED

Businesses and individuals hold a significant portion of their funds in credit institutions. In most of countries in the world, total assets of credit institutions exceed the GDP of that country. Managing significant amounts of money credit institutions affect the whole economy and they have the substantial impact on the entire financial system. For these reasons, credit institutions are commonly treated as a matter of public interest.[4]

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[3] Mishkin, F.S., Eakins, S.G., *Financial markets and institutions*, Eighth edition, p. 20

[4] Spong, K., *Banking Regulation: Its Purposes, Implementation and Effects.* Fifth edition. Kansas City: Federal Reserve Bank of Kansas City, p. 7

Table 2: Total assets of credit institutions and GDP comparison

2016 (in billions of US$)	Total assets of credit institutions	Total assets of all financial institutions (%)	Total assets CI and GDP ratio (%)
USA	17.986	23,90	103,28
Eurozone	38.087	55,27	288,22
Croatia	60,89	69,47	114,88

Sources: FED, ECB and CNB, 2018

Development of special regulation for credit institutions has been gradual and every major bank or financial crisis initiated new rules. Prior to the deposit insurance system or liquidity support system or supervision there were numerous cases of financial panics and bank runs. Thus, in the 19th century, bank crisis in the United States occurred every 20 years, in 1819, 1837, 1857, 1873, 1884, 1893, and 1907.[5] During that period, banks' insolvencies and failing represented a major problem. As credit institutions grant long term loans they cannot have enough liquidity for all depositors in case of bank runs. However, in situations of financial crisis, depositors doubt the ability of a credit institution to pay off deposits. In financial crisis depositors of all credit institutions are doing the same thing they try to withdraw their own funs form the bank. In the past there were no liquidity support and banks could not find enough liquidity to repay all deposits. For that reason and among other things, the Federal Reserve System – FED was established in 1913 by Federal Reserve Act.[6]

The Federal Reserve –FED was established to prevent such situations by providing a reserve base and by allowing banks to borrow funds from Reserve banks to meet depositor needs and

demands. To provide further confidence to depositors, the U.S. Government instituted federal deposit insurance system in the 1930s. The main aim of deposit insurance system was to eliminate the link between the fate of a bank and small depositors. Deposit insurance system insured that the small depositor got their deposit from state agency in case their bank fails. Although deposit insurance has not been without cost or risk, it has provided stability in the payments system and given bank regulators greater flexibility in resolving individual bank problems.[7]

Protection of deposits and depositors is the primary reason for regulation and supervision of credit institutions. Over time, it was recognized that the regulation

5 Mishkin, Eakins, *op. cit.* note 4, p. 492

6 Spong, *op. cit*. note 4, p. 20

7 Spong, *op. cit.* note 4, p. 20

and supervision of an individual credit institution (microprudential regulation and supervision) is not sufficient. Regardless of how well the credit institution manage the risk, systemic risk can be transferred to a credit institution from other credit or financial institutions. And the instability that occurs in the system usually is transferred to all credit institutions. For that reason, another level of supervision and regulation of credit institutions is being developed. That is macroprudential regulation and supervision which primary goal is to preserve the stability of the whole financial system.

Table 3: Comparative representation of microprudential and macroprudential regulation

	Micrprudential regulation	**Macroprudential regulation**
Proximate objective	Limit distress of individual Institutions	Limit financial system-wide Distress
Ultimate objective	Investor and depositor Protection	Avoid financial instability
Calibration of prudential controls	In terms of system-wide risk; top-down	In terms of risks of individual institutions; bottom-up

Sources: Bank for International Settlements (2008) *Adressing financial system procyclicality: a possible framework.* Note for the FSF Working Group on Market and Institutional Resilence, p. 4/17.

According to different researches consequently the main goals of regulation and supervision of credit institutions are: stability of credit institutions, protection of depositors and investors and the stability of the entire financial system.

3. BANKING UNION AND REGULATIONS FOR CREDIT INSTITUTIONS IN THE EU

In EU, the core principle of the Single Market for services is a freedom to establish a company in any EU country and a freedom to provide services in an EU country other than the one where the company is established. (Article 49. and 56. TFEU)[8].

In accordance with these freedoms in 1989. *Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions* was adopted[9]. This Directive introduced freedom to provide banking services in whole EU. That means that a credit institution can be established in any EU member State with the license of the home

[8] Articles 49 and 56 of Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012.)

[9] Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 386, 30.12.1989)

competent authority and to have a freedom to provide services in any other member State (single license/single passport rule).

The same rule applies also in Croatia; the credit institution established in Croatia with the license of Croatian National Bank can provide its services in any EU country. In addition, credit institution from another EU country can provide its services in Croatia without license from Croatian National Bank.[10]

According to ECB "Banking union is an important step towards a genuine Economic and Monetary Union. It allows a consistent application of EU banking rules".[11] The Banking Union is based on a unified regulatory framework that applies to all credit institutions in the EU. That unified regulatory framework is called single rulebook and is divided into three key areas:

- Establishment and prudential requirements for credit institutions (CRD IV package),
- Recovery and resolution of credit institutions (BRRD) and
- Deposit Guarantee Schemes (DGS).

The Banking Union has three pillars: Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and European deposit insurance scheme (EDIS).

The Single Supervisory Mechanism (SSM) refers to the system of banking supervision in the Eurozone. It comprises of the ECB and the national supervisory authorities. The ECB directly supervises the 118 significant banks of the participating countries. These banks hold almost 82% of banking assets in the euro area.[12] The Single Resolution Mechanism is the second pillar of the banking union which main purpose is to ensure the efficient resolution of failing banks with minimal costs for taxpayers and to the real economy. Central resolution authority in the Eurozone is Single Resolution Board. A Single Resolution Fund, financed by contributions from banks, will be available to pay for resolution measures.[13] European deposit insurance scheme (EDIS) proposal builds on the system of national de-

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10 Art. 74. to 89. of Credit Institutions Act, Official Gazette No. 159/13, 19/15, 102/15, 15/18

11 Quoted from European Central Bank webpage: [https://www.bankingsupervision.europa.eu/about/bankingunion/html/index.en.html] Accessed 08.02.2018

12 According to European Central Bank webpage: [https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html] Accessed 08.02.2018

13 According to European Commission website: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/single-resolution-mechanism_en] Accessed 08.02.2018

posit guarantee schemes (DGS) regulated by Directive 2014/49/EU. This system already ensures that all deposits up to €100 000 are protected through national DGS all over the EU. EDIS would provide a stronger and uniform degree of insurance cover in the euro area. This would reduce the vulnerability of national DGS to large local shocks, ensuring that the level of depositor confidence in a bank would not depend on the bank's location and weakening the link between banks and their national sovereigns.[14] EDIS would apply to deposits below €100 000 of all banks in the banking union. When one of these banks is placed into insolvency or in resolution and it is necessary to pay out deposits or to finance their transfer to another bank, the national DGS and EDIS will intervene.

4. ESTABLISHMENT OF CREDIT INSTITUTIONS AND PRUDENTIAL REQUIREMENTS FOR CREDIT INSTITUTIONS

The establishment of credit institutions, prudential requirements for credit institutions and prudential supervision of credit institutions in the EU are regulated by uniform set of rules called CRD IV package. CRD IV is composed of:

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 335, 23.12.2015.

- 10 Commission implementing regulation (ITS)
- 11 Commission delegated regulation (RTS) and
- 12 Guidelines

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 158, 27.5.2014.) and

- 18 Commission implementing regulation (ITS)
- 45 Commission delegated regulation (RTS) and
- 10 Guidelines

With this unique set of rules for credit institutions throughout the European Union has been regulate:

[14] According to European Commission website: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/european-deposit-insurance-scheme_en] Accessed 08.02.2018

- **Establishment of credit institutions.** Credit institution is obliged to obtain authorization from supervisory authority before commencing their activities. Credit institution has to fulfill conditions to be granted authorization such as initial capital of at least 5 million EUR, suitable shareholder, sound and prudent management, personnel, organizational and technical conditions for providing services. Credit institution has to allow supervision at any time. Once credit institution obtain authorization, it can provide its services all over the entire EU (single passport principle). In Croatia, the supervisory authority is Croatian National Bank.[15]

- **Authorization for shareholders.** Shareholders who decided to acquire 10% or more shares of credit institution also has to obtain authorization from supervisory authority. Shareholders have to have a good reputation, financial strength and act in the best interest of the credit institution.[16]

- **Internal governance and risk management.** Members of the management body have to possess adequate knowledge, skills and experience. They have to act with honesty, integrity and independence of mind. Members of the management body also need to have authorization from supervisory authority.[17]

- **Capital requirements.** Regulation (EU) No 575/2013 sets the minimum capital requirements. Credit institutions shall at all times satisfy own funds requirements: Common Equity Tier 1 capital ratio of 4,5% of Risk-Weighted Assets (RWA), Tier 1 capital ratio of 6% of RWA and total capital ratio of 8% of RWA. Regulation (EU) No 575/2013 sets out in detail the method of calculating risk-weighted assets.[18]

In addition, Directives 2013/36/EU sets more capital requirements in form of capital buffers. There are five capital buffers: Capital conservation buffer of 2,5% of RWA, Countercyclical capital buffer that can be used to reduce negative effects of economic cycles, Systemic risk buffer that is used to protect a credit institution from systemic risks, global and other systemic risk buffers that can be used to protect systemic important banks. [19]

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15 Article 8. of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC OJ L 335, 23.12.2015., further in the text: Directive 2013/36/EU

16 Article 22. of Directive 2013/36/EU

17 Article 88. of Directive 2013/36/EU

18 Article 92. of Regulation (EU) No 575/2013

19 Article 128. of Directive 2013/36/EU

Regulation (EU) No 575/2013 will soon sets a minimum requirement of 3% for the financial leverage Ratio.

- **Liquidity requirements.** Regulation 575/2013/EU sets the minimum liquidity requirements. Credit Institutions shall hold enough liquid assets to cover their net liquidity outflows. Moreover, Credit institutions shall ensure that long-term obligations are adequately met with stable funding instruments. [20]

- **Limits to large exposures.** Regulation 575/2013/EU sets that credit institution shall not incur an exposure to a client or group of connected clients the value of which exceeds 25 % of its eligible capital. [21]

- **Supervision of credit institutions.** Each Member State shall designate a competent authority that shall supervise credit institutions and grant authorization to credit institution, its shareholders and its management body. [22]

In Croatia, competent supervisory authority is Croatian National Bank and in the Eurozone competent supervisory authority is European Central Bank.

"The purpose of the Single Rulebook is to ensure the consistent application of the regulatory banking framework across the EU." [23]

Credit Institutions Act which entered into force on January 1, 2014, transposed Directive 2013/36/EU into Croatian legislation and set the rules for application of Regulation (EU) No. 575/2013/EU.[24] In addition to Credit Institutions Act, 35 Decisions as subordinate legislation have been adopted to further regulate capital buffers, suitability of management and supervisory board members, rules for shareholders, risk management, internal control system etc.

Credit Institution Act introduced Croatian National Bank as competent authority for credit institutions. That means that CNB has powers to issue and to revoke authorization for credit institutions, for shareholders and for members of management and supervisory boards of credit institutions. CNB has powers to supervise credit institutions and to issue supervisory measures. CNB can initiate misdemeanor proceedings in case of violation of the rules. The CNB is also designated

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20 Article 411. of Regulation (EU) No 575/2013

21 Article 395. of Regulation (EU) No 575/2013

22 Article 4. of Directive 2013/36/EU

23 Quote from European banking authority website: [https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook] Accesed 08.02.2018

24 Article 2. of Credit Institutions Act, Official Gazette no. 159/13, 19/15, 102/15, 15/18

as a macroprudential authority in Croatia and has powers to introduce macroprudential measures. [25]

Credit Institutions Act introduced additional capital requirements so called capital buffers.

CNB has identified systemically important credit institutions in Croatia and we have 8 credit institutions that are systemically important: Zagrebačka banka d.d., Erste & Steiermärkische Bank d.d., Privredna banka Zagreb d.d., Raiffeisenbank Austria d.d., Splitska banka d.d., Addiko Bank d.d., OTP banka Hrvatska d.d. and Hrvatska poštanska banka d.d.[26]

Credit Institutions Act has imposed penalties for minor offenses in case of violating the provisions of the Credit Institutions Act or Regulation 575/2013 ranging from HRK 50,000 to 10% of annual income.

5. RECOVERY AND RESOLUTION OF CREDIT INSTITUTIONS

Resolution and recovery of credit institutions are regulated by:

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014. and

- 1 Commission implementing regulation (ITS)
- 15 Commission delegated regulation (RTS) and
- 12 Guidelines

With this unique set of rules for resolution and recovery of credit institutions throughout the European Union has been regulate:

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[25] Article 11. of Credit Institutions Act, Official Gazette no. 159/13, 19/15, 102/15, 15/18

[26] CNB Notification on the review of the identification of other systemically important credit institutions in the Republic of Croatia. CNB website: [https://www.hnb.hr/documents/20182/2293349/e-priopcenje-preispitivanje-sistemski-vaznih-ki-u-RH_22-2-2018.pdf/cb8b76ed-6aef-4a4d-aac0-defa83565ccd] Accessed 08.02.2018

- **Recovery plans**. Recovery Plan is a plan drawn up by the credit institution itself that provides measures to be taken by credit institution in case of financial distress. In this plan, the credit institution itself envisages measures to improve capital, liquidity and business stability.[27]

- **Early intervention measures.** The supervisory authorities have additional powers (in addition to supervisory powers) which can be taken in the event of financial distress such as: require the credit institution to implement one or more measures from recovery plan or replace an individual member of the management, introduce a special administration, Write down of capital instruments to absorb losses, etc. All these measures may be taken as early intervention measures. Early intervention is a formal procedure that can be initiate by the decision of the supervisor. Formal decision on opening an early intervention has to be deliver to the deposit insurance system to prepare for deposit repay. [28]

- **Resolution plans**. Resolution plans are plans that resolution authority will draw up for each credit institution and that plan shall provide resolution actions which resolution authority may take in case of resolution of credit institutions.[29]

- **Resolution** is a procedure in which resolution authority applies one or more resolution tools to protect depositors and clients fund and to avoid a significant negative effect on the financial system[30]

- **Resolution authority**. Each Member State shall designate a resolution authority that will prepare resolution plans, manage resolution fond and applies resolution tool if necessary. In Croatia State Agency for deposit insurance and bank resolution is one resolution authority and Croatian National Bank another. In Eurozone, Single Resolution Board is a resolution authority for all credit institutions that are part of single supervisory mechanism.[31]

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27 Article 5. of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173), further in the text: Directive 2014/59/EU

28 Article 27. of Directive 2014/59/EU

29 Article 10. of Directive 2014/59/EU

30 Article 31. of Directive 2014/59/EU

31 Article 3. of Directive 2014/59/EU

- **Resolution fund.** Resolution fund is financed by credit institutions and funds can be spent for resolution of any credit institutions. [32]

Resolution of Credit Institutions and Investment firms Act which entered into force on February 2015, transposed Directive 2014/59/EU into Croatian legislation and set the rules for recovery and resolution of credit institutions.

Resolution of Credit Institutions and Investment firms Act introduced three resolution authorities in Croatia. Two of them Croatian National Bank for credit institutions and Croatian financial services supervisory agency for investments firm have powers before the resolution in the phase of preparing for resolution. Theirs powers include the power to prepare resolution plan, to monitor if the conditions for resolution has been met and to propose resolution. And the third resolution authority is Croatia State Agency for deposit insurance and bank resolution that carries resolution procedure if credit institution or investment firm is in public interest. DAB also maintains a resolution fund. [33]

Since the Resolution of Credit Institutions and Investment firms Act we have had one credit institutions in resolution, Jadranska bank headquartered in Šibenik. DAB opened resolution procedure on Jadranska bank because Jadranska bank was failing and saving thefailed bank was considered as a public interest. DAB applied resolution instruments and wrote down capital instruments to absorb losses, used money from resolution fund to cover remaining losses and prepare Jadranska bank for merging with another bank.[34]

On other side on three banks: Nava banka d.d., Banka splitsko dalmatinska d.d. and Tesla štedna banka d.d. bankruptcy proceedings were initiated. Saving those banks were not in public interest because they were small banks.[35]

6. DEPOSIT INSURANCE SYSTEM

Deposit insurance system is regulated by:

Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, Further in text: DGS or Directive 2014/49/EU) and

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32 Article 100. of Directive 2014/59/EU

33 Article 8. of Resolution of Credit Institutions and Investment firms Act, Official Gazette No. 19/15

34 Decision of initiation of resolution procedure on Jadranska bank: [http://www.dab.hr/novosti/] Accessed 08.02.2018

35 CNB list of credit institutions undergoing bankruptcy proceedings [http://www.hnb.hr/en/core-functions/supervision/list-of-credit-institutions] Accessed 08.02.2018

- 4 Guidelines

With this unique set of rules for deposit insurance system throughout the European Union has been regulate:

- **Deposit insurance.** With this set of rules the same level of deposit insurance in the amount of EUR 100,000 was established in EU countries. Designated authority is obliged to repay insured deposits within 20 working days from the day that the deposits are determined unavailable. [36]
- **Contributions to the deposit insurance system.** Credit institutions are obliged to contribute to deposit insurance fund on base of the amount of cover deposits and the degree of risk incurred by the credit institution. [37]
- **Deposit insurance fund.** Each Member State shall designate an authority which administers a deposit insurance fund or deposit guarantee schemes. In Croatia designated authority is State Agency for deposit insurance and bank resolution. Deposit insurance fund should have enough money to repay insured deposits in case of deposits become unavailable. Directive 2014/49/EU set a minimum funds of deposit insurance fun at a level of 0,8% of all insured deposits. [38]
- **Use of funds from deposit insurance fund.** Funds shall be primarily use in order to repay depositors but can also be used in order to finance the resolution of credit institutions and as alternative measures in order to prevent the failure of a credit institution. [39]

Deposit Insurance Act which entered into force on July 2015, transposed Directive 2014/49/EU into Croatian legislation and set the rules for deposit insurance.[40]The Act designated State Agency for deposit insurance and bank resolution as designated authority for deposit insurance and for maintaining deposit insurance fund.[41] Deposit Insurance Act has determined the minimum level of the deposit insurance fund, which is 2.5% of the insured deposits.[42] As of 31 December 2016, in all credit institutions in Croatia there were about HRK 165 billion of insured

36 Article 6. and 8. of Directive 2014/49/EU
37 Article 13. of Directive 2014/49/EU
38 Article 10. of Directive 2014/49/EU
39 Article 11. of Directive 2014/49/EU
40 Article 2. of Deposit Insurance Act, Official Gazet No 82/15
41 Article 3. of Deposit Insurance Act, Official Gazet No 82/15
42 Article 14. of Deposit Insurance Act, Official Gazet No 82/15

deposits.[43] This means that the minimum level of the deposit insurance fund is HRK 4,125 billion.

Credit institutions in Croatia are obliged to pay a premium for deposits insurance based on the insured deposits and the level of risk of an individual credit institution. This premium for each quarter is equal to 0.08% of insured deposits multiply with risk ranging from 50% to 150%.[44] This means that credit institutions in Croatia are obliged to pay contributions to deposit insurance fund in the amount of about 120 million HRK every three months.

7. HISTORICAL DEVELOPMENT OF BANK REGULATION IN CROATIA SINCE INDEPENDENCE UNTIL TODAY

7.1. The beginnings of banking regulation in modern Croatia

The Banks and Savings Banks Act (Official Gazette 94/1993) entered into force on October 28, 1993.[45] Prior to that, Banks and Other Financial Organizations Act from ex-Yugoslavia applied in Croatia. The Banking and Savings Act defines the bank as a financial institution established as a joint-stock company or as a limited liability company, whose business is performing all or only certain banking services. Banking services were then defined as: taking all kinds of deposits, granting credits, foreign exchange transactions, redemption of bills of exchange and checks, and provide payment services[46].This law has significantly changed the inherited institutional structure of banking regulation and introduced the banking system based on the free market. The main goals of new regulation were:

- establish a banking system on market principle without any influence from political factors or government bodies
- increase competition between banks and allow domestic and foreign entrepreneurs to participate as banks shareholders
- to strengthen the supervision of banks by the competent authority of the Croatian National Bank. The Act introduced supervisory standards using IMF guidelines.

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43 DAB publication: file://hnb.local/hnb/Users01$/dhlupic/Downloads/DEPOZITI%2031122016%20(1).pdf

44 Article 21. of Deposit Insurance Act, Official Gazette No. 177/04, 119/08, 153/200., 80/2013, 82/2015

45 Banks and saving bank Act, Official Gazette No 94/93, 12/95, 24/96, 90/96, 98/96, 89/98, 161/98

46 Article 1 and 3 of Banks and saving banks Act, Official Gazette No 94/93, 12/95, 24/96, 90/96, 98/96, 89/98, 161/98

By that Act, Croatia has adopted the European model of a universal, multifunctional bank. At the time, the financial sector was undeveloped and most of the financial sector was concentrated in the banks. In addition to collect deposits and grant loans, the law sought to encourage the development of providing other forms of financial services.

Since 1993 the banking market in Croatia was significantly liberalized and a large number of new banks were established. In 1990 in Croatia there were 30 banks and up to 1997, the number of banks was doubled and in 1997 there were 60 banks operating on the market.[47] However, many of the banks had financial problems and were unable to repay deposits, what affected the stability of the entire financial and economic system.

State Agency for deposit insurance and bank resolution was established in 1994, and the deposit insurance system has been established in 1998. Initially, the amount of the insured deposit was up to 30,000 HRK.

7.2. The regulator's response to the banking crisis

The 1998 Banking Act introduced restrictions to ensure better and safer banking operations. The Bank was defined as a joint stock company whose business is collecting deposits and granting credits and other placements. Since 1998 bank could only be established as a joint stock company, not as a limited liability company.

The 1998 Act introduced three types of authorizations and each of the authorization had a certain number of services the bank could provide. So the range of services that banks could provide was small, medium and large. The most important limitation was the limit on collecting deposit for the first three years. Newly established banks could not receive deposits in the first three years after its establishment.

The 1998 Act did not brought positive effects and the banking system remained unstable. Many of banks failed and the resolution was carried out on six banks, including the second-largest bank in Croatia Privredna banka Zagreb. The result was that the largest banks in Croatia, Zagrebačka and Privredna banka, were sold to foreign investors UniCredito and Intesa Sanpaolo. Many banks have ended up in bankruptcy, and some of the banks were merged with other banks. This has led to a reduction in the number of banks in the banking system from 60 banks in 1997, to the 41 in 2003, and that number continued to decrease.

[47] Draft of Banking Act from 1998

7.3. Harmonization with EU directives

The Banking Act from 2002 defined the bank as a financial institution that has been authorized by the Croatian National Bank. The definition was formal in a way that the bank is any financial institution that has received a CNB authorization. Banking services were defined as collecting deposits and granting loans from these funds for account of a bank as well as issuing electronic money.[48]

Banks could also provide financial services.

The 2002 Banking Act implemented Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions, which provided the freedom to provide services throughout the European Union. Restrictions from the previous Act have been abolished. Thus, a small, medium and large authorization was abolished and only one authorization was introduced. There were no limits on collecting deposit for the first three years.

The Act was amended in 2006 and the amendments introduced a savings bank as a "small" bank that can provide a limited range of bank services. The Banking Act was effective until 1 January 2009 when the Credit Institutions Act came into force.

Deposit insurance Act from 2004 increased the amount of insured deposit from 30.000 HRK to 100.000 HRK. In 2008 the amount of insured deposit increased from 100.000 HRK to 400.000 HRK. And from July 2013 amount of insured deposit is 100.000 EUR.[49]

7.4. Complete implementation of EU regulation

Credit institutions Act from 2009 implemented CRD I into Croatian legislation and that was one of conditions Croatia had to meet to become the member of the EU.

Credit Institutions Act, which entered into force on January 1, 2014, transposed Directive 2013/36/EU into Croatian legislation and set the rules for application of Regulation (EU) No. 575/2013/EU.

Regulatory activities in Croatia and European Union brought us large number of rules and regulations. The graph shows the number of regulations that are supervised by the CNB, DAB and HANFA (whose responsibilities are to supervise

[48] Article 2. of Banking Act, Official Gazette No. 84/02, 141/06., 117/08,74/2009

[49] Article 4 of Deposit insurance Act, Official Gazette No. 177/04, 119/08, 153/200., 80/2013, 82/2015

non-banking financial sector: pension and investment funds, insurance companies, leasing and factoring companies, etc.).

8. CONCLUSION

Credit institutions provides socially important services collecting deposits from public and investing those funds to those who needs it. By providing that service, credit institutions collect a large amount of money. Managing those funds is in the public interest. To protect public interest, activities of credit institutions are strictly regulated and supervised. In this paper, we have elaborated the most important regulations that regulates activities of credit institutions and protect depositors.

Almost every aspect of credit institutions operations has been regulated. From the establishment, credit institution has to obtain license before commencing their activities, it has to have enough capital; it has to have sound business strategy, fit and proper management structure, etc. Accomplishing all of these required conditions, credit intuitions provide insurance for its depositors and can attract more deposits. On one hand by the fulfillment of required conditions, regulators can achieve stability and safety of credit institutions business activities. However, on the other hand, plentiful regulation can have negative effects; for example, it can be too expensive for credit institutions. Today we have a term regulatory cost, it is a cost that credit institution have to bare for complying with rules and regulation. Some of that cost credit institutions tend to shift to its customers in order not to reduce their profits. Looking from that angle, regulators have to be very cautious not to exceed with regulation, and regulate only major aspect of credit institution activities that are important for stability and safety of credit institutions.

In the future, it can be expected a lot of innovation in banking activities like enhance internet banking, mobile banking, instant payment etc. Those innovations will bring new types of risks and new types of frauds like stilling identity or stilling a credit card on the internet etc. The regulators will follow the trends and will try to insure the safety of clients of credit institutions in the future.

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THE ACCESS TO THE EU FINANCIAL MARKET FOR THE COMPANIES FROM NON-MEMBER STATES[1]

ABSTRACT

The provision of financial services in the EU is characterized by the increased integration of the internal market, as well as, globalisation of said services. On the one hand, companies in the Member States can use the passport for the financial services, which allows their provision throughout the EU without the need to acquire a permit in each country separately. On the other hand, the financial crisis has shown a strong interdependence among financial markets globally and the negative effects deficiency in one of them can have on the EU market. Consequently, the possibilities for companies from non-member states to provide their services are limited in scope. However, gradually several possible methods of access were developed. Among them are setting up an EU subsidiary, operating a branch in the EU, or seeking a national exemption. One of the methods is determining the equivalence of third-country regulations and supervision mechanisms with the EU regime. This approach is sometimes deemed as controversial because the decision on equivalence is in the sole discretion of the European Commission, which causes fears that the process could be influenced by the political and economic necessities. The mechanism is characterized by the fragmentary approach – it is not prescribed in all acts on financial services and it is tailored to the needs of each act separately - and is granting fewer rights than a passport for financial services. Despite the controversy, its significance is reflected in the incentives for regulatory convergence with the EU regime and closer co-operation among regulatory bodies. This issue is proving to be more and more important, especially having in mind the newest developments in the EU market, as Brexit or new regime for the financial markets.

Keywords: *financial services, EU, third country, equivalence, passporting*

1. INTRODUCTORY REMARKS

In the past decades, the levels of cross-border activity have significantly increased, mainly due to three factors – liberalization (i.e. the removal of barriers to investment and trade), the increase in collective investment and technological progress which allowed for the cross-border connectivity of counterparties and alleviated

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the business process.[2] Despite positive outcomes, the strong interconnectedness of financial markets worldwide has shown its negative side when the 2008 crisis emerged. Namely, interconnectedness and risk exposures from foreign jurisdictions have shaken the EU financial market foundations.[3] This has called for a radical change in the EU regulatory landscape, which was previously rather liberal and characterized by self-governance and openness.[4] The main objectives were securing global financial stability through major institutional reforms and, afterwards, introducing reforms aimed at market efficiency.[5] During this process, the EU faced the dilemma between the need of restoring financial stability in its territory and maintaining the competitiveness of its financial industry.[6]

The debate on third-country access to the EU's financial services market has run parallel with the integration of markets in Europe and the process of globalisation of financial services.[7] Considering that third-country participants in the internal market had their share in the crisis, the EU has set a goal of "expanding European regulatory clout over a range of market actors domiciled in third countries but operating in European markets".[8] Since the financial crisis, the EU's regulatory approach to relations with third countries has been reshaped and extended.[9] The financial crisis has significantly influenced third-countries position towards EU financial market – either there are restrictions on the ability of third-country firms to provide services to EU counterparties, or third-country firms or transactions are subjected to EU requirements.[10]

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2 Armour, J., Fleischer, H., Knapp, V., Winner, M., *Brexit and Corporate Citizenship*, [http://ssrn.com/abstract_id=2897419] Accessed 6 September 2017, p. 3

3 European Commission, *Commission staff working document EU equivalence decisions in financial services policy: an assessment*, SWD(2017) 102 final, Brussels, 2017, [https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf] Accessed 7 January 2018, p. 4

4 Moloney, N., *Brexit, the EU and its investment banker: rethinking 'equivalence' for the EU capital market*, [https://ssrn.com/abstract=2929229] Accessed 6 September 2017, pp. 29-30

5 Moloney, N., *EU securities and financial markets regulation*. OUP, Oxford, 2014, pp. 956-957

6 Quaglia, L., *The Politics of 'Third Country Equivalence' in Post-Crisis Financial Services Regulation in the European Union*, West European Politics, Vol. 38, Issue 1, 2015, p. 168

7 European Parliament, *Understanding equivalence and the single passport in financial services Third-country access to the single market*, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf] Accessed 7 January 2018, p. 2

8 Pagliari, S. *A Wall Around Europe? The European Regulatory Response to the Global Financial Crisis and the Turn in Transatlantic Relations*, Journal of European Integration, Vol. 35, Issue 4, 2013, p. 392

9 European Parliament, *op. cit.* note 7, p. 2

10 Ng, L. *"Third country" issues in current EU financial services regulation*, Butterworths Journal of International Banking and Financial Law, May 2012, p. 287

The renewed interest in EU third-country access framework is also a consequence of the newest developments in the EU. First of them is certainly Brexit. The exit of the UK from the EU membership has launched a series of discussions on how will the future relations between the two entities look like. Various scenarios are in play, one of them being the so-called "hard Brexit" where the UK severs all the ties with the EU and acquires the status of a third country. Though Brexit could impact the functioning of this regime in the future, possibly resulting in stricter conditions for the third-country access, some authors doubt that outcome. They point out that this probably won't happen, having in mind the interest of EU to remain open financial market, to promote and nourish G20 values and the fact that the participation of the ESA makes the access process less political.[11] The second significant development regarding the third-country status in the EU is a new legislative framework in force as of January 2018 that is aimed at establishing a more harmonized approach to the access rights of third-country entities to financial markets and that introduces new options so far unfamiliar in the EU legislation.

2. THE POSITION OF EU MEMBER STATES

The EU membership brings significant advantages for the market participants originating from one of the Member States, such as an unrestricted use of four market freedoms, no discrimination on basis of location or currency and standing before CJEU.[12]

However, one of the major benefits concerns the provision of financial services in the Single Market characterized by the possibility for EU firms to use the system of passporting. The logic of the mechanism is that the license to provide services doesn't have to be acquired in each Member State separately, but it is obtained in one of them and is used to provide services in other states – either via branch or offering cross-border services directly to clients.[13] It seeks to minimize legal, regulatory and operational barriers to cross-border provision of financial services

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11 Ferran, E., *The UK as a third country actor in EU financial services regulation*, [http://ssrn.com/abstract=2845374] Accessed 23 September 2017, pp. 19-20

12 *Ibid.*, p. 3

13 Armour, J., *Brexit and financial services*, [https://ssrn.com/abstract=2892679] Accessed 26 September 2017, p. 5; Nemeczek, H., Pitz, S., *The Impact of Brexit on Cross-Border Business of UK Credit Institutions and Investment Firms with German Clients*, [https://ssrn.com/abstract=2948944] Accessed 23 September 2017, p. 3; Ringe, W. G., *The Irrelevance of Brexit for the European Financial Market*, [https://ssrn.com/abstract=2902715] Accessed 7 January 2018, pp. 4-5

in the EEA.[14] The mechanism is based on mutual trust of supervisory authorities and is dependent on harmonization of legislation and coordinated supervision of financial subjects.[15] This approach avoids the need for companies to satisfy regulatory demands in each country separately, thus providing a more efficient system and significant cost reductions.[16]

3. THE POSITION OF THIRD COUNTRIES

Unlike the firms from Member States and EEA countries, the position of companies from third countries[17] is characterized by "a decentralised model of state-by-state authorisation", meaning that said firms cannot avail themselves of fundamental market freedoms but have to obtain authorisation in each Member State where they wish to operate.[18] The only exception is the right to free movement of capital, which is under Article 63 of TFEU extended to third countries.[19] However, in the area of financial services, this is of minor importance, because the provision of financial services is covered by the freedom of establishment, which takes precedence over free movement of capital and doesn't extend to third countries.[20] Also, third-country entities are not protected from discriminatory measures Member States can introduce.[21]

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14 Peihani, M., *Brexit and Financial Services Navigating through the Complexity of Exit Scenarios*, [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.4.pdf] Accessed 25 March 2018, p. 3

15 Moloney, N., *"Financial services, the EU, and Brexit: an uncertain future for the city?"*, German Law Journal, 17, 2016, p. 77

16 International Regulatory Strategy Group, *The EU's third country regimes and alternatives to passporting*, [https://www.thecityuk.com/assets/2017/Reports-PDF/The-EUs-Third-Country-Regimes-and-Alternatives-to-Passporting.pdf] Accessed 28 March 2018, p. 33; Kokkinis, A., *The impact of Brexit on the legal framework for cross-border corporate activity*, [http://wrap.warwick.ac.uk/83606] Accessed 31 August 2017, p. 25; Lehmann, M., Zetzsche, D. A., *Brexit and the consequences for commercial and financial relations between the EU and the UK*, [http://ssrn.com/abstract=2841333] Accessed 4 September 2017, p. 23

17 The qualification of a "third-country firm" applies to entities formed outside the Union. These include the entities formed in the non-EU jurisdictions that follow "incorporation" theory, and after the Brexit, the UK pre- or post-Brexit formed companies. It also refers to companies in non-EU jurisdictions that follow the "seat" theory. Böckli, P., *et al.*., *The consequences of Brexit for companies and company law,* [https://ssrn.com/abstract=2926489] Accessed 5 September 2017, p. 12

18 Armour, *op. cit.* note 13, p. 8; International Regulatory Strategy Group, *op. cit.* note 16, p. 39; Böckli *et al., op. cit.* note 17, p. 12

19 Armour, *op. cit.* note 13, p. 8; International Regulatory Strategy Group, *op. cit.* note 16, p. 39

20 Armour, *op. cit.* note 13, p. 8, fn. 11; International Regulatory Strategy Group, *op. cit.* note 16, 39

21 International Regulatory Strategy Group, *op. cit.* note 16, p. 40

This traditional model has been reconsidered after the onset of the financial crisis because it bore higher costs and made the control of systemic risk harder.[22] Hence, the EU financial regulation has slowly evolved in the direction of allowing broader access to the third-country firms.[23] The opening of the Single Market for financial services toward third-country providers is based on two reasons. On the one hand, it enhances the competition by market expansion and providing more liquidity, innovation and differentiation of products.[24] On the other hand, it enables "achieving greater resilience against smaller crises by establishing a global infrastructure system".[25]

The treatment of third-country counterparties will directly influence the future (positive) development of cross-border financial activities.[26] In regulating the third-country position, the European legislator oscillated between two polar opposites – promoting stability through stricter regulation, or enhancing the competitiveness at the expense of the stability.[27] Namely, the EU recognizes the potential dangers for the internal market and market participants mirrored mainly through less strict supervision in third countries.[28] Nevertheless, an overly strict regime of third-country access can lead to excessive market entry barriers, leading to foreign providers avoiding European space and disappearance of innovation and competition.[29]

The third-country access is conditional upon completion of various requirements. Even though there is no universally accepted framework of third-country access, some conditions can predominantly be found in the European legislation. They include equivalence, local authorisation and effective supervision and enforcement for the third-country firm and Cooperation agreements between the third country and the relevant bodies in the EU.[30] Sometimes additional requirements can apply, such as reciprocity or submission of disputes to local courts' jurisdiction.[31]

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22 Armour, *op. cit.* note 13, p. 10

23 Ferran, *op. cit.* note 11, p. 4

24 Sethe, R., *Das Drittstaatenregime von MiFIR und MiFID II*, Schweizerische zeitschrift für wirtschaftsrecht, Issue 6, 2014, p. 616

25 Lehmann, M., Zetzsche, D. A., *How Does It Feel to Be a Third Country? The Consequences of Brexit for Financial Market Law*, [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.14_2.pdf] Accessed 25 March 2018, p. 6

26 Ng, *op. cit.* Note 10, 289

27 Quaglia, *op. cit.* note 6, p. 170

28 Sethe, *op. cit.* note 24, p. 616

29 *Ibid.*, p. 616

30 International Regulatory Strategy Group, *op. cit.* note 16, p. 42

31 *Ibid.*, p. 45

Each of these conditions has its purpose. The requirement of equivalence protects investors and the financial system against risks created by insufficiently regulated or supervised market participants, reciprocity creates a level playing field, allowing EU firms the same market opportunities as counterparties from third countries. The requirement of cooperation in various areas protects important public interests, such as security.[32]

4. THIRD-COUNTRY ACCESS VIA THE PRINCIPLE OF EQUIVALENCE

Sometimes the access to the EU markets is possible provided the third country meets certain criteria specified in legislative acts. Among these conditions, the Commission's decision that the third-country legal and supervisory system is "equivalent" to the EU one, will often constitute the core prerequisite for obtaining EU markets' access.[33]

The use of third-country equivalence rules in EU financial markets regulation is a relatively new phenomenon that gained significance after the global financial crisis.[34] These rules are seen as the cornerstone of the new regulatory approach of the EU towards third countries in finance.[35] Equivalence model has developed in the ambit of two contrasting approaches in the EU and has resulted in a compromise between the two types of EU economies. On the one hand, are "market shaping" economies (i.e. Germany and France) that were concerned over the possible negative influence of financial instability of third countries and that demanded the alignment of third-country rules with EU legislation and on the other hand are "market making" economies (i.e. UK) which emphasized the need to open the market to third countries and instigate the competitiveness of the EU financial sector.[36]

The absence of equivalence determination causes that foreign firms doing business in the EU will be subject to the EU regulation in addition to their home country regulation.[37] The practical effects of equivalence clauses can be the encouragement

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32 Lehmann, Zetzsche, *op. cit.* note 25, p. 6

33 Wymeersch, E., *Brexit and the equivalence of regulation and supervision*, [https://ssrn.com/abstract=3072187] Accessed 7 January 2018, p. 2

34 Quaglia, *op. cit.* note 6, p. 169

35 *Ibid.*, p. 168

36 *Ibid.*, pp. 168-172

37 Howarth, D., Quaglia, L., *Brexit and the Single European Financial Market*, [https://orbilu.uni.lu/bitstream/10993/31955/1/Howarth%20and%20Quaglia%2C%20Brexit%20and%20the%20Single%20European%20Financial%20Market.pdf] Accessed 25 March 2018, p. 5

of third countries to modify domestic rules making them equivalent to EU rules, or the increase of costs for third-country firms that provide services in the EU or to EU counterparts, subjecting those firms or transactions both to EU and home state regulations.[38]

4.1. Characteristics of the equivalence

Several characteristics of the regime can be established:

a) The notion of equivalence implies a limited opening of the EU markets to third-country operators on the basis that the third-country regime offers the same or comparable guarantees as enjoyed by EU investors and institutions.[39] This general notion is later calibrated to the scope and purpose of individual instruments of financial regulation that contain the "equivalence clause".[40]

b) "Equivalent" does not mean "identical".[41]

c) The process is outcome-based, i.e. the third-country legislation doesn't have to replicate EU legislation word-by-word, but has to achieve the same objectives.[42] The determination of outcomes includes analyses of home country rules, levels of investor protection, the enforcement, oversight, international cooperation framework, membership in international organisations, etc.[43]

d) The timing of the process is open-ended and depends exclusively on the speed of competent authorities.[44]

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38 Quaglia, *op. cit.* note 6, p. 167

39 Wymeersch, *op. cit.* note 33, p. 36

40 European Parliament – Directorate-general for International Policies., *Implications of Brexit on EU Financial Services*., [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602058/IPOL_STU(2017)602058_EN.pdf] Accessed 5 February 2018, p. 23

41 International Regulatory Strategy Group, *op. cit.* note 16, p. 43

42 Howarth, Quaglia, *op. cit.* note 37, p. 24; Edddy, p. 28. European Commission, *op.cit.* note 3, p. 4; some authors claim that two regulatory regimes that have different legal characteristics may nonetheless be "equivalent" if they produce the same economic effects ("market-based test for equivalence"). See Wei, T., *The Equivalence Approach to Securities Regulation*, Northwestern Journal of International Law & Business, Vol. 27, Issue 2, Winter 2007, p. 262

43 Moloney, *op. cit.* note 4, p. 32

44 International Regulatory Strategy Group, *op. cit.* note 16, p. 50

e) The process is discretionary in character – the decision is based on the sole discretion of the competent authority, thus increasingly becoming political instrument aimed at protection of EU interests.[45]

f) The decision is unilateral and lies on the EU authorities. However, today, equivalence is slowly evolving and becoming more and more a bilateral determination, based on reciprocity ("equivalence-plus-reciprocity").[46]

g) There is no single, unified mechanism, but each legislative act contains its own rules and requirements. Equivalence provisions are tailored to the needs of each specific act and their meaning varies from one legal text to another.[47]

4.2. Equivalence vs. passporting

The place of equivalence as a market access tool can be further determined by comparing it to the mechanism that provides the widest access to the EU market. Even though sometimes when equivalence is described, the passporting is mentioned, the two concepts are not the same, i.e. equivalence is not a weaker form of passporting, but a considerably different technique.[48] Passporting is a right related to the EU membership; it is permanent and cannot be unilaterally varied or withdrawn by the EU.[49] Whereas, equivalence may be withdrawn unilaterally and represents a privilege, not a right.[50] Unlike passport, equivalence doesn't provide for "a single point of entry to the entirety of the single market".[51] Passporting rights are also in many instances wider in scope and depth.[52] Equivalence is limited in scope – it doesn't cover all the areas of market access, sometimes it relates only to certain types of clients, and some areas are not regulated. In terms of decision making, equivalence is more complex, because it requires a Commission's decision, adopted after a thorough and lengthy investigation.[53] This limited scope and

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45 Wymeersch, *op. cit.* note 33, p. 37; Böckli *et al., op. cit.* note 17, p. 15

46 Wei, *op. cit.* note 42, p. 257. Similar Armour *et al.*, *op. cit.* note 2, p. 31

47 Margerit, A., Magnus, M., Mesnard, B., *Third-country equivalence in EU banking legislation*, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf] Accessed 22 March 2018, p. 2

48 Wymeersch, *op. cit.* note 33, p. 37

49 International Regulatory Strategy Group, *op. cit.* note 16, p. 52; European Parliament, *op. cit.* note 7, p. 4

50 Ringe, *op. cit.* note 13, p. 31

51 Ferran, *op. cit.* note 11, p. 4

52 European Parliament, *op. cit.* note 7, p. 4

53 Wymeersch, *op. cit.* note 33, p. 37

legislation-specific nature make the equivalence regime less attractive option than an EEA-type passport.[54]

4.3. Advantages and disadvantages of the regime

Having in mind the increased importance of the equivalence mechanism for the shaping of relations between EU and third countries, it is necessary to consider its positive and negative impact. It is recognised that this mechanism brings significant economic benefits reflected in reduced costs, improved legal certainty and limited regulatory arbitrage.[55] The introduction of equivalence serves as an incentive for third-country regulators to enhance supervisory co-operation and to seek closer regulatory convergence with the EU.[56] Its application avoids conflicting rules and exempts cross-border trading firms from double regulation and supervision.[57] The approach fosters product innovation and competition,[58] providing EU market participants with a wider range of services, instruments and investment choices originating from third countries.[59]

Despite its advantages, the system has a certain amount of flaws that reduce its effectiveness. It is often being criticised as "being piece-meal, inconsistent, and subject to a range of different procedures and conditions".[60] The process bears the risk of political exploitation[61] because it affords the Commission very significant discretion.[62] Also, EU's equivalence only covers a narrow range of services and can be withdrawn at any time.[63] Lack of uniform formulation of criteria or procedure[64] and lack of transparency of the process[65] influence the desirability of this mechanism.

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54 Peihani, *op. cit.* note 14, p. 8

55 Weber, R, Sethe R., *Äquivalenz als Regelungskriterium im Finanzmarktrecht*, Schweizerische Juristen-Zeitung, Vol. 110, Issue 22, 2014, p. 572

56 European Commission, *op.cit.* note 3, p. 4

57 Ferran, *op. cit.* note 11, p. 4; Lehmann, Zetzsche, *op. cit.* note 25, p. 5; European Commission, *op.cit.* note 3, p. 5

58 Lehmann, Zetzsche, *op. cit.* note 25, p. 5

59 European Commission, *op.cit.* note 3, p. 5

60 Moloney, *op. cit.* note 4, p. 46

61 Ringe, *op. cit.* note 13, p. 32

62 Moloney, *op. cit.* note 4, p. 21

63 Howarth, Quaglia, *op. cit.* note 37, p. 24

64 Wymeersch, *op. cit.* note 33, p. 29

65 Wei, *op. cit.* note 42, p. 294

5. "CLASSICAL" METHODS OF MARKET ACCESS

If the equivalence approach for whatever reason cannot apply (e.g. it is non-existent, reduced or retrieved)[66] companies themselves can take the initiative and reorganize their business in order to obtain market access.[67] For that purpose, several approaches can be used.

5.1. Subsidiaries and branches

A foreign entity that wishes to do business in the EU market can create a subsidiary in one of the EU Member States. A subsidiary is a separate legal entity and has to comply with the relevant conditions posed in the country of founding.[68] Its main advantage is the fact that it would be considered a European company and could avail itself of the freedom of establishment and the prohibition of discrimination.[69] It can also benefit from the passporting rights and can be used as an "EEA hub" for the provision of services throughout the EU without the need to establish a separate presence in each country.[70] However, the major disadvantages of the regime are the need to comply with the capital and staff requirements and expensive and time-consuming application process.[71]

Unlike subsidiaries, branches are not separate legal entities. Their main benefit is that third-country firm may be able to use capital which it holds in its home jurisdiction to satisfy local capital requirements.[72] Branches are considered to be a less attractive option for third-country firms because they don't enjoy the passporting right and their activities are limited to the member state of establishment.[73] In case they want to provide services in other EU countries, the firms would have to set up branches in each country of interest.[74] The approval of the establishment of branches could be significantly influenced by bilateral political conflicts.[75] The need to comply with different national requirements affects the costs and the attractiveness of the market access.[76]

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66 International Regulatory Strategy Group, *op. cit.* note 16, p. 114

67 Ringe, *op. cit.* note 13, p. 4

68 Wymeersch, *op. cit.* note 33, p. 15

69 Böckli *et al.*, *op. cit.* note 17, p. 16

70 Nemeczek, Pitz, *op. cit.* note 13, pp. 18-19; Lehmann, Zetzsche, *op. cit.* note 25, p. 12

71 International Regulatory Strategy Group, *op. cit.* note 16, p. 120

72 *Ibid.*, p. 126

73 Nemeczek, Pitz, *op. cit.* note 13, p. 20; Wymeersch, *op. cit.* note 33, p. 15

74 International Regulatory Strategy Group, *op. cit.* note 16, p. 127

75 Lehmann, Zetzsche, *op. cit.* note 25, p. 14

76 Lehmann, Zetzsche, *op. cit.* note 16, p. 23; Lehmann, Zetzsche, *op. cit.* note 25, p. 14

5.2. Passive use of the freedom to provide services (reversed solicitation)

Third-country firms can provide the services to EU clients on the basis of "reversed solicitation" where the client approaches the firm and requests its services.[77] In this case, the supervisory and private law of the company's home country applies.[78] This procedure is considered to be "prudentially unobjectionable" since the customer chooses the level of protection of the third state on his own volition.[79] However, this model doesn't seem to be viable for wider use, because it can only be applicable in certain specific situations and can pose risk for the third country if an adequate system of risk management is not established.[80]

5.3. National exemption

Sometimes third-country firms can rely on existing rights of access under the local laws of EU Member States to provide cross-border services.[81] This option presupposes they don't need to be separately authorized in that jurisdiction. However, the regulatory regimes vary significantly and there is no general rule on this option.[82] The firms have to obtain exemptions for each EEA country whose financial markets they intend to cover.[83] Germany, for example, allows the provision of services if the company is adequately supervised in the home country and cooperation between BaFin and home state supervisory authority is established. Nevertheless, this exemption is not available for retail client services and is limited to the provision of services only in Germany.[84]

5.4. Bilateral agreements

One of the possible options is that third countries try to negotiate the access for their firms to the Single Market through the agreement which would "reduce overlaps and enhance regulatory and supervisory reliance".[85] Nevertheless, this process often requires long negotiations and means combat over whose national interest shall prevail.[86] So far, the EU has concluded several types of bilateral agree-

77 International Regulatory Strategy Group, *op. cit.* note 16, p. 120
78 Lehmann, Zetzsche, *op. cit.* note 25, p. 15
79 Sethe, *op. cit.* note 24, p. 617
80 International Regulatory Strategy Group, *op. cit.* note 16, p. 121
81 *Ibid.*, p. 116
82 *Ibid.*, p. 118
83 Nemeczek, Pitz, *op. cit.* note 13, p. 21
84 *Ibid.*, p. 21
85 European Commission, *op.cit.* note 3, p. 6
86 Lehmann, Zetzsche, *op. cit.* note 16, p. 24

ments with various countries. Their main feature is that they are mostly not comprehensive and include only certain areas, making wider market access rather expensive. The most comprehensive set is concluded with Switzerland, which opted out EU membership and chose to regulate its relations to the EU through sets of sector-specific agreements. In the area of financial services, however, there is only one agreement that regulates non-life insurance.[87] Another possible type of agreement is Deep and Comprehensive Free Trade Area (DCFTA) that is the part of the Association Agreement between the EU and Ukraine. This agreement regulates the field of financial services and provides the access to the Single Market on the condition that the continuous regulatory approximation is conducted. Parties to the treaty grant each other internal market treatment that implies the freedom of establishment and freedom to provide services.[88]

6. MIFID II/MIFIR REGIME[89]

While under MiFID regime[90] third-country access primarily was the function of national law, the newly established regime brings a radical change by achieving a greater centralization of the access process at the EU level.[91] Namely, under MiFID regime, there was no harmonized third-country access, but it was solely determined by national laws.[92] Said regime was partial, complex, and lacking in coherence.[93] MiFID II aimed at establishing a harmonized framework which gives third-country companies equal access to EU markets.[94] In regulating the subject matter, the new regime adopts a twin-track approach, dividing responsibility between the Member States and the Commission/ESMA based on the manner in which the firm operates (services or branch) and the clients to whom the services

87 European Commission, *op.cit.* note 3, p. 6

88 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014], OJ L 161/3, Annex XVII, Art. 4 (3)

89 MiFIR is Regulation (EU) no. 600/2014 of the European parliament and of the Council of 15 May 2014 on markets in financial instruments and amending regulation (EU) no 648/2012 (Text with EEA relevance) [2014], OJ L 173/84 and MiFID II is Directive 2014/65/EU of the European parliament and of the Council of 15 May 2014 on markets in financial instruments and amending directive 2002/92/EC and directive 2011/61/EU (recast) [2014], OJ L 173/349

90 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004], OJ L 145/1

91 Moloney, *op. cit.* note 5, p. 403

92 Nemeczek, Pitz, *op. cit.* note 13, p. 22

93 Moloney, *op. cit.* note 4, p. 14

94 Sethe, *op. cit.* note 24, p. 619

are provided (professional or retail).[95] The regime is closest to providing passport-like access to the EU market.[96]

Under MiFID II/MiFIR regime, market access by third-country firms depends on the type of clients firm intends to provide services. If the client is a professional client or an eligible counterparty,[97] the rules established under MiFIR apply. In this case the firm doesn't have to establish a branch in a Member State. However, this mode of access is conditional upon the determination of equivalence, existence of cooperation agreements between supervisory authorities and granting of reciprocity. Only after these conditions have been met, the firm can apply for registration with ESMA. Apart from successful registration, the firm has to notify the clients that it provides services only to professional clients and that is supervised outside the EU. The most controversial precondition is an obligation to accept the jurisdiction of the Member State's court.[98] Though the main purpose of this norm was to protect investors from litigations outside of the EU, it can have far wider consequences, leading to MiFID II/MiFIR being applied as a mandatory European law.[99] After the process is completed, Member States cannot place additional requirements on third-country firms. Otherwise, this would contravene the purpose of the established framework, which is to harmonize current fragmented regulatory regimes of Member States for cross-border provision of services by third-country firms.[100] In case the equivalence condition is not met, each Member State can decide whether to allow access to its market. In case equivalence is determined and third-country firm has an established branch in one of the Member States, it can provide services to professional clients in other Member States without the need to establish any new branches. This phenomenon is being referred to as "European passport light"[101] or "third-country passport".[102] However, the use of this option remains dubious, as it doesn't grant any regulatory advantages comparing to direct provision of cross-border services.[103] In case the prospective clients are retail clients or "opt in" professional clients,[104] the third-country firms acquire access through establishing a branch upon the request of Member State. Unlike with professional clients, this regime doesn't grant passporting rights.

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95 Moloney, *op. cit.* note 5, 403-404

96 International Regulatory Strategy Group, *op. cit.* note 16, p. 46

97 See MiFID II Annex II

98 Armour, *op. cit.* note 13, p. 17

99 Lehmann, Zetzsche, *op. cit.* note 16, p. 26

100 Nemeczek, Pitz, *op. cit.* note 13, p. 30

101 *Ibid.*, p. 33

102 Lehmann, Zetzsche, *op. cit.* note 16, p. 24

103 Nemeczek, Pitz, *op. cit.* note 13, p. 33

104 See MiFID II Annex II

7. CONCLUDING REMARKS

In the past decade, the EU has faced many challenges that threatened the stability of the financial market such as the financial crisis and nowadays Brexit. Each incidence has reinforced the efforts of the European legislators and policymakers in finding adequate responses to mitigate possible negative consequences. Learning from the crisis, the current regime lays great value on the convergence of laws and cooperation of supervisory authorities in order to prevent or soften the systemic risks. Having in mind globalization tendencies and interconnectedness of the financial markets worldwide, the position of firms from non-member states that wish to enter the European market has shown to be one of the decisive factors when creating future policies. Through the scope of the market access granted to the third-country firms, EU reacts to the global developments and implicitly expresses its political stances.

Several methods of access have been recognized so far. Some of them exist long(er) and can be characterized as "classical". These include creating subsidiaries or branches in the Member State, use of reversed solicitation option, applying for national exemption (if possible) or concluding a bilateral agreement that regulates the specific areas of EU-third country relations. Each model of access has its own qualities, but neither of them provides for the full access to the EU market, as the passporting rights do for the Member States. The newest method of regulating the third-country access is determining the equivalence of third-country regulations and supervision mechanisms with the EU regime. This mechanism is the result of two opposing needs of the EU – guarding financial stability, on the one hand, and opening the market for the competition, on the other hand. It promotes greater convergence of legislation and closer co-operation of supervisory bodies. However, it is often criticized on grounds that it lies in the discretion of the competent authority and can be used to achieve political or economic goals.

The current regime of third-country firm access to the financial market takes advantage of equivalence clause, allowing wider Single Market-access, but in return imposes stricter conditions for access.

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THE CHALLENGES AND EFFECTIVENESS OF VALUE ADDED TAX RATES AS A DISTRIBUTIONAL TOOL

ABSTRACT

In modern states, taxation of consumption, with taxation of personal and corporate income, is the most aboundant tax source. As a rule, developing countries such as the Republic of Croatia are mostly turning to taxation of consumption through the general sales tax of goods and services and special taxes, ie excise duties. Until 1 January 1998, consumption in the Republic of Croatia was taxed by the application of sales tax on products and services. The rates were proportional and applied to the selling price. Product and service tax disadvantages were attributable to its cumulative effect, which means that the tax burden was greater when the production process was realized in several phases.

Value added tax (VAT) was introduced due to the need to reform the entire Croatian tax system in new economic and political circumstances and the need to harmonize the Croatian tax system with the EU tax system. The extraordinary place and role of this tax was reflected not only in its pronounced financial leverage in relation to other taxes, but also in frequent use as an instrument for regulating supply and demand for certain products.

VAT is the net surplus sales tax that is calculated at each stage of the production and sales cycle, but only on the value added that was created at that stage, not on the total production value.

Of great importance is the type of rate that applies when it comes to VAT. In the Republic of Croatia there is a fairly high proportional rate which has an adverse regressive effect on a wide circle of taxpayers. In this paper, the authors will discuss and try to analyze the efficiency of VAT rates and how to reduce the regressive effects of VAT through various measures of a positive legal tax system in the Republic of Croatia.

We consider it important to note that the framework of this paper does not allow a detailed analysis and that we are forced to limit ourselves exclusively to some aspects of the issue at hand.

Keywords: *VAT, proportional tax rate, reduced tax rate, regressive effect of taxation*

1. INTRODUCTION

The principle of social balance of the tax system is one of the important requirements that is now being put before the tax system of each country. It implies that the tax system in itself should not be the source of additional social tensions, since it is only under that assumption that most of the citizens can accept it.

However, the value added tax (VAT), and especially the one where taxation is made on a single-rated system, places the tax burden regressively in relation to the income of the taxpayer. Since the relative share of income spending falls as income rises, the value added tax, cut at a uniform tax rate, harder affects the poorer than the richer population.[1]

The author discusses a set of measures that should be taken within the tax and fiscal system, and the value added tax system, to mitigate or anull this negative effect.

2. THE PRINCIPLE OF THE SINGLE-RATED VAT SYSTEM

Starting from the basic purpose of VAT, which is the collection of tax revenue, whereby VAT is the most aboundant tax revenue, „it is now considered that value added tax should be taxed as much as possible on a larger number of products and services, that is to say, it is possible to apply a wider tax base to apply as fewer rates as possible (ideally only one), exemptions should be reduced to as little as possible and avoiding zero rates (except for export taxation)."

Commitment to the one-sided VAT system can be explained by the fact that today, especially in developed countries, social conditions are not needed for the application of preferential tax rates. However, the biggest criticism of the VAT on which taxation is carried out at one rate is that in relation to income, the tax burden is regressively distributed. The regressive effect of the value added tax does not take into account the principle of vertical equity in the allocation of tax burdens.

3. MULTIPLE-RATED VAT SYSTEM

VAT is the net surplus sales tax that is calculated at each stage of the production and sales cycle, but only on the value added that was created at that stage, not on the overall production value.

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[1] Šimović, J., *Socijalni učinci poreza na dodanu vrijednost*, Revija za socijalnu politiku, Svezak 5, Br. 2, 1998
[l]http://www.rsp.hr/ojs2/index.php/rsp/article/view/337/341] Accessed 15 February 2018

The added value can be defined as the difference between the value of sales of produced goods and services (outputs) and input value (but not inputs) for which those goods and services are produced. Therefore, added value is the value that the manufacturer adds to inputs before selling them as new products and services.

In the multi-rated VAT system, four levels of tax rates are applied: general (standard), lower (privileged), zero and higher (increased) rate.

A standard or general rate of VAT is the rate for taxing the largest number of products and services that are not subject to a reduced, increased or zero tax rate and which do not apply to tax exemptions.

The reduced tax rate is lower than standard and is generally taxed on product-related life-style products (food products, books, medicines and the like).

The zero tax rate or tax exemption with the right to deduct input tax is such a tax rate whereby the taxpayer pays the VAT on his own sale at a zero rate with the right to deduct the paid VAT paid to suppliers for his purchases as a tax prepayment.[2]

VAT rates, such as their number and height, are subject to frequent changes, especially in the first years of application of this tax.

As a rule, higher VAT rates are taxed for products that are considered to be luxury goods, that is to say, tax on certain products that were more fiscally significant. However, today the increase in taxation of these products is carried out by prescribing excise duty.

3.1. Advantages and disadvantages of multiple-rated VAT system

Advocates of the multiple-rated VAT system suggest the introduction of reduced rates to annul or mitigate the regressive effect of VAT. Such reduced rates should be applied to the products necessary for the existence and fulfillment of basic living needs, which would make the products on the market offered at lower prices, more acceptable to poor citizens.[3]

In support of the multiple-rated VAT system is the fact that the use of reduced tax rates on certain products and services leads to economic growth and increased competitiveness of key sectors.[4]

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2 Jelčić, B., *et al., Financijsko pravo i financijska znanost*, Narodne novine d.d., Zagreb, 2008, p. 383

3 Cindori, S., Pogačić, L., *Problematika utvrđivanja broja i visine stopa poreza na dodanu vrijednost*, Ekonomska misao i praksa, br. 2, Dubrovnik, 2010, pp. 227-249

4 Kuliš, D., *Oporezivanje potrošnje: porez na dodanu vrijednost i trošarine*, Newsletter, povremeno glasilo Instituta za javne financije, 33, 2007

In addition to its benefits, there are some disadvantages, in particular in the social sphere. The biggest criticism of the VAT is that in relation to income, the tax burden is distributed regressively.[5] There has been a need to develop certain mechanisms to mitigate or even annul this negative impact of VAT on a social plan. Measures to mitigate or anull the regressive effect are as follows:

1. measures within the VAT system

2. measures within the tax system and outside the VAT system

3. measures beyond the tax system, and within the socio-economic system

4. combined measures.[6]

To mitigate, annul the regressive effect within the VAT system itself, the following measures are generally taken:

- exemption of VAT payments for certain products is introduced

- a system of reduced tax rates is introduced.

As one of the ways of mitigating the regressive effect of VAT, it is common practice to use a system of reduced tax rates for a certain product range. However, although practice has proven that the system of preferential tax rates is a bad income distribution instrument, it has, however, still maintained in some countries as one of the ways of this distribution.

Exemptions from VAT payments, whose purpose of non-taxation is to mitigate regressive VAT activity, is usually related to food products, school supplies, children's shoes and clothing, medicines. The same applies to the system of reduced rates and the zero tax rate for VAT. However, many financial and economic theorists and practitioners believe that the range of these measures to mitigate the regressive effect is limited and often ineffective, so other measures are needed.[7]

In contemporary tax systems, the function of mitigating the regressive effect of VAT within the tax system and outside the VAT system is increasingly taken over by other tax system instruments. The most effective measure to mitigate the regressive effect of VAT is the use of progressive tax rates (in particular broken progressive tax rates) when personal income is taxed in the commbination with tax reliefs and exemptions and persolan deductions which is called compensatory progression.

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5 Šimović, J., Šimović, H., *Fiskalni sustav i fiskalna politika Europske unije*, Zagreb, 2006, p. 81

6 Jelčić, *op. cit*. note 2, p. 365

7 *ibid*.

The regressive effect of the VAT can be mitigated or annuled by measures outside the tax system. This is primarily achieved through the system of social transfers towards citizens with lower economic strength. Other social policy measures such as child allowance, use of student and student homes, social housing, etc. are also used.

The VAT system with multiple tax rates shows more disadvantages than the one-rated system, which states:

1. A multiple VAT rate system is more complicated in implementation and control, which leads to an increase in administrative costs;

2. Reduced tax rates lead to narrowing of the tax base, which consequently leads to an increase in the general (standard) rate;

3. It is very difficult to clearly and unambiguously identify goods that relate to individual rates, which leads to tax evasion.[8]

There are very strong arguments against the use of a larger number of tax rates in the value added tax system and hence their use to mitigate its regressiveness. These are arguments, above all, in the following:

(1) research of Institute for Public Finance has shown that in the value-added tax system with a graduated tax rate wealthy citizens get twice as much use unlike poor people, measured in absolute amounts. This is because in the value added tax system it is impossible to distinguish, for example, expensive, quality food products from cheap (ordinary) food products purchased by poorer citizens,

(2) the rate-gradation of the value-added tax rate to mitigate regression is a very expensive instrument. Studies of the International Monetary Fund show that in case of transition from one to two tax rates administration and supervision costs increase five times, and if the rate increases from two to three, administration costs are increased ten times,

(3) the application of reduced or zero rates to the amount of revenue set to be collected from the value added tax, necessarily results in an increase in the standard rate. Thus an increased standard rate leads to a distortion of the distribution of the tax burden on consumers and the abandonment of the neutrality principle.[9]

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8 Jelčić, *op. cit.* note 2, p. 386

9 Šimović, *loc. cit.*

4. VAT IN THE REPUBLIC OF CROATIA

In modern states, taxation of consumption, with taxation of income, is the most expensive tax source. Until 1 January 1998, consumption in the Republic of Croatia was taxed by the application of sales tax on products and services. The rates were proportional and applied to the selling price. Product and service tax disadvantages were attributable to its cumulative effect, which means that the tax burden was higher when the production process was realized in several phases.

In the first years of the existence of independent Croatia, the pivotal role of fiscal instruments was entrusted to the sales tax. The extraordinary place and role of this tax in those years was reflected not only in its pronounced financial leverage in relation to other taxes, but also in the frequent use as a tool for regulating supply and demand for certain products under the specific conditions of the formation and functioning of a newly founded state caused by war. In the regulation of the taxation of goods, account was also taken of the social repercussions of the application of the sales tax, the place of that tax in the transition to the market economy, the replacement of the taxation of retail trade turnover by the application of value added tax.

The Croatian Parliament passed the first Sales Tax Act on Products and Services by the end of June 1991. An integral part of this law was the Sales Tax Tariff, which has been changed on several occasions. The tariff contained 8 tariff numbers referring to the taxation of the product and 6 tariff numbers for which the sales tax rates were determined. The Act on Sales Tax on Products and Services has undergone numerous changes over the years, especially in 1994, when it was changed five times, which was affected by the fact that the Croatian tax system of that year included taxation of turnover by applying individual sales tax (excise duty excise tax).

The 1994 Taxation Act on Products and Services, as amended (1995 and 1996), was applicable until the beginning of taxation of value-added tax turnover, ie until 1 January 1998. Taxation of traffic by using one-phase retail sales tax can be considered as the longest tax modality, not just traffic, in this area.

Value added tax was introduced due to the need to reform the entire Croatian tax system in new economic and political circumstances and the need to harmonize the Croatian tax system with the EU tax system.

Article 38 of the Law on VAT[10] stipulates that value added tax is paid at a rate of 25%.

[10] Law on VAT, Official Gazette No. 73/2013, 99/2013, 148/2013, 153/2013, 143/2014, 115/2016

In the Republic of Croatia there are two reduced rates of VAT. Value added tax is payable at a rate of 13% to:

a) accommodation or accommodation services with breakfast, half board or full board in hotels or similar facilities, including holiday accommodation, rental of premises in camps for recreation or in places designated for camping and accommodation in sailing yachts,

b) newspapers and periodicals of newspaper publishers having a statute of the media and newspapers and periodicals of publishers for which there is no obligation to adopt the media statute under a special regulation other than those printed on periodically printed paper and other than those containing, in whole or in part, ads or services advertising,

c) edible oils and fats, plant and animal origin,

d) car seats for children and baby food and processed cereal-based foods for infants and young children,

e) the supply of water, other than water placed on the market in bottles or other packaging, in terms of public water supply and public drainage under a special regulation,

f) tickets for concerts,

g) the supply of electricity to the other supplier or end-user, including delivery fees,

h) a public service for the collection of mixed municipal waste, biodegradable municipal waste and separate collection of waste under a special regulation,

i) urns and coffins,

j) seedlings and seeds,

(k) fertilizers and pesticides and other agrochemicals,

(l) animal feed, other than petfood.[11]

Value added tax is payable at a rate of 5% to:

(a) all types of bread,

(b) all types of milk (cows, sheep, goats) marketed under the same name in liquid form, fresh, pasteurized, homogenised, condensed (other than sour milk, yogurt, chocolate, chocolate milk and other dairy products), substitutes for breast milk,

[11] Article 47 of Ordinance on VAT, Official Gazette No. 79/2013, 85/2013, 160/2013, 35/2014, 157/2014, 130/2015, 115/2016, 1/2017, 41/2017, 128/2017

c) books of professional, scientific, artistic, cultural and educational content, textbooks for pedagogical education, primary, high school and higher education, in all physical forms,

d) medicines determined in accordance with the Decree on the Establishment of the Medicines List of the Croatian Institute for Health Insurance,

e) medical equipment, aids and other devices used to relieve the disability treatment exclusively for the personal use of the disabled prescribed by the Ordinance on orthopedic and other aids of the Croatian Institute for Health Insurance,

f) cinema tickets,

g) newspaper of a newspaper publisher who has a media statute printed on a daily paper, other than those containing, in whole or in part, ads or advertising,

h) scientific journals.[12]

This rate used to be zero tax rate, but the Republic if Croatia had to change it to reduced tax rate as one of the conditions required for membership in the EU.

Croatia's tax system is largely based on „friendly" VAT, which is the most abound-ant budget revenue (HRK 45 billion or 63% of tax revenue in the 2016 state budget), and a small change in the tax rate causes large changes in revenue. A room for reducing the standard VAT rate will only be opened if long-term and sustainable rationalization of government expenditures is realized. But even then it may be wiser to lower the „harmful" taxation of labor and capital and thus encourage growth and employment, and leave a „friendly" VAT to compensate for such a reduction. Certainly, the flexibility in determining the tax rate of VAT proposed by the European Commission will contribute to making domestic VAT better suited to domestic economic priorities.

5. IMPORTANCE OF VAT IN EU

VAT with revenue - which in 2015 amounted to 1 trillion euros - plays a key role in the European common market. Unfortunately, there is also revenue loss, ie „VAT gap" (the difference between actually collected and expected revenue), which in 2015 amounted to 151 billion euros or 12.7% of total VAT tax liability.

In addition, the EU looses around EUR 50 billion annually due to cross-border fraud and embezzlement. Thus, the huge resources that could be invested in

[12] Law on VAT, Official Gazette No. 73/2013, 99/2013, 148/2013, 153/2013, 143/2014, 115/2016

stimulating economic growth, opening up new jobs, schools, hospitals, etc. are being lost. The Commission is trying to reform VAT and make it more flexible and modern, and reduce revenue losses. Such a policy direction is much better than proposing the introduction of new or increasing existing „more damaging" tax forms for the loss of VAT revenues. VAT is, in fact, one of the least damaging forms of taxation and especially „friendly" to economic growth.[13]

According to the basic regulation governing the common VAT system - EU Directive on a common system of VAT - each Member State may apply:

- one standard rate applicable to most deliveries which can not be less than 15%;
- a maximum of two reduced rates for certain deliveries of goods and services, but not less than 5%.

The Directive prescribes which products and services may apply reduced tax rates. Some Member States may also use a number of derogations from the VAT rules, ie additional reduced tax rates. In this way, common rules do not apply equally to all member states, so more than 250 discount tax rates and exemptions are allowed, which allows some countries more flexibility in determining the tax rates unlike the others that are not allowed. This has led to the diversity and inconsistency of the European VAT system.[14]

5.1. VAT funds applicable to country of EU membership

As the opinions of financial experts are divided on the topic of the number of rates, no agreement on the height of VAT rate has been achieved either. The European Union does not prescribe the upper limit of the VAT rate, but the discussions are only about the lower limit.

The standard VAT rate in the EU can not be less than 15 percent, while the reduced rate may not normally be lower than 5 percent. However, in addition to standard and reduced rates, in some Member States, the application is still called:

- a surplus rate - a rate lower than 5 percent
- parking - rate - lower than 15 percent, and higher than 5 percent
- zero rate
- geographic rate.[15]

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13 Kesner-Škreb, M., *Prijedlozi novih stopa PDV-a u Europskoj uniji*, Aktualni osvrti, IJF, br. 101., Zagreb, 2018, p. 3

14 *cf. ibid.,* p. 1

15 Cutvarić, *loc. cit.*

The possibility of applying these rates of individual member state of the European Union was obtained during the accession negotiations with the European Union and the exceptions were made possible because the lower rates were in their system before the entry into force of the Sixth Directive (1977) or before accession to the European Union.

Table 1: List of VAT rates applied in the Member States (updated twice a year - January & July)- March 2018

Member state	Country code	Standard rate	Reduced rate	Super reduced rate	Parking rate
Austria	AT	20	10/13	-	13
Belgium	BE	21	6/12	-	12
Bulgaria	BG	20	9	-	-
Cyprus	CY	19	5/9	-	-
Chech Republic	CZ	21	10/15	-	-
Germany	DE	19	7	-	-
Denmark	DK	25	-	-	-
Estonia	EE	20	9	-	-
Greece	EL	24	6/13	-	-
Spain	ES	21	10	4	-
Finland	FI	24	10/14	-	-
France	FR	20	5,5/10	2,1	-
Croatia	HR	25	5/13	-	-
Hungary	HU	27	5/18	-	-
Ireland	IE	23	9/13,5	4,8	13,5
Italy	IT	22	5/10	4	-
Lithuania	LT	21	5/9	-	-
Luxembourg	LU	17	8	3	14
Latvia	LV	21	12	-	-
Malta	MT	18	5/7	-	-
Netherlands	NL	21	6	-	-
Poland	PT	23	5/8	-	-
Portugal	PT	23	6/13	-	13
Romania	RO	19	5/9	-	-
Sweden	SE	25	6/12	-	-
Slovenia	SI	22	9,5	-	-
Slovakia	SK	20	10	-	-
United Kingdom	UK	20	5	-	-

Source: European Commission, europa.eu https://europa.eu/youreurope/business/vat-customs/buy-sell/vat-rates/index_en.htm

From the old member states only Denmark applies a single-rated taxation system with zero rates for individual domestic deliveries. All other Member States have opted for a multiple-rated tax system, where, generally, they only apply a reduced rate to reduce the regressiveness of the VAT system.[16] Spain, France, Ireland, Italy and Luxembourg, in addition to the general and one reduced rate, also apply a super reduced rate.

Certain Member States apply parking rates. These are the countries that had introduced VAT before 01/01/1991, and their standard rate did not exceed 15 percent. These countries are allowed a transitional period. The problem lies in the fact that neither the delivery types nor the length of the transitional period are imposed on those countries to the privileged position. As disadvantages have been placed on the admissible exemptions of individual Member States, there has long been a requirement to extend the list of goods and services to which a reduced VAT rate may be applied and which is considered to be unlikely to cause disturbances in the functioning of the Single Market of the European Union.

6. THE FUTURE WAY OF DETERMINING THE VAT RATE

The proposed new system will provide equal flexibility to member states in determining the tax rate. With the standard tax rate of at least 15% of the member states could determine in the future:

- two separate reduced tax rates of between 5% and the standard rate of the Member State;
- one exemption from VAT (ie „zero tax rate“);
- one reduced tax rate between 0% and the height of the reduced tax rates.[17]

The current complex list of products and services from the Directive to which the reduced tax rates could apply would be abolished and replaced by new so-called „negative“ list that would contain products such as: weapons, alcoholic beverages, gambling, tobacco products, etc. Standard tax rate would always have to be applied on these cathegories of products. The novelty is that the weighted average VAT tax rate will have to be at least 12% in order to ensure sufficient funds in the budgets of the Member States and the Union. The new regime also provides continuing use all rates different from the standard rate.

16 *cf. ibid.* p. 71

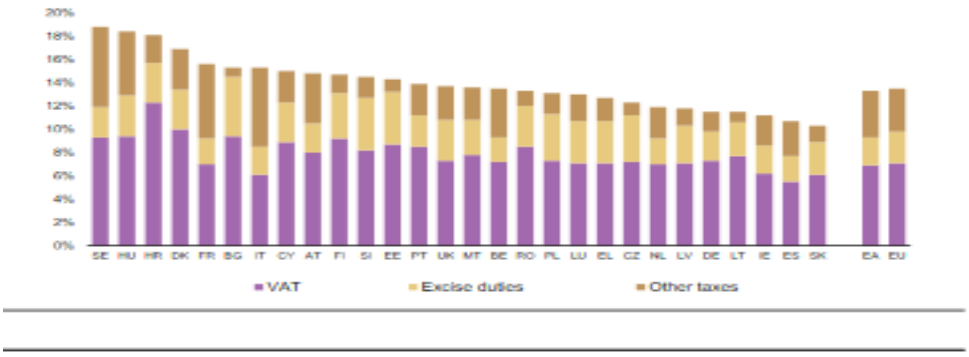
17 Kesner-Škreb, *op.cit.* note 14, p. 2

7. EFFECTIVENESS OF VAT RATES AS A DISTRIBUTIONAL TOOL

Consumption taxes are generally an important source of revenue for Member States' governments, although there are significant differences between countries. In general, 'new' Member States tend to raise a higher proportion of their revenue from consumption taxes. Bulgaria and Croatia stand out with tax on consumption generating around half of total revenue.

Various other consumption taxes (besides VAT, taxes on energy, and alcohol and tobacco duties) also constitute important sources of revenue for certain Member States. As a percentage of GDP, VAT revenue ranged from 5.5% in Spain to 12.3% in Croatia.[18]

Graph 1: *Consumption tax revenue s a percentage of GDP in 2012*



Source: Tax Reforms in EU Member States 2015, Tax policy challenges for economic growth and fiscal sustainability X/2015, European Commission, Luxembourg: Office for Official Publications of the European Communities, ISBN 978-92-79-51181-3, p. 35

The use of reduced rates and exemptions considerably narrows the VAT base in many Member States and VAT revenue is therefore far below the level that could theoretically be collected were all consumption taxed at the standard rate. Limiting the use of reduced rates and exemptions can help to avoid economic distortions, reduce compliance costs and increase tax revenue. It should be noted that the VAT Directive[19], requires Member States to make certain compulsory exemptions,but

[18] *Tax Reforms in EU Member States 2015, Tax policy challenges for economic growth and fiscal sustainability* X/2015, European Commission, Luxembourg: Office for Official Publications of the European Communities, ISBN 978-92-79-51181-3, p. 35

[19] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347

leaves it to their discretion as to whetherto apply reduced rates and a set of additional non-compulsory exemptions.

Consumption taxes do indeed have a regressive effect when the cost to households is measured as a percentage of current income, but can be shown to be generally either proportional or slightly progressive when their effect is measured as a percentage of expenditure.[20] They may, however, also be slightly regressive when measured as a percentage of expenditure if few reduced rates and exemptions are applied.

OECD confirms the findings presented in previous studies as regards the effectiveness of reduced VAT rates as a distributive measure. It shows that many of the reduced rates introduced to support low-income households, such as reduced rates on food and on energy products, do increase the purchasing power of these households. Nonetheless, it also clearly shows that reduced VAT rates are a poorly targeted and costly way of achieving this aim. At best, rich households receive as much benefit from a reduced rate as do poor households. At worst, rich households benefit much more than poor households. In some cases, the benefit of reduced VAT rates to rich households is so large that they actually have a regressive effect —benefiting the rich more not only in absolute terms, but also as a proportion of expenditure. This is generally the case for most reduced rates introduced to help meet social, cultural and other objectives.[21]

8. CONCLUSION

When it comes to reduced tax rates in the value added tax system, today they can be more justified on political and historical grounds, and much less on the scientific and professional level. Among financial theorists today, there is a great deal of consensus that the success of the value added tax is significantly increased by the introduction of a single-rated taxation system (S. Crrossen, M. Rose, A. Tait). Commitment to a single-rated VAT system is explained by the fact that today, especially in developed countries, social circumstances are such that there is no need to apply reduced tax rates, and it has been proven that value added tax, due to its regressiveness, is a bad instrument distribution of income, so this distribution should be realized through other, more suitable instruments. For these reasons, it is often argued in professional discussions that the application of a higher tax rate in the value added tax system can only be justified for political and historical reasons.

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20 Tax Reforms in EU Member States 2015, *op. cit.* note 19, p. 86

21 *ibid.*

Given that supporting low-income households is one of the main reasons for applying reduced VAT rates, the results provide some evidence in favour of a simpler VAT system with few reduced rates (which would, correspondingly, be more efficient and have lower compliance costs). This argument is based on the view that support to low -income households can be better achieved through more direct mechanisms such as income-tested cash transfers (i.e. benefits). A targeted cash transfer can generally compensate the vast majority of low-income households for the loss in purchasing power they would suffer as a result of reduced VAT rates being abolished.

Experts recommend the application of VAT, which includes a very wide tax base, ie the allocation of tax burden on as many products and services being placed on the market, a small number of rates (ideally only one and possibly one reduced), and the application of zero rates only for export.

However, in spite of all the advantages of a single-rated system and of the EU's massive effort to reduce number of rates, all member states continue to apply a multi-rated VAT system.

It is an undisputable fact that to a greater extent fiscal and economic impacts are realized through value added tax. Social effects are only partially realized through the value added tax system themselves, while others have to be realized through other instruments and measures of the tax system.

When it comes to the solution of the problem of regressivity of VAT, it is best to apply the measures within the tax system and outside the VAT system. The Republic of Croatia recognized the problem and uses the model of combined measures. It recognized that not only the fiscal goal of taxation matters but the social goal aswell. The most effective measure to mitigate the regressive effect of VAT is the use of progressive tax rates when personal income is taxed in the commbination with tax reliefs and exemptions. In this case we recognize the personal qualities of a taxpayer such as age, dependent family members, children, disability and combine them with the use of broken progressive tax rate on personal income. But there is an open question of how effective the progressive taxation of income is if we apply only 2 progressive rates and consequently how can such a type of progressive taxation affect the anullment of the regressive effect of VAT.

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INVESTOR STATE ARBITRATION AS PART OF EU'S JUDICIAL SYSTEM

ABSTRACT

There is a long lasting debate between legal scholars if investor state arbitration is part of EU's judicial system. Some argue that Investor state arbitration is incompatible with the autonomy of EU law and with the role of the Court of Justice of the European Union, which is guarding the uniform interpretation and application of EU law. Some have contrary opinion. In recent decision in Case C-284/16 the Court of Justice of the European Union declared that the investor-state arbitration provision in the bilateral investment treaty between The Netherlands and Slovakia is incompatible with EU law. The Court of Justice of the European Union did not follow the Advocate General's Opinion, which reached the opposite conclusion. Taking into consideration two opposing opinions, the goal of the paper is to analyse recent case law and argue whether other investment arbitration tribunals set up under intra-EU bilateral investment treaties should be seen as courts common to the member states and are therefore fully part of the EU's judicial system. The author concludes that as the Court of Justice of the European Union focused only on the specific bilateral investment treaty between the Netherlands and Republic of Slovakia at issue, it is difficult to apply the same argumentation on disputes currently pending under the Energy Charter Treaty if only two member states of the EU are involved.

Keywords*: Investor-state arbitration, bilateral investment treaty, arbitration, TFEU*

1. INTRODUCTION

After the Lisbon Treaty we live on times of backlash of investor state arbitration in European Union (EU). The Treaty of Lisbon extended the EU's exclusive competences by including foreign direct investment in common commercial policy. It is important that in May 2017, the European Court of Justice published Opinion 2/15 where it held that matters related to foreign direct investment fall within the exclusive competence of the EU, apart from investment protection (to the extent it relates to non-direct investments) and investment arbitration, which fall within a competence shared between the EU and the member states.[1]

[1] Opinion of the Court 2/15 [2017], ECLI:EU:C:2017:376, para. 305

The legality of investor–state dispute settlement, in EU trade agreements under EU law is a contentious issue among academics and legal experts. The main question concerns the autonomy of the EU legal order and investor state arbitration effect on the exclusive jurisdiction of the EU courts to hear claims for damages.

In recent decision in *Slovakia Republic v Achmea B.V.*[2] the Court of Justice of the European Union (European Court of Justice) found that the investor state arbitration provision in the bilateral investment treaty between The Netherlands and Slovakia is incompatible with EU law. The Court did not follow the Advocate General's Opinion, which reached the opposite conclusion. In the same dispute the investment arbitral tribunal in the case *Achmea v. Slovakia*[3] took another view when decided on jurisdiction. The tribunal held that there was no incompatible provision for protecting an investment and fundamental investor rights under Intra-EU bilateral investment treaties and EU law. Present opposing arguments are based upon different political visions,[4] and that means that the debate on the issue won't end soon.

Current development proves the topicality of the issue and raises additional questions concerning the future of investor – state arbitration clauses in bilateral investment treaties concluded by EU member states. The question of disputes - still open concerning bilateral investment treaties, is unclear after the decision of the European Court of Justice.

In the following chapters the author will analyse the role of investor-state arbitration in EU's judicial system from perspective of international arbitral tribunals and the European Court of Justices. Taking into consideration two opposing opinions, the goal of the paper is to analyse recent case law and argue whether other investment arbitration tribunals set up under intra-EU bilateral investment treaties should be seen as courts common to the member states and are therefore fully part of the EU's judicial system.

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2 Case C-284/16 *Slovakia Republic v Achmea B.V* [2018] ECLI:EU:C:2018:158, para. 60

3 UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

4 Niemelä, P., *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration*, Helsinki, 2017, Academic Dissertation, p. 6
[https://helda.helsinki.fi/bitstream/handle/10138/225135/TheRelat.pdf?sequence=1] Accessed 1 April 2018

2. THE COMPLEX ROLE OF INVESTOR-STATE ARBITRATION IN INTERNATIONAL INVESTMENT DISPUTES IN EU

Investor-state arbitration is known since the mid-twentieth century when first bilateral investment treaty was concluded. The system provides advantages for both parties: investor and host state. It is considered to be more independent and flexible than national courts, as both parties have the opportunity to choose arbitrators and the proceedings of the dispute settlement are mostly confidential. At the end of arbitration process there is a binding decision based on law. A variety of institutions or rules are available for arbitration between foreign investor and host state. The parties may choose to settle the dispute in ad-hoc arbitration, which is in the case when arbitration is not supported by a particular arbitration institution. In practice, majority of the cases are brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) which promotes economic development through the creation of a favorable investment climate.[5] The ICSID Convention created the International Centre for Settlement of Investment Disputes (ICSID). ICSID provides system of dispute settlement that is specialized in investor-state disputes.[6] Some bilateral investment treaties leave the investors with the choice between ICSID and other types of arbitration, as ICSID is not the only institution for foreign investment arbitration.

The treaties under which investor state arbitration have arisen have either been bilateral investment treaties or multilateral investment treaties, for example, North America Free Trade Agreement (NAFTA). Bilateral investment treaties are treaties between two states containing reciprocal undertakings. They provide a direct way for investors to protect their rights through arbitration against the state in which they have invested, if the standards of treatment contained in treaty have been breached. Bilateral investment treaties generally include standard provisions related to the protection provided by international legal principles.

In the EU there is a division of intra-EU bilateral investment treaties and extra-EU bilateral investment treaties. The latter are concluded between a member state and a third state. After the Lisbon Treaty there is a transitional regime for extra-EU BITs, which allows their continued existence on a number of conditions until the

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5 ICSID Convention, Regulations and Rules. *Convention on the settlement of investment disputes between states and national of other states*, p. 11 [https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf] Accessed 1 April 2018

6 Reed, L., Paulsson, J., Blackaby, N., *Guide to ICSID Arbitration*, Kluwer Law International, 2011, pp. 6-9

EU has concluded equivalent investment protection treaties with the respective third states.[7] The regulation [8] expressly states that extra-EU BITs 'remain binding on the member states under public international law', and it simultaneously requires that member states 'take the necessary measures to eliminate incompatibilities, where they exist, with EU law, contained in bilateral investment agreements concluded between them and third countries'.

After the enlargement of the EU in 2004 and 2007, new member states joined the European Union. Intra-EU bilateral investment treaties are the ones concluded between the new member states and the old ones at that time, before they entered EU. In general intra-EU bilateral investment treaties are concluded between two EU member states. Intra-EU bilateral investment treaties have been described as anomaly within the EU internal market.[9] These investment agreements, which may favor foreign investors, may contain provisions that conflict with provisions of EU law. In result some EU member states are being sued by foreign investors in arbitration for the new policies they implement when trying to comply with EU Law. European Court of Justice has held that EU law prevails over member states' mutual treaty obligations in case of conflict,[10] but the application of primacy of EU law outside the EU legal order is not evident.

Division of intra and extra bilateral investment treaties is the main reason for jurisdiction of investor state arbitration to become relevant when there is an investment dispute between two EU member states and bilateral investment treaty with arbitration clause is present. There are some areas where a possibility of conflict between EU law and bilateral investment treaty provisions may occur and in those situations it doesn't matter if it is intra-EU bilateral investment treaty or extra-EU bilateral investment treaty. The situations may concern: Capital transfer restrictions, performance requirements, public policy exceptions, state aid prohibitions and liberalization, overlap with EU trade agreements with third countries.[11] As extra-EU bilateral investment treaties are covered by public international law, the principle of supremacy of EU law does not apply.

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7 See Case 41/76 *Suzanne Criel v. Procureur de la République*, ECLI:EU:C:1976:182, para. 32

8 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and Third Countries [2012] OJ L 351, pp. 40-46

9 PCA Case No. 2008-13, *Eureko v Czech Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010], para. 177

10 See Case C-3/91 *Exportur SA v. LOR SA and Confiserie du Tech*, ECLI:EU:C:1992:420, para. 8

11 Kleinheisterkamp, J., I*nvestment protection and EU law: The Intra- and Extra- EU dimension of the Energy Charter Treaty*, Journal of International Economic Law 15(1), 2012, pp. 85-109

The European Commission is on the opinion that since the Lisbon Treaty, bilateral investment treaties made between EU member states are incompatible with EU law. That would mean that Investor- state arbitration provisions included in those treaties should be governed by the legal framework of the EU and investor - state arbitration tribunals have no jurisdiction.

Mostly arbitral tribunals have refused to uphold this opinion. For instance, the arbitral tribunal in *Achmea v. Slovakia*[12] when deciding on jurisdiction analysed the argument that Article 351 of TFEU requires the member states to take action against incompatibilities between EU law and an earlier treaty. The tribunal held that intra-EU bilateral investment treaties provided wider investment protection than EU law and that there was no incompatible provision for protecting an investment under Intra-EU bilateral investment treaties and EU law. The tribunal also noticed that there was no intention on the part of the member states to derogate from the application of Intra-EU bilateral investment treaties.

It is also discussed in scholar articles, that protection of bilateral investment treaties are broader and more effective than remedies available under EU law and national laws of the member states.[13] At the same tame it is considered that any comparison of the particular remedies will reveal that the comparison is difficult by nature.[14]

In the arbitration case the question of supremacy of EU law was discussed. Principle of supremacy enables EU law to prevail over treaties concluded between EU member states. The tribunal decided that international law had to be applied as a matter of law, while EU law may be applied as facts, in assessing whether there was a breach of the afforded substantive protection. The principle of supremacy concerns only EU and EU member states in EU law matters, but tribunals gain jurisdiction based on bilateral investment treaty or ICSID Conventions, which are part of public international law. That means that arbitral tribunal is of the opinion that also intra-EU bilateral treaties are part of public international law.

The analyse went together with concerns of the exclusive jurisdiction of the European Court of Justice on interpreting EU law and providing preliminary rulings. There is no option for arbitral tribunals to seek preliminary rulings if there is a need to make interpretation on EU law. Arbitral tribunal in this case was on the opinion

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12 UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

13 Sattorova, M., *Investor Rights under EU Law and International Investment Law*, 17 Journal of World Investment & Trade, 2016, pp. 895-918

14 Paparinskis, M., *Investors' Remedies under EU Law and International Investment Law*, 17 Journal of World Investment & Trade, 2016, pp. 919-941

that the European Court of Justice had no jurisdiction over investor-state disputes, and there was no prohibition of investor-State arbitration under EU law. Similarly, the arbitral tribunal in *Micula v. Romania*[15] case refused to allow the prevailing application of EU law over the bilateral investment treaty, since the investment was made prior to Romania's accession to the EU, thus being subject only to the intra-EU bilateral investment treaty. In general Commission's submission that European Court of Justice has exclusive jurisdiction whenever an issue of EU law arises in a dispute has been rejected by several tribunals - *Eureko v. Czech Republic*,[16] *Binder v. Czech Republic*,[17] *Eastern Sugar BV v. Czech Republic*.[18] Arbitral tribunals have explained that investment treaty tribunal is vested with jurisdiction by virtue of bilateral investment treaty and ICSID Convention. It is argued that international law is controlling tribunals and providing them with jurisdiction. The fact that investors may have more rights under bilateral investment treaty than EU law does not mean that there is an incompatibility. In *Eureko v. Czech Republic* tribunals stressed that nothing in EU law precludes investor-state arbitration.

Argumentation above leads to a chance for possibility that a tribunal renders an award allegedly incompatible with EU law. One may argue that in this case national court of member state might set aside award, given that EU law forms part of public policy or refuse recognition or enforcement. This argument would not be valid if the award is rendered under ICSID Convention, because ICSID Convention specifically rules out any invocation of "ordre public" or "public policy" in a challenge to ICSID awards.[19]

3. RECENT VIEW OF THE EUROPEAN COURT OF JUSTICE ON THE COMPATIBILITY OF INVESTOR STATE ARBITRATION WITH EU LAW

From the perspective of EU many serious question arise when discussing compatibility issue of investor state arbitration with EU law. First of all it concerns the principle of non-discrimination in EU single market. If it is concluded that inves-

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15 ICSID Case No. ARB/05/20 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania,* Decision on Jurisdiction and Admissibility, 2008

16 PCA Case No. 2008-13 *Eureko v Czech Republic*, Award on Jurisdiction, Arbitrability and Suspension, 2010, para. 177

17 UNCITRAL case *Binder v Czech,* Award on Jurisdiction, 2007

18 SCC Case No.088/2004 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* Partial Award, 2007

19 Ku, J. G., *Enforcement of ICSID Awards in the People's Republic of China*, 6 Contemp.asia Arb. J. 31, 2013 [https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1305&context=faculty_scholarship] Accessed 1 April, 2018

tor state arbitration is part of EU judicial system, then it results that investors from certain member states enjoy a greater degree of protection than that afforded by the EU Law. In the light of intra-EU bilateral investment treaties, it is important to note that arbitral tribunals are not bound to the same restrictions on judicial review as courts of the European Union and national courts in the member states.

The European Commission has been strict on the opinion that intra EU bilateral treaties are contrary to EU Law.[20] There were also several infringement proceedings launched against Austria, the Netherlands, Romania, Slovakia and Sweden in respect of their intra-EU bilateral investment treaties.[21]

Recently the question of investment arbitration in intra-EU disputes were discuss in European Court of Justice in the case *Slovakia Republic v Achmea*. The process divided arbitration community in two fronts as the Opinion of Advocate General defended investor state dispute settlement as part of EU judicial system in contrary to the decision of The Court.

The case concerned reference for preliminary ruling by a German Federal Court of Justice about the validity of an award rendered by an Investor-State dispute settlement mechanism established by an intra-EU bilateral investment treaty. The award was issued against the Slovak government as the result of the partial reversal of the privatization of the Slovak health care system.

In an advisory Opinion to the European Court of Justice, Advocate General Wathelet suggests that an investor state dispute settlement mechanism between two member states is not contrary to EU law. That means that there is no conflict of jurisdiction between the EU courts and investor state arbitration. Advocate general also argues that, in disputes arising from bilateral investment treaties between two member states, arbitral tribunals may refer questions on the interpretation of EU law to the European Court of Justice by way of the preliminary reference procedure.[22] That would mean that arbitral tribunal are under an obligation to apply EU law in the same way as any other court in EU member states.

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20 Commission newsletter, *Get the facts: Intra-EU bilateral investment treaties*, 2015, [http://ec.europa.eu/newsroom/fisma/item-detail.cfm?item_id=24581&utm_source=fisma_newsroom&utm_medium=Website&utm_campaign=fisma&utm_content=Get%20the%20facts%20Intra-EU%20bilateral%20investment%20treaties%20&lang=en] Accessed 1 April, 2018

21 SCC Case No.088/2004 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* Partial Award, 2007

22 Case C-284/16 *Slovakia Republic v Achmea B.V* [2018], Opinion of Advocate General Wathelet delivered on 19 September 2017, ECLI:EU:C:2017:699, para. 131

The Advocate General discusses that accession treaties of the member states did not provide for the termination of intra-EU bilateral investment treaties, thus providing for uncertainty.[23]

In the Opinion Advocate General argues the most common issues raised against investor state dispute settlement mechanisms in EU judicial system. Firstly, Advocate General claims that there was no discrimination on grounds of nationality, even though the concerned bilateral investment treaty benefitted only investors from the Netherlands and Slovakia and not from other member states. Advocate General explains that Slovakia has concluded other bilateral investment treaties with other EU member states providing basically the same treatment. Advocate General supports argumentation with the prior case law and uses analogy with the Case C376/03,[24] where decision concerned Double Taxation Treaties. In this case the European Court of Justice held that member states were permitted under EU law to engage in bilateral treaties granting rights to each other's nationals in matters of taxation. In general the European Court of Justice in this case found that these treaties was not discriminatory notwithstanding the fact that a national from a third member state cannot take advantage of them. In overall Advocate General concludes that Investor state dispute settlement mechanism in not contrary to Article 18 of the Treaty of Functioning of European Union (TFEU). Interesting is the fact, that in his Opinion Advocate General noted how the EU membership was divided over the question whether intra-EU BITs are compatible with EU law. There were five EU member states: Austria, Finland, France, Germany and the Netherlands which argued for compatibility, while eleven member states argued the opposite.[25] It may be explained that division reflects the member states' different experiences of investment arbitration.

Secondly Advocate General states that there is no contradiction between Investor states dispute settlement clause in bilateral investment treaty and Article 344 of TFEU. In general Article 344 of TFEU provides that EU member states undertake not to submit a disputes concerning interpretation of EU law to any other dispute settlement mechanisms outside EU legal system.[26] Firstly Advocate General argues that Article 344 TFEU does not apply to disputes between member state and foreign investor. Consistent analysis was performed by the arbitral tribunal at the

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23 *Ibid*. para. 41

24 *Ibid*. para. 73-75

25 *Ibid*. para. 34-35. Member states that argued the opposite: Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Poland, Romania, the Slovak Republic and Spain

26 Art. 344 TFEU (Lisbon)

jurisdiction challenge stage in the arbitration proceedings in *Achmea v. Slovakia* and other investment arbitration tribunals that have dealt with this issue.[27]

Further Advocate General argues that dispute does not concern the interpretation of EU law, but interpretation of bilateral investment treaty and thus the arbitral tribunal's jurisdiction in present case was expressly confined to the alleged breaches of the bilateral investment treaty. Advocate general concludes that by their scope bilateral investment treaties are wider than EU law.

While approach taken by Advocate general may work for arbitral tribunals established under UNCITRAL arbitration rules as in this case and having their seat within the EU, it is problematic to see how arbitral tribunals, seated outside the EU, could be required to be able to request preliminary rulings from the European Court of Justice. This is even less possible for ICSID arbitral tribunals, which operate under the ICSID Convention. ICSID Convention contains significant differences as regards enforcement and the possibility of national courts to review the compatibility of arbitral awards with EU law. In the recent decision European Court of Justice took into consideration these arguments and issued a decision contrary to the Opinion of Advocate General.

European Court of Justice in decision of March 6, 2018 in the case *Slovakia vs. Achmea BV*[28] ruled that arbitration clauses in bilateral investment treaties concluded between EU member states – intra-EU bilateral investment treaties, were incompatible with, and had an adverse effect on EU law.

In the decision the European Court of Justice agrees with the argumentation of the European Commission that, by concluding the bilateral investment treaty with arbitration clause, Slovakia and the Netherlands had established a mechanism for settling disputes which was not capable of ensuring that those disputes will be decided by a court within the judicial system of the EU, which is able to ensure the full effectiveness of EU law. The European Court of Justice stated that Articles 267 and 344 of TFEU must be interpreted as preventing a provision in an international agreement concluded between member states, such as arbitration clause in the bilateral investment treaty between the Netherland and Slovakia. Arbitration clause in the treaty meant that an investor from one of those member states may, in the event of a dispute concerning investments occur in the other member state, bring proceedings against the latter member state before an arbitral tribunal whose jurisdiction that member state has undertaken to accept. The

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27 UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

28 Case C-284/16 *Slovakia Republic v Achmea B.V* [2018] ECLI:EU:C:2018:158

European Court of Justice stressed that arbitration clause of the intra EU bilateral investment treaty in question "has an adverse effect on the autonomy of EU law" and was not compatible with the principle of sincere cooperation.

The ruling of the European Court of justice is significant as it is binding on all member states. However, the full impact of the decision is not yet clear, as the European Court of Justice focused only on the specific bilateral investment treaty between the Netherlands and Slovakia at issue and did not hand down a ruling of general application. If the further practice shows that the ruling has more general nature then the investor state dispute settlement clauses in the nearly 200 intra EU bilateral investment treaties currently in force, are incompatible with EU law.

What is also not so clear from the decision is whether this also applies to bilateral investment treaties concluded between individual EU member countries and third States. The fact that the decision doesn't cover extra-EU bilateral investment treaties gives some hope for investor state dispute settlement mechanism to survive in other aspects apart from intra-EU bilateral investment treaties. The European Court of Justice is also not clarifying if the ruling also applies to the disputes currently pending under the Energy Charter Treaty if only two member states of the EU are involved. From the perspective of investors, also the question of "legitimate expectations" arises after decision.

The European Court of Justice didn't provide for alternative in its' ruling, but in recent years initiative comes from European Commission. In order to address criticisms towards investor stated dispute settlement, the EU's approach has been in attempt to use an Investment Court System in trade and investment agreements it concludes on behalf of its Member states. For example, the provision was included in The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Investment Court System involves a permanent and institutionalized court, whose members are appointed in advance by the parties to the treaty instead of being appointed on a case-by-case basis by the investor and the state involved in the dispute. That is different from the appointment mechanisms used in investor state arbitration. An appellate body is also provided for by CETA.

4. CONCLUDING REMARKS

The European Court of Justice has decided that investor state arbitration is not part of EU's judicial system. The ruling is significant, however the full impact of the decision is not yet clear, as it only covers specific bilateral investment treaty at issue and doesn't hand down a ruling of general application. At the same time it

is clear that the ruling will have an adverse impact on the enforcement of future investment arbitration awards.

Investor state arbitration is an important dispute resolution mechanism, but after decision of European Court of Justices there are various questions, when the dispute concerns an intra-EU investment issue, which make the mechanism less attractive. At the same time European Court of Justice failed to provide safe and fair alternative for investment protection. The question how investment arbitration shall be shaped within the EU and in the context of the applicable EU law is still open.

The public international law implications of the Europeans Courts of Justice judgment will have to be considered and determined by the national court, as well as arbitral tribunals called upon to decide disputes under intra-EU bilateral investment treaties. Respondent EU member states will relay on the judgment of European Court of Justice in on-going and future arbitrations of intra-EU bilateral investment treaty disputes to challenge the jurisdiction of tribunals and to resist the enforcement, or to challenge the validity, of awards. Change in performance of EU member states will make investment disputes in arbitration unpredictable and long developed investment protection mechanisms undesirable. That also could lead to situations when investors are forced to restructure their investment in order get protection guaranteed in bilateral investment treaty.

The judgment of the European Court of Justice will also put pressure on EU member states to terminate intra-EU bilateral investment treaties and in general will support the European Commission in the pending infringement proceedings against certain member states refusing to terminate their intra-EU bilateral investment treaties.

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EUROPEAN UNION IN FUNCTION OF DEVELOPMENT AND PROMOTION OF SMALL AND MEDIUM ENTERPRISES

ABSTRACT

Small and medium enterprises are a vital force for economy development. Activities on EU level are necessary in order for unique commodity market to remain open and fair. Modern entrepreneurship has a dominant significance in economy and often referred as entrepreneurship economy or entrepreneurship society.

In EU, around 99 % of the enterprises are designed as small and medium enterprises.

SME represents 98 % enterprises and 67 % of working places and crucial force for economic growth, innovations, employability and social integrations in EU. Hence, European Commission promotes successful entrepreneurship and enhances the business environment for SME.

SME in Europe represents a sociological phenomenon since SME provides solutions to so many existential questions, economic growth and development, business competitiveness and development of working places.

This paper is concerned with the current situation of SME in Europe and examines the possibilities of SME for further development as a crucial economic force in EU, strategic EU needs as well as the politics for promotion of SME. The paper present current statistical data.

Keywords: *small and medium enterprises, EU, development, promotion*

1. INTRODUCTION

In developed societies, entrepreneurship is the creator of new business activities. The main entrepreneurship' goal is to create new values by developing new business. Entrepreneurship creates employment opportunities, crates possibilities for new business development, innovations and investments on new global markets. Furthermore, it has a main role in productions so it is fair to say that develop society that organize economic life cannot exist without entrepreneurship.

Small and medium enterprises present a very heterogeneous group. They are usually operating in the sectors of trade, agribusiness, manufacture and service. Large

number of the business are innovative, driven to growth while others remain small and they are usually family owned business for generations with no need to change or resize. Small and medium enterprises are usually classified by the number of the employees or by values of their assets.

SME represent a key role in transition and developing European countries. Development of SME is viewed as one of the key instrument in poverty reduction. Small number of SME sector is able to identify the possibilities that arise for the globalization and trade liberalization and to create a response to market changes. SMEs due to their size and limitations in human resources and in financial assets are controlled by bureaucratic procedures, inadequate access to finance and humble state of infrastructure.

2. SMES IN EUROPE

2.1. Definition of the SMEs

The definition of SMEs varies from country to country depending on the criteria selected. These criteria reflect, among others, the structure and nature of the economy as well as the extent of industrial development. The number of employees, the scope of financial assets, or the level of sales turnover used to define SMEs are to a great extent a function of whether an economy is advanced, emerging, or developing. In other words, the definition of an SME in the advanced economies would consist of higher number of employees, larger financial assets or sales turnover than their counterparts in developing economies. However, the number of employees constitutes the main variation across national statistical systems.[1]

For the last twenty years, the EU has had to negotiate with national governments and a variety of sectoral concerns over its role in SME policy often with competing notions of what an SME is. The EU currently defines SMEs as those companies with fewer than 250 employees, which are independent from larger companies, with an annual turnover of less than €50 million and an annual balance sheet total not exceeding €43 million.[2]

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1 Khalfan M. *et al., Towards a growing, Comeptitive and dynamic Small and Medium - Sized Entreprises*, Oman, 2014, p. 4

2 Dannreuther, C., *EU SMS policy: On the edge of governance*, 2007., p. 8, available at: [https://www.cesifo-group.de/DocDL/forum2-07-focus2.pdf] accessed March 29, 2018

Enterprises qualify as micro, small or medium-sized enterprises if they fulfil maximum ceilings for staff headcount and either a turnover ceiling or a balance sheet ceiling[3] (Table 1).

Table 1. SME Definition

Enterprise category	Staff Headcount (number of persons expresses in annual work units)	Turnover	or	Balance sheet total
Medium- sized	< 250	≤ € 50 million		≤ € 43 million
Small	< 50	≤ € 10 million		≤ € 10 million
Micro	< 19	≤ € 2 million		≤ € 2 million

Source: Commission Staff Working Document, European Commission, Brussels, 2009., p.3. available at: [https://ec.europa.eu/energy/sites/ener/files/documents/sec_2009-642.pdf] Accessed April 2, 2018

The staff headcount is a crucial initial criterion for determining in which category an SME falls. It covers full-time, part-time and seasonal staff and includes the following: employees, persons working for the enterprise being subordinated to it and considered employees under national law, owner-managers, and partners engaged in a regular activity in the enterprise and benefiting from financial advantages from the enterprise. Apprentices or students engaged in vocational training with apprenticeship or vocational training contracts are not included in the headcount. The annual turnover is determined by calculating the income that enterprise received during the year in question from its sales and services after any rebates have been paid out. Turnover should not include value added tax (VAT) or other indirect taxes. The annual balance sheet total refers to the value of company's main assets.[4]

2.2. SMEs as an important drive for economic growth in Europe

From a worldwide perspective, SMEs are recognized as engine of economic growth because of their dependence on indigenous skills and technology, innovativeness and expansion of industrial linkages. SMEs are endogenously based enterprises as their linkages with the large multinational corporations lead to rapid growth

[3] Commission Staff Working Document, European Commission, Brussels, 2009, p. 2, available at: [https://ec.europa.eu/energy/sites/ener/files/documents/sec_2009-642.pdf] Accessed April 2, 2018

[4] The new SME definition, User guide and Model declaration, Enterprise and Industry Publication, European Commission, 2005, p. 15 , available at: [https://www.eusmecentre.org.cn/sites/default/files/files/news/SME%20Definition.pdf] Accessed April 2, 2018

and expansion of SMEs. They also play a vital role in employment generation and poverty reduction. In addition they contribute towards resource mobilization, revenue generation through export earnings, increase in savings, and equitable distribution of income, promotion of craftsmanship, egalitarian structure of society and development of an entrepreneurial culture. SMEs are also instrumental in skill acquisition through a system of informal apprenticeship and provide training ground for upgrading and developing skills.[5]

In European Union, some 23 million SMEs provide around 75 million jobs and represent 99% of all enterprises. However, they are often confronted with market imperfections. SMEs frequently have difficulties in obtaining capital or credit, particularly in the early start-up phase. Their restricted resources may also reduce access to new technologies or innovation. Therefore, support for SMEs is one of the European Commission's priorities for economic growth, job creation and economic and social cohesion.[6]

Overall, in 2016, SMEs in the EU-28 non-financial business sector accounted for:

- almost all EU-28 non-financial business sector enterprises (99.8 %);
- two-thirds of total EU-28 employment (66.6 %); and
- slightly less than three-fifths (56.8 %) of the value added generated by the nonfinancial business sector [7]

Micro SMEs are by far the most common type of SME, accounting for 93.0 % of all enterprises and 93.2 % of all SMEs in the non-financial business sector. However, micro SMEs account for only 29.8 % of total employment in the non-financial business sector, while small and medium-size SMEs accounted for 20.0 % and 16.7 % respectively of total employment. In contrast to the very uneven distribution of the number of enterprises and employment across the three SME size classes, their contribution is broadly equal in terms of value added, ranging from 17.8 % (small SMEs) to 20.9 % (micro SMEs).[8]

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5 Khiza, S. K., M. WAsif Siddiqi., *The Determinants of Ecport Performace: Evidence from small engineering units in Guranwala, GjurT nd Sialkot Sidtricts*, Interdisciplinary Journal of Contemporary research in Business, Vol 3, no1, 2001, p. 1411-1412

6 The new SME definition, User guide and Model declaration, Enterprise and Industry Publication, European Commission, 2005., p. 5., available at: [https://www.eusmecentre.org.cn/sites/default/files/files/news/SME%20Definition.pdf accessed] Accessed April 2, 2018

7 Annual report on European SMEs, Focus on self employmnet, London- Luxemoburg, European Commision, European Union, 2017, p. 10-11, available at: [https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf] Accessed April 2, 2018

8 *Ibid.,* p. 11

3. POLICIES FOR DEVELOPMENT AND PROMOTION OF SME IN EUROPE

In order to develop and strengthen the entrepreneurship potential of the European population,

especially of the young generations that will enter the labor market in the coming years, European institutions place specific focus on stimulating Member States to incorporate entrepreneurship as part of the school curriculum in all levels in their educational systems. Entrepreneurship education aims at preparing people to be responsible and enterprising individuals. It helps people develop the skills, knowledge, and attitudes necessary to achieve the goals they set out for themselves. By teaching entrepreneurship skills in classes, young people can find better opportunities in the labor market in the future. [9]

Traditionally, formal education in Europe has not been conducive to entrepreneurship and self-employment. However, as attitudes and cultural references take shape at an early age, the education systems can greatly contribute to successfully addressing the entrepreneurial challenge within the EU.[10]

SMEs must be able to respond quickly and efficiently to market signals to take advantage of trade and investment opportunities and reap the benefits of the international trading system. Among others, business development services (BDS) help SMEs to learn implement competitive business practices and strategies. The Committee of Donor Agencies for Small Business Development define BDS to include training, consultancy and advisory services, marketing assistance, information, technology development and transfer, and business linkage promotion. Disillusionment with the public provision of BDS has led to a market-based approach: traditional programs have been supply driven, they have crowded out potential private sector BDS suppliers with free or subsidized services, they have been limited in outreach, and of low-quality due to limited institutional capabilities (*e.g.* civil service based SME consultants without business experience).[11]

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9 Assessment of the effectiveness of the EU SME policies 2007-2015, Study, European Economic and Social Committee, 20 April 2017, p. 39, available at: [https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-02-17-762-en-n.pdf] Accessed May 11, 2018

10 Assessment of the effectiveness of the EU SME policies 2007-2015, Study, European Economic and Social Committee, 20 April 2017, p. 40, available at: [https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-02-17-762-en-n.pdf] Accessed May 11, 2018

11 Promoting Entrepreneurship and Innovative SMEs in a Global Economy: *Towards a more responsible and inclusive globalization,* 2nd OECS conference of ministers responsible for small and medium – sized enterprises; OECD, Istanbul, Turkey, 63-5 June, 2004, p. 30-31

Even though it is hard to give a grade of effectiveness of all measures, it cannot go without the evidence of concern that is given to SMS sector in different ways: entrepreneurship promotion, consultant hiring to help the entrepreneurs, building awareness and active education of entrepreneurship and for entrepreneurship, as shown in Table 3. [12]

Table 2. Historical timeline of EU SME politics trough phases

Phase	Features
1952.-1986.	- measurements based upon profession and self-employment - bigger awareness about SME importance in RU after parliamentary elections - 1982. as European Year of SME (EYSME)
1986.-1990.	- defines action plan for SME, distinctive horizontal measurements (aimed on resolving business and market environment questions) and vertical measurements (aimed upon questions of financing, acquiring skills…) - usage of "soft" laws and open consultations (for maintaining sovereignty of EU countries which resulted in complicated development of EU politics)
1990.-2000.	- insight of heterogeneity among business (micro enterprises, medium and large) - directionality on coordination, development and measurement of good practice
2000.-	- Lisbon strategy – process directionality of SME politics - European Charter on small enterprise - European Council in Santa Feira - "Think small first" principle - Small Business Act – 2008.

Dannreuther, C. (2007), *EU SME policy: on the edge of governance*, CESifo Forum, 2/2007, cited in: Vuković, K.: Mala i srednja poduzeća u ekonomiji EU, FOI, Varaždin, 2012, p. 75-76

Business Development Services include training, consultancy and advisory services, marketing assistance, information, technology development and transfer, and business linkage promotion. A distinction is sometimes made between "operational" and "strategic" business services. Operational services are those needed for day-to-day operations, such as information and communications, management of accounts and tax records, and compliance with labor laws and other regulations. Strategic services, on the other hand, are used by the enterprise to address medium- and long-term issues in order to improve the performance of the enterprise,

[12] Vuković, K., *Mala i srednja poduzeća u ekonomiji EU*, FOI, Varaždin, 2012, p. 75-76

its access to markets, and its ability to compete. For example, strategic services can help the enterprise to identify and service markets, design products, set up facilities, and seek financing. The market for operational services may already exist, since there is often articulated demand and willingness to pay for these services. In contrast, markets for strategic services. [13]

While a large proportion of BDS involves short-term professional (for entrepreneurs and professional staff of SMEs) and vocational (for the workforce) training, it cannot substitute for deficiencies in the education and training system of an economy. The ability of SME to adjust to the competitive pressures that come with trade liberalization and globalization will very much depend on the level of skills that are available within transition and developing economies. The education and training systems have the opportunity to influence the level of entrepreneurial activity in transition and developing economies, where new and innovative enterprise creation is a priority.[14]

Access too funding – both national and international credit – is one of the main constraints on the creation, survival and growth of SMEs, especially the most innovative of them. Another challenge is related to public administration and officials who are often poorly trained too much red tape and often a lack of transparency. In addition, the inadequate quality of key infrastructure such as roads, telecommunications, and electricity and water distribution networks often leads to poor yields on private investment in projects that depend on such infrastructure. The economic and financial crisis makes the difficulties for SMEs worse, firstly because it is more difficult to find funding and secondly because it leads to a drastic fall in demand for goods and services. In general, SMEs are more vulnerable in times of crisis for several reasons. On the one hand, it is difficult to reduce their size, because they are already small. On the other, their financial structure is weaker and they often suffer the backlash difficulties faced by large companies. [15]

Support politics of SMSs are concerned in maximizing the number of people that are starting own business and building a simple operative environment for small business. Main goals of that politics is quality and quantity. Politics that is oriented toward encouragement of fast-growing business emphasizes quality and

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[13] World Bank, "Business Development Services for Small Enterprises: Guiding Principles for Donor Intervention", *Committee of Donor Agencies for Small Enterprise Development*, 2001 Edition, February, Washington D.C., p..1

[14] Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a more responsible and inclusive globalization,2nd OECS conference of ministers responsible for small and medium – sized enterprises; OECD, Instambul, Turkey, 63-5 June, 2004, p. 32-33

[15] Fathallah, U., *Report on The role of small and medium-sized entreprises in the Mediterranean*, ARLEM, Morocco, 2012, p. 3-4

dynamics as priority. Table 4, clarifies the two approached in encouraging small and medium business, that differ in goals, approach based on availability and availability of resources. [16]

Table 3. Main differences between SME politics and support politics of fast-growing business

	Main support SME politics	Entrepreneurship support politics of fast-growing business
Politics goals		
Goals connected to entrepreneurship	Encourage as many people to become entrepreneur	Encourage the right people to become entrepreneurs
Goals connected to business	Increase number of business	Increase growth of new business
Goals connected to business surroundings	Improve surroundings for small project functioning	Improve surroundings for functioning of project oriented on growth
Availability of resources		
Source	Mostly form public sources	Combination of public and private sources
Type of financing resource	Loans, incentive	Loans for resource and development, incentives for innovations, business angels, risk capital, initial public offer
Dominative service	Standard advises on building business, business planning and operative	Expert advices on financing, strategic planning, organization growth
Principle of service distribution	Insure equal access to everyone	Select promising recipient (resource focusing)
Focus on life cycle	Remove obstacles for new business entries	Remove obstacles for growth of new business
Administrative obstacles	Reduce administrative procedures for small business	Simplify dramatic changes based on production volume
Attitude toward failure	Avoid bankruptcy and failure	Embrace failure and bankruptcy but reduce their economic and social expense
Connections with other politics	Industrial politics, social and work politics	Industrial politics, innovative politics, work politics

Source: Autio et. Ar. (2007): *High-Growth SME Support Initiatives in Nine Countries: Analysis, Categorization and Recommendations*, MTI Publications, Helsinki, p. 79., cited in: Vuković, K.: Mala i srednja poduzeća u ekonomiji EU, FOI, Varaždin, 2012, p. 98-99

[16] Vuković, *op. cit.* note 12, p. 97-98

EU policies and programmes continue evolving to become more SME-friendly in the complete lifecycle of enterprises, from birth to development and growth, and further innovation to final transfer. With the current financial and economic crisis, there is however a need and opportunity to speed up the delivery of support to SMEs in the Member States and at regional level, as well as within the European Commission. An important part of improving delivery would be to examine for instance how to better coordinate the European, national, regional levels in their strategies, policies and funding to SMEs. In the longer term, this links to the debate about shaping the budget of the future for post-2014, where we surely need better links between directly funded programmes and shared management.[17]

4. CONCLUSION

Challenges faced by SME sector do vary from country to county in EU but it is undeniably one of the most propulsive sector for economic growth of most EU country. SME sector has positive effect on competiveness of certain economy, has positive impact on employment, it challenges the innovativeness and creativeness of certain economy.

One if the biggest opportunities for entrepreneurship innovation lies in entrepreneurship incubators and business clusters. Another opportunities for developing economies lies ion trade, agriculture, service and handcraft. It is the responsibility of the EU countries to recognize these innovative possibilities and make incentives to enable and help new entrepreneurs to enter the market.

Nevertheless, SME sector requires more policies and promotions from EU. One of the biggest area that need additional promotion and reinforced policies is the education sector for entrepreneurs and inclusion of education of entrepreneurship in educational system. Access to funding and in most cases, bureaucracy public administrations represent a big obstacle for new entrepreneurs. SME financing is still considered one of the biggest challenge for countries in development and for least developed countries in EU.

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