# EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC 3)

International Scientific Conference

# “EU AND MEMBER STATES – LEGAL AND ECONOMIC ISSUES“

Editors:
Dunja Duić
Tunjica Petrašević

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International Scientific Conference

# “EU and Member States – legal and economic issues“

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# FOREWORD

The present book is a follow-up to the international scientific conference "EU and Member States – legal and economic issues" that was held on 6–7 June 2019 at the Faculty of Law in Osijek, Croatia. This third annual conference in Osijek was organized with the EU and Comparative Law Issues and Challenges Series (ECLIC) that has resulted from the EU project "Jean Monnet Chair for the EU procedural law". Implemented project activities were aimed to develop and deepen the study of EU law at the Law Faculty in Osijek, improving existing and introducing new EU courses to the curriculum. The final purpose was positioning the Faculty of Law Osijek in the regional centre as a reference point for the study of EU law that promotes excellence in teaching and scientific research.

The hardworking project leader and his associates have indeed succeeded. This was acknowledged by the panel of experts from the Directorate-General responsible for EU policy on education, culture, youth, languages, and sport of the European Commission, who assessed and identified the project as a "success story". Such description is awarded to remarkably successful projects that have distinguished themselves by their impact, contribution to policy-making, innovative results, and/or creative approach.

Such an award was substantially strengthened by the organization of a series of international scientific conferences on an annual basis called "EU and Comparative Law Issues and Challenges (ECLIC)". The significance of the conference organization dedicated to EU law was demonstrated in the very first year when the conference entitled "Procedural aspects of EU law", held on 6 and 7 April 2017, was attended by a respectable number—fifty—academics and practitioners, including a large number of participants from abroad. They discussed current issues of EU law and their impact on national legal systems. Thus, the vision and idea of a young team of scientists who have invested outstanding effort to become a regional role-model in EU law research, has been implemented.

The second international scientific conference "EU Law in Context – Adjustment to Membership and Challenges of the Enlargement" held on 14 and 15 June 2018 explored the new trends in the development of EU law and made an additional step forward implementing a multidisciplinary approach that includes economic challenges to research in EU law. The broadening of the research field enlarged the number of participants over sixty.

The results of the third conference that are collected in this book entitled *EU and Member States – legal and economic issues* focuses on the plenitude of issues that dominate the legal and economic EU space. The book is divided into six chapters following the six conference panels. The papers discuss different legal and economic challenges on the EU institutional level (division of competences between the EU and member states, Croatian presidency of the EU) and on the level of the national legal systems (infringement proceedings, preliminary rulings); legal challenges of the accession states (Bosnia and Herzegovina, Serbia); Brexit-related issues (bilateral agreement with the UK); economic challenges of the EU, economic challenges of member states (Scotland's Independence Movement, Digital Single Market issues); challenges in family law (support for life and until death, surrogacy issues, parents with disabilities); rule of law issues; criminal justice issues and immigration issues.

The conference was attended by more than 90 prominent experts with backgrounds mainly in academia but also in judicial and prosecutorial practice, attorneys at law, and the ministries of interior and justice from ten EU and candidate countries as well as EU institutions.

The evident value of the conference is reflected in its results, which are permanently written down in this third series of EU and comparative law issues and challenges (ECLIC) featuring papers published after a double-blind peer review process. In addition, the young team of scientists, in a very short period of just two years, received international acknowledgement of the excellence of their work by including the ECLIC publication in the prestigious Web of Science database, leading to the conclusion that this is a worthwhile endeavour that goes far beyond the Croatian national framework and absolutely deserves recognition and undeniable support in further work. It is the only international science conference in the Republic of Croatia dedicated to the legal sciences whose conference proceedings are indexed in the Web of Science database.

This young team of scientists has shown valuable and remarkable results and demonstrated dedication in the organization of the conference and preparation of the conference proceedings. Only such an approach and the work could result in valuable and admirable results that directly contribute to the development of the Croatian legal science and practice. Their diligence, discipline and ambition give us confidence that they will be equally successful and motivated in their future scientific and professional endeavours. So, let's congratulate them!

Zagreb, May 29, 2019

Prof. dr. sc. Zlata Đurđević

Faculty of Law University of Zagreb

Topic 1

# EU legal issues and perspective of enlarged EU

# PRELIMINARY REFERENCE PROCEDURE AND THE SCOPE OF JUDICIAL REVIEW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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***ABSTRACT***

*The purpose of this paper is to examine the scope of the ECtHR's review of preliminary reference procedure provided for in Article 267 TFEU, insofar as it concerns the right to a fair trial and other procedural safeguards read into substantive rights of the ECHR. In Ullens de Schooten and Rezabek v. Belgium, the ECtHR established the principles of its review under Article 6(1) ECHR in connection to the obligation of the national courts to refer the question for a preliminary ruling. This paper analyses the scope of protection of the right to a fair trial in the context of the national court's failure to refer a question to the CJEU for a preliminary ruling, in particular in the light of the CJEU's Cilfit case law and additional obligations imposed on the national courts by the ECtHR that supplement the standards set out in the CJEU's jurisprudence. The reason behind circumventing the applicability of the right to an effective remedy (Article 13 ECHR) to the preliminary reference procedure is being ellaborated as well, especially with respect to the CJEU's finding that a request for preliminary ruling does not constitute a mean of redress available to the parties. Furthermore, this paper discusses whether the preliminary reference procedure can be considered as a procedural safeguard read into substantive rights of the ECHR. In connection to the latter, the interrelation between preliminary reference procedure and two principles - the principles of subsidiarity and equivalent protection - is analysed.*

**Keywords:** *preliminary reference procedure, right to a fair trial, presumption of equivalence, European Court of Human Rights, Court of Justice of the European Union*

## 1. INTRODUCTION

It is now settled case law of the European Court of Human Rights (hereinafter: ECtHR) that an absolute right to have a case referred to the Court of Justice of the European Union (hereinafter: CJEU) cannot be derived from the provisions of the ECHR, nor the duty of the national courts to refer a question for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU).[1] Furthermore, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) does not guarantee the right to have a case, which was referred to the CJEU, decided by a preliminary ruling, because a national court may simply withdraw the request for a preliminary ruling from the CJEU.[2] However, national courts are not exempted from the duty to respect the principle of fairness inherent to the right to a fair trial. The latter principle may be infringed where the refusal to seek a preliminary ruling from the CJEU deems unreasonable or arbitrary.[3] This paper, however, will not focus only on the arbitrariness of the refusal to refer, but all relevant aspects of the right to a fair trial will be taken into consideration.

## 2. PRELIMINARY REFERENCE PROCEDURE AND THE RIGHT TO A FAIR TRIAL

### 2.1. Does Article 6(1) ECHR guarantee access to the CJEU?

If there is no right under Article 6(1) ECHR to obtain a preliminary ruling, is it possible to assess the refusal to refer within the meaning of the right of access to the court? In *Züchner v. Germany*, the ECtHR ascertained that the refusal could be, in principle, examined in connection to the right to a "tribunal established by law".[4] However, in *Jansen and Verschueren-Jansen v. Netherlands*, the ECtHR concluded that the scope of its review shall be limited only to the question whether the applicants had access to a national court competent to decide on the request

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1 See, for example, decisions in the cases of *John v. Germany* (2007); *Ferreira Santos Pardal v. Portugal* (2012); *Stichtung Mothers of Srebrenica and Others v. Netherlands* (2013), par. 172; This opinion was founded upon previous case law on the „right to obtain a preliminary ruling" from another domestic or international authority, e.g. *Coëme and Others v. Belgium* (2000), par. 114 and *Wynen and Other v. Belgium* (2001), par. 41-43

2 See the judgment *Pafitis and Others v. Grece* (1998), par. 111

3 See, for example, decisions in the cases of *Schweighofer and Others v. Austria* (2001), *Canela Santiago v. Spain* (2001), *Bakker v. Austria* (2003), *De Bruyn v. Netherlands* (1999), and *John*, op.cit. note 1; See also Valutytė, R., *State liability for the infringment of the obligation to refer for a preliminary ruling under the European Convention on Human Rights*, Jurisprudence, *Vol.* 19, No. 2, 2012, pp. 10-11

4 Decision *Züchner v. Federal Republic of Germany* (1987), par. 3

for a referral.[5] Since the preliminary reference procedure is not conceived by EU law as a remedy providing direct access to the CJEU, the right of access to the latter cannot be guaranteed under Article 6(1) ECHR.[6]

### 2.2. Prohibition of arbitrariness and the right to a reasoned decision

The general prohibition of arbitrariness is closely related to the right to a reasoned decision. In its early case law, the ECtHR ascertained that as long as the national courts provide reasons for the refusal to seek a preliminary ruling, it will not deem the refusal arbitrary. Where a national court finds that the question raised by the applicant falls outside the scope of application of EU law, its finding will suffice to the standard of a reasoned decision.[7] The ECtHR reached the same conclusion in *DIVAGSA Company v. Spain* where the matter brought before a national court was *acte clair* with respect to the relevant case law of the CJEU.[8]

There is only one situation in which the national courts are not required to adhere strictly to the standard of a reasoned decision, that being in the case of an applicant who failed to request expressly a referral to the CJEU, or failed to adduce precise reasons thereto.[9] Therefore, the request for a referral must be sufficiently substantiated. Where the applicant complained of interpretation of relevant national law, instead of stating the question on interpretation of EU law, the national court was exempted from the duty to adduce the reasons for non-referral.[10] General remarks as to the incompatibility of the impugned decision with EU law cannot suffice either.[11] Due to the non-exhaustion rule, an applicant must submit a request and raise a complaint on non-referral before a competent national authority.[12] However, he may do so in the latest stage of national proceedings before a constitutional court.[13]

The *Ullens de Schooten and Rezabek v. Belgium* case provided the ECtHR an opportunity to clarify which duties are conferred on the national courts by the right to a reasoned decision. It is a seminal case because the ECtHR decided to explain

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[5] Decision *Jansen and Verschueren-Jansen v. Netherlands* (1993), par. 1

[6] For a critical review on access of the individuals to the CJEU, see Galera, S., *El derecho a un juicio justo en el Derecho de la Unión Europea: luces y sombras*, Revista de Derecho Político, No. 87, 2013, pp. 63-65

[7] See, for example, decisions *Moosbrugger v Austria* (2000), par. 2; and *Canela Santiago v Spain* (2001)

[8] Decision *DIVAGSA Company v. Spain* (1993), extracts

[9] Decision in *John*

[10] Decision *Matheis v. Germany* (2005), par. 3

[11] See, in particular, the judgement in *Wallishauser v. Austria No. 2* (2013), par. 85

[12] See the decision in *Mens and Mens-Hoek v. Netherlands* (1998), par. 2

[13] Decision *Herma v. Germany* (2009)

for the very first time, in the judgment on the merits of the case, the meaning of the concept of arbitrariness in context of the preliminary reference procedure.[14]

The refusal to refer is arbitray „where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules".[15]

Furthermore, the ECtHR departed from general standard of sufficient or relevant reasons and, in the light of *Cilfit* case law, has established more stringent standards which require special quality of the reasons adduced by the national courts. From there on, the ECtHR requires that the national courts „indicate the reasons why they have found that the question is irrelevant, that the (EU) law provision in question has already been interpreted by the Court of Justice, or that the correct application of (EU) law is so obvious as to leave no scope for any reasonable doubt".[16] Thus, the ECtHR declared itself competent to review case by case whether the national courts observe the *Cilfit* criteria and the *acte claire* principle.[17]

Meanwhile, it must be emphasised that the *Ullens de Schooten* judgment has established the criteria of quality, not quantity. Depending on the circumstances of an individual case, summary reasoning of the refusal to refer may suffice.[18] In this connection, in *Harisch v. Germany* the ECtHR found no violation Article 6(1) ECHR even though the Federal Court of Justice as the court of last resort within the meaning of Article 267 TFEU barely provided any reasons for non-referral. Thus because the impugned decision of the superior court was procedural by its nature and the ECtHR was satisfied that the lower appelate court had provided extensive reasons for non-referral.[19] The ECtHR accepted "that the reasons for a

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14 For detailed circumstances of the case, see judgment *Ullens de Schooten and Rezabek v. Belgium* (2011), par. 10-13

15 *Ibid.*, par. 59; See also the judgment in *Baydar v. Netherlands* (2018), par. 39; As to the interpretation of those criteria in the case law of German Federal Court, see Valutytė, R., *Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling*, Jurisprudence, *Vol.* 19, No. 3, 2012, p. 1175

16 Judgment in *Ullens de Schooten*, par. 62; See also Derlen, M.; Lindholm, J. (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Hart Publishing, Oxford and Portland Oregon, 2018, p. 22

17 See also Broberg, M.; Fenger, N., *Preliminary references to the Court of Justice of the European Union and the right to a fair trial under Article 6 ECHR*, European Law Review, *Vol.* 41, No. 4, 2016, pp. 605-606

18 See the decision in the case of *Stichtung Mothers of Srebrenica*, par. 173-174; and the judgment in *Baydar*, par. 43, 45

19 *Harisch v. Germany* (2019), par. 37-40

decision by a superior court may be implied from the circumstances in some cases or from endorsement of the reasoning of the lower court".[20]

On the other hand, the ECtHR clarified that the assessment whether the national court's interpretation of EU law was „erroneus" falls outside its jurisdiction.[21] However, in *Ramaer and Van Willigen v. Netherlands*, the ECtHR assessed whether the national court's interpretation of EU law following the preliminary ruling delivered by the CJEU in the earlier stage of proceedings was, in general terms, arbitrary.[22]

In its early case law, the ECtHR refrained from intervening in the national courts' refusal to refer to the CJEU and the vast majority of the complaints thereto were rejected as manifestly ill founded. Eventually, in *Dhahbi v. Italy* the ECtHR found that the refusal to seek a preliminary ruling violated Article 6(1) ECHR, but without any references to the *Ullens de Schooten* judgment.[23] Thus because in *Dhahbi* the ECtHR did not deal with the concept of arbitrariness as it had been ellaborated in *Ullens de Schooten*. The alleged violation of the right to fair trial in *Dhahbi* was blatant because the national court did not observe that the applicant had submitted the request for a preliminary ruling, nor did it adress the applicant's submissions thereto in the impugned decision.[24] Therefore, the national court infringed the applicant's right to a reasoned decision.

### 2.3. Preliminary reference procedure and adversarial principle

The *Ullens de Schooten* case is also significant with respect to the conclusion that the refusal to refer must adhere to the adversarial principle, another procedural safeguard of the right to a fair trial.[25] The parties must be provided the opportunity

[20] *Ibid.*, par. 41

[21] Decision in *Stichtung Mothers of Srebrenica*, par. 65-66; See also par. 89-90 of the decision in *Vergauwen and Others v. Belgium* (2012) where the ECtHR concluded that: „it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law"

[22] Decision *Ramaer and Van Willigen v. Netherlands* (2012), par. 104

[23] Krommendijk, for example, criticised the latter approach. See more in Krommendijk, *"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer*, European Law Review, *Vol.* 42, No. 1, 2017, pp. 46-62

[24] Judgment *Dhahbi v. Italy* (2014), par. 31-33; In almost identical circumstances and for identical reasons, a violation of the right to a fair trial was found in the case of *Schipani and Others v. Italy* (2015), par. 69-72; For further comments on these cases, see Broberg, M.; Fenger, N., *Preliminary references to the Court of Justice of the European Union and the right to a fair trial under Article 6 ECHR,* European Law Review, *Vol.* 41, No. 4, 2016, pp. 602-603; and Konstadinides, T., *The Rule of Law in the European Union: The Internal Dimension*, Hart Publishing, London, 2017, p. 177.

[25] Judgment in *Ullens de Schooten*, par. 66

to submit the pleadings, or to respond to the submissions of the opposing party in connection to the referral.[26] Therefore, the parties' submissions must be examined with due dilligence.

Another interesting issue as to the compliance with the adversarial principle arose in *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands* case where the applicant complained that the latter was violated because he was denied to respond to Advocate General's opinion in the proceedings before the CJEU. The ECtHR concluded that in so far as the applicant's complaints must be understood as being directed against the EU itself, they are inadmissible as incompatible with the provisions of the ECHR *ratione personae.* However, the ECtHR is not precluded from determining whether the alleged violation of adversarial principle before the CJEU could be imputed to the referring national court. Such conclusion was reached because the interference with the applicant's right to a fair trial may, in principle, be attributed to the national court's decision to seek a preliminary ruling.[27]

Therefore, the ECtHR is competent to review under Article 6(1) ECHR the effects that the proceedings before the CJEU might have had on the proceedings before a national court. In this regard the ECtHR examined whether the procedure before the CJEU was accompanied by guarantees which ensured equivalent protection of the applicant's right to a fair trial. With a view to the principle of equivalence, no violation of the right to a fair trial had been found. As the ECtHR pointed out, the protection of adversarial principle before the CJEU is not required to be identical to that provided by the ECHR. However, the ECtHR reviews whether the procedural safeguards of the right to a fair trial are observed by the CJEU. If there was an infrigment of the right to a fair trial found in the proceeding before the CJEU, it would be imputed to the Member State's domestic court, not the CJEU itself.[28]

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[26] Finding no violation in the case of *De Bruyn*, the ECtHR concluded: "...it does not appear that the applicant was unable or was insufficiently able to submit arguments based on rules emanating from the European Union which he considered relevant to the outcome of his case."

[27] Decision *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands* (2009), par. 2-3; The latter decision was inspired by the case of *Vermeulen v. Belgium* (1996), in which a violation of the right to a fair trial was found because the applicant was deprived of an opportunity to reply to the advisory opinion of the advocate-general of a superior national court (par. 42-44); see also *K. D. B. v. Netherlands* (1998)

[28] The ECtHR clarified: „*Although thus prevented from examining the procedure before the ECJ in the light of Article 6 § 1 directly, the Court is not dispensed from considering whether the events complained of engaged the responsibility of the Kingdom of the Netherlands as a respondent party…The nexus between a preliminary ruling by the ECJ under Article 234 of the EC Treaty and the domestic proceedings which give rise to it is obvious.*", *ibid.*, par. 3

### 2.4. Stay of proceedings and the right to a fair trial within reasonable time

Once the case was referred to the CJEU for a preliminary ruling, domestic proceedings must be stayed. The stay of proceedings enables the CJEU to deliver a judgement having real effect on the outcome of a dispute which had invoked a question on interpretation of EU law. However, due to the CJEU's heavy caseload, the preliminary reference procedure contributes to the overall length of proceedings before national courts, thus raising a question whether the national proceedings that have been stayed after the referral conform to the right to a fair trial within reasonable time. In *Pafitis and Others v. Greece*, the European Commission of Human Rights concluded that national authorities cannot be held accountable for the delays which had occurred before the CJEU, provided that „the decision to make a preliminary reference was in conformity with the proper administration of justice".[29] The meaning of the latter „proper administration of justice" prerequisite has not been clarified in the context of the national court's decision on referral. The Commission furthermore implied that it will not examine the national rules on the stay of proceedings, even if the case referred to the CJEU was urgent in facts and law.

This case, nevertheless, illustrates a good example of human rights becoming „devoid of any purpose". The CJEU pronounced on the request two years and seven months after the matter was referred to it, therefore contributing significantly to the overall length of proceedings. Having regard to short time that has been left to the national court to decide on the applicants' case within reasonable time, the ECtHR decided that the national courts cannot be held accountable for any delays that might have occured due to the proceedings conducted the CJEU. By taking no recourse to the lack of formal jurisdiction over the CJEU, the ECtHR has thus created a situation in which nobody can be held accountable for delays in domestic proceedings.[30]

Since the referral for a preliminary ruling also constitutes the exercise of judicial discretionary powers, thus even those parties who had opposed to it remain unprotected. Moreover, where the applicants insist on referral to the CJEU and submit additional pleadings which prolong the proceedings, those circumstances will be taken into consideration to their detriment in the ECtHR's assessment of the conduct of national authorities.[31]

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[29] Judgment in *Pafitis,* par. 111; See also the judgments in the cases of *Koua Poirrez v. France* (2003), par. 61

[30] See also Broberg, M.; Fener, N., *Preliminary References to the European Court of Justice*, Oxford University Press, Oxford, 2014, pp. 278-279

[31] Judgment *Pedersen and Pedersen v Denmark* (2004), par. 51; see also the decision in *T. Dalsgaard and J. Dalsgaard v. Denmark* (2005)

## 3. THE REQUEST FOR A PRELIMINARY RULING - AN EFFECTIVE LEGAL REMEDY WITHIN THE MEANING OF ARTICLE 13 ECHR?

According to the CJEU's *Cilfit* judgment, Article 267 TFEU does not provide for any means of legal redress in the proceedings before national courts.[32]

The first opportunity to conclude whether the proceedings provided for in Article 267 TFEU fall within the scope of application of Article 13 ECHR arose in *Adams and Benn v. the United Kingdom* where the applicants claimed that, due to the national court's decision to withdraw from the CJEU the questions referred, they were left without effective judical protection in so far as they had invoked an application of the relevant primary law provisions on free movement of persons to their case.[33] The Commission for Human Rights noted that „the applicants' claim is based on a provision of a treaty which provides in general terms for freedom of movement of citizens of the EU" which cannot be considered as an arguable claim of a violation of the ECHR. Consequently, it was concluded that their complaints, in so far as they concerned Articles 6 and 13 ECHR, were incompatible *ratione materiae* with the ECHR.[34]

Furthermore, in *Emesa Sugar N. V. v. Netherlands* the European Commision, as an intervenor to the proceedings before the ECtHR, argued that „the preliminary ruling procedure was conceived as a dialogue between judges at the national and the Community level on a question of interpretation of EC law".[35] Unfortunately, the ECtHR did not advance that argument in connection to the applicability of Article 13 ECHR to the latter case.

Eventually, in *Ullens de Schooten*, the ECtHR reiterated that Article 6(1) ECHR implies the full panopl of safeguards which are stricter and thus absorb those

[32] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] E.C.R. 3415, par. 9; For a critique of such solution and further recommendations, see Lacchi, C., *Multilevel judicial protection in the EU and preliminary references*, Common Market Law Review, *Vol*. 53, No. 3, 2016, pp. 679–707; and Silveira, A.; Perez Fernandes, S.; *Preliminary References, Effective Judicial Protection and State Liability. What if the Ferreira da Silva Judgment Had not Been Delivered?,* Revista de Derecho Comunitario Europeo, No. 54*,* 2016, pp. 641-648

[33] Decision *Adams and Benn v. the United Kingdom* (1997)

[34] *Ibid*., par. 2-3; This interpretation was directly overturned in the CJEU's *Baumbast* judgment. The latter court came to a conclusion that the freedom to reside or move freely within the territory of the Member States confers on the individuals the „rights which are enforceable by them and which the national court must protect". See Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091, par. 86; On autonomous and directly effective right of movement and residence, see Craig, P.; de Burca, G., *EU Law – Text, Cases and Material*, Oxford University Press, Oxford, 2015, pp. 860-865

[35] Decision *Emesa Sugar N. V. v Netherlands* (2005)

of Article 13. For that reason, it concluded that the complaints of non-referral should be examined under Article 6(1) ECHR alone.[36]

## 4. PRELIMINARY REFERENCE PROCEDURE AND THE PRINCIPLE OF SUBSIDIARITY

Nevertheless, it must be emphasised that the ECtHR has never stated expressly that Article 13 ECHR is not applicable to the preliminary reference procedure. The reason thereof, most probably, was to prevent limiting the scope of the ECtHR's review. It is important to notice that if the ECtHR had interpreted that a request for a preliminary ruling is an effective legal remedy within the meaning of Article 13 ECHR, it would have to examine, whenever proper interpretation of EU law is in the core of the applicant's complaint, whether all remedies provided for in domestic law were exhuasted prior to the application, including the request for a referral. Consequently, the ECtHR's scope of review on the matters concerning EU law would be limited by the principle of subsidiarity.

Therefore, the ECtHR would be deprived from its supervisory mechanisms whenever a Contracting Party claims that the complaints raised before the ECtHR fall clearly within the scope of application of EU law. Thus, for example, in *X. S. A. v. Netherlands*, the ECtHR refused to adress the Government's complaint as to the non-exhaustion of domestic remedies due to the applicant's failure to seek a preliminary ruling on interpretation of EU law.[37]

However, the latter does not mean that the ECtHR cannot apply the principle of subsidiarity with respect to the EU's legal order. It had applied it, but only in *LAURUS INVEST HUNGARY KFT and Others v. Hungary* where the proceedings were still pending before the CJEU. Taking into account the circumstances of the case, the ECtHR pointed out that "to substitute its own assessment for that of the national courts as guided by the CJEU, without awaiting the outcome of those proceedings, would be tantamount to ignoring its subsidiary role".[38]

## 5. PRELIMINARY REFERENCE PROCEDURE AS A PROCEDURAL SAFEGUARD READ INTO SUBSTANTIVE RIGHTS GUARANTEED BY THE ECHR - THE REBUTTABLE PRESUMPTION OF EQUIVALENCE

The question whether a refusal to refer for a preliminary ruling could be examined as a procedural safeguard read into substantive rights of the ECHR arose for the

[36] Judgment in *Ullens de Schooten,* par. 52

[37] Decision *X. S.A. v. Netherlands* (1994), par. 1

[38] Decision *LAURUS INVEST HUNGARY KFT and Others v. Hungary* (2015), par. 42

first time in *Spiele v. Netherlands* where the ECtHR concluded that the refusal to seek a preliminary ruling did not disclose any issue under Article 10 of the ECHR.[39] Later on, in *Chylinski and Others v. Netherlands* the applicants suggested that their complaint should be examined under Article 5 of the ECHR. However, the application was declared inadmissible because the ECtHR ascertained that the request for a preliminary ruling could have had no bearing on the lawfulness of detention.[40] Even though the ECtHR did not respond definitely to the applicants' question, it assessed the refusal to refer in connection to the lawfulness of detention, a concept inherent to the substantive right to liberty under Article 5 of the ECHR. Thus, the possibility of assessing the refusal to seek a preliminary ruling as a procedural safequard read into the substantive rights has not been ruled out by the ECtHR.

Meanwhile, the ECtHR found another, less explicit form of assessing the request for a referral as a procedural safeguard read into substantive rights of the ECHR. In the *Bosphorus* judgment the ECtHR has established the presumption of equivalent protection. Taking into account the protection of human rights afforded to the individuals by the Charter of Fundamental Rights and the primary law of the EU, as well as the role and powers of the CJEU, the ECtHR found that that protection is, in principle, equivalent (comparable) to that for which the ECHR provides.[41] The latter presumption can be rebutted only if the protection of human rights provided for in the EU legal order can be regarded as manifestly deficient.[42]

Furthermore, in *Michaud v. France* the ECtHR subjected the presumption of equivalence to two conditions: 1. absence of discretionary powers in application of EU law on the part of domestic authorities; 2. deployment of the full potential of the supervisory mechanism provided for by EU law.[43] The second condition relates especially to the judicial review of the CJEU. The *Michaud* judgment was

39 Decision *Spiele v. Netherlands* (1997), par. 1

40 Decision *Chylinski and Others v. Netherlands* (2015), par. 48

41 See more in Ravasi, E., *Human Rights Protection by the Ecthr and the Ecj: A Comparative Analysis in Light of the Equivalency Doctrine*, Brill - Nijhoff, Leiden, 2017, pp. 385-388; and Tridimas, T.; Schütze, R. (eds.), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order*, Oxford, 2018, pp. 404-405

42 See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (2005)*, par. 156, 159-165; For a comment on this concept in *Bosphorus* case law, see Callewaert, J., *The European Convention on Human Rights and European Union Law: a Long Way to Harmony*, European Human Rights Law Review, No. 6, 2009, pp. 772-773; As to the application of this concept in the *Avotiņš* case, see 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 23 May 2016, Case No. 17502/07, Avotiņš v Latvia*, European Constitutional Law Review, *Vol.* 3, No. 3, p. 559

43 Judgment *Michaud v. France* (2012), par. 113-115

interesting in regard to the reason for which the ECtHR found that the presumption of equivalence was rebutted. It reiterated that the circumstances of the *Bosphorus* case differ from those in the *Michaud* case in connection to the national court's decision to refer the question for a preliminary ruling. While in the *Bosphorus* case the national court referred the questions on interpretation of EU law to the CJEU, in the *Michaud* case the applicant's request for a referral to the CJEU had been rejected. For that particular reason, the ECtHR stated: „The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply.“.[44]

In order to avoid possible misinterpretations of the *Michaud* judgment, in *Avotiņš v. Latvia* the ECtHR clarified that the refusal to seek a preliminary ruling does not preclude the application of the presumption of equivalence in any circumstances.[45] In the instant case it took into consideration that the applicant failed to adress properly the reasons for which the interpretion of EU law is required. Furthermore, it stated that in the *Michaud* case the applicant raised a question whether the impugned provisions of EU law are compatible with the ECHR and that distinctive issue had never been examined by the CJEU in its previous case law.[46]

Even though the ECtHR had not stated that the refusal to seek a preliminary ruling may be assessed as a procedural safeguard read into substantive rights of the ECHR, it nevertheless acknowledged that such refusal may rebut the presumption of equivalence and lead to deployment of full protective machinery of the ECHR. Consequently, it may be concluded that the preliminary reference procedure, at least indirectly, has been recognised by the ECtHR as a procedural safequard relevant to the assessment on conformity of EU law to the substantive rights protected by the ECtHR.

[44] *Ibid.*, par. 115

[45] See also Jelinić, Z.; Knol Radoja, K., *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,* EU and Comparative Law Issues and Challenges, No. 2, pp. 579-582

[46] Judgment *Avotiņš v. Latvia* (2016), par. 110-111

## 6. CONCLUSIONS ON THE SCOPE OF REVIEW OF THE ECTHR

The ECtHR's review is a self-restrained judicial review of the preliminary reference procedure at the level of national courts. The fact that the ECtHR will not establish any form of review of the proceedings conducted by the CJEU became obvious in *Emesa Sugar N. V.* Even though the ECtHR avoided to respond to the European Commission's argument that it lacks jurisdiction over the acts of the EU's institutions, the ECtHR's case law does not show a frank restraint from intervening in the matters which could be considered to fall within an exclusive jurisdiction of the CJEU.[47] The reason thereof can be found in the *Bosphorus* judgment where the ECtHR indirectly stated that, due to the limited access of individuals to the CJEU, the ECtHR retained the role of the ultimate guardian of the respect for human rights in the EU.[48]

In its early case law, the ECtHR founded its judicial review of early stages of the preliminary reference procedure upon a general prohibition of arbitrariness (the right to a reasoned decision) as it is being interpreted withing the meaning of the right to a fair trial. In this regard the ECtHR follows the methodology developed in *Cilfit* case law and has abandoned the autonomus concepts of the ECHR as a method of interpretation. Therefore, the ECtHR acknowledges the autonomy of the EU's legal order and adheres to the criteria developed by the CJEU.

However, the scope of the ECtHR's review of is not limited exclusively to observance of the national courts' duty to reason the decision on non-referral.

The ECtHR's case law indicates that observance of the adversarial priniciple at any stage of national proceedings prior to, and after referral, may be subjected to its scrutiny if it is affected by the proceedings conducted before the CJEU.

Even though the ECtHR has not accepted the possibility of applying the principle of subsidiarity and the non-exhaustion rule to the complaints which raise an issue of proper interpretation of EU law, it has acknowledged that the preliminary reference procedure pending before the CJEU may preclude him from examining the merits of such complaints. Thus because the purpose of the ECtHR's review is not to substitute it for that of the CJEU.

Finally, the *Michaud* judgment has indicated that the ECtHR's review of the preliminary reference procedure may be extended beyond Article 6(1) ECHR. The latter case revealed that a mere failure of a national court to seek a preliminary rul-

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47 Decision *Emesa Sugar N. V*; See also Kuhnert, K*., Bosphorus – Double standards in European human rights protection?*, Utrecth Law Review, *Vol.* 2, No. 2, 2006, p. 184

48 See judgment in *Bosphorus*, par. 162

ing may rebut the presumption of equivalence and lead the ECtHR to assess the conformity of EU law (and national law derived from it) to the ECHR. Therefore, a decision on non-referral does not trigger the applicability of Article 6(1) ECHR only, but also raises serious concerns about observance of substantive rights guaranteed by the ECHR.

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# THE REQUEST FOR PRELIMINARY RULING AND PRACTICE IN THE REPUBLIC OF CROATIA

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***ABSTRACT***

*The Republic of Croatia joined the European Union on 1 July 2013 marking the end of a process which started in 2001 with the signing of the Stabilisation and Association Agreement. Membership in the Union brought significant changes in Croatian legal practice, particularly in its case law. Reference-based relationship between national courts and the Court of Justice of the European Union (CJEU) calls for changes in existing perspective. National courts are under an obligation to give full effect to applicable provisions of EU law and, if necessary, to refuse of their own motion application of any conflicting provision of national legislation. Furthermore, the existence of a rule of national law whereby courts against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot deprive the lower courts of the right provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU) to refer questions on the interpretation of EU law to the CJEU. From the outset, the author will lay down general remarks on the preliminary ruling procedure, on the scope and relevance of Article 267 TFEU and on the national court's perspective. While discussing the application of EU law in Croatia, the focus will be on the "shift" of powers between legislative and judicial authority arising from direct effects and supremacy of EU law. Namely, the duty of national courts to set aside incompatible national legislation on their own motion amounts to a derogation of existing national legislation. Deciding cases by applying directly applicable EU legislation calls for no prior legislative activity on the side of national legislator. The application of EU law in Croatia also calls for modification of existing judicial hierarchy. Rules of binding decisions of superior courts do not apply as they did since the lower courts still have the right to refer questions of interpretation of EU law to the CJEU whenever in doubt about the correct interpretation of EU law. There is also a matter of possible „bypassing" of the Constitutional Court (in case of provision of national law that is not only contrary to EU law, but also unconstitutional) that will be addressed. Statistics and summarised analysis of CJEU case law on request for preliminary rulings from Croatia will be given as well as references to subsequent case law of domestic courts. The emphasis will be put on the issues raised so far, namely Article 18 of the Criminal Procedure Act and the case law of Supreme Court of the Republic of Croatia on staying criminal procedure when the request for the preliminary ruling has been made. Also, reference will be made to the existing case law on staying civil procedures when the request for the preliminary ruling has been made.*

***Keywords:*** *Republic of Croatia, CJEU, preliminary ruling, Supreme Court of the Republic of Croatia*

## 1. KEEPING UP WITH NEW LEGAL ORDER

Croatian membership in the EU brought significant changes for national courts. It is not only because domestic courts are obliged to apply numerous new pieces of European legislation, which is enough of a challenge as it is, but also because of the manner in which the now applicable European law applies.

Direct effect of European law and its supremacy over national legislation and jurisprudence call for a different kind of diligence of Croatian judges. If the matter at hand relates to Union issues, it does not suffice to make a decision in accordance with national law. At best, judges are to interpret domestic legislation in a way to enable full effects of the applicable European rule on the matter. If such an interpretation is not possible without acting *contra legem*, the courts might be under duty, depending on the nature of impugned situation, to set aside provision of domestic law entirely, and directly apply European norms.

When it comes to situations regulated by the Union, relying entirely on domestic laws is a luxury that does not exist anymore. While the fact that courts are not lawmakers remains, ultimately the courts are the last line of the defence of the European legal order with both the power and duty not to apply incompatible national legislation. In other words, domestic laws and well established practice of domestic courts are not an excuse for hindering intended effects of EU law. Judges should be well aware and mindful of such a duty. It is a novelty but a novelty well worth accepting as the mistakes in application of EU law can rise issues of responsibility both at a domestic and European level.

Furthermore, as the obligation to properly apply EU law lies with all judges working at all levels of jurisdiction; all judges should pay attention to it. The idea that only the highest courts in a country are under an obligation to apply European law is incorrect. While it is true that the highest courts bear specific responsibilities to that effect, it by no means implies that lower courts are without responsibilities. The earlier the procedure in which the application of European law is recognized, discussed and applied, the better.

When a question of interpretation of EU law arises it should not suffice, as judges normally do, to weigh all arguments, reach a reasoned decision and let appellate courts deal with it. Although it is true that lower courts are free to essentially do exactly that, one should be mindful of preserving the principles of procedural economy and reasonable length of procedure. In that regard, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (further in text: ECHR) applies.

Application of European law brings us to the biggest novelty of all – its interpretation. A new player has stepped in on the Croatian judicial scene. Not only that national courts are to seek guidance on interpretation of law applicable in Croatia from a Court sitting up north in Luxembourg, but they are not bound by such interpretation when given by superior national courts if that interpretation is contrary to EU law. Consequently, rules on binding decisions of superior courts are somewhat overridden. It changes existing dynamics in judicial hierarchy and requires adjustments of the existing practice.

## 2. INTERPRETATION OF EU LAW

As noted above, when interpreting EU law, domestic courts are not bound by the interpretations of law given by higher national courts, not even the highest one. The existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice.[1] "The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the CJEU questions which concern it."[2]The reasoning is simple – the CJEU alone bears exclusive jurisdiction for the correct and uniform interpretation of EU law in all Member States, regardless of different national circumstances. Uniform interpretation enables uniform application.

This exclusive privilege of the CJEU cannot be circumvented by the transpositions of some directly applicable norms of EU law (i.e. regulations) into national legislation by way of merely copying relevant EU norms into national legislation. Such a transposition essentially creates a situation in which European norms become domestic and, as such, are exclusively interpreted by domestic courts. That is the reason why a regulation is a binding legislative act and must be applied in its entirety across the EU. For example, when the EU wanted to make sure that there are common safeguards on recognition and enforcement of judgments in civil and commercial matters, it adopted a regulation[3]. Given such universal application of regulations, one can assume that transposition of regulations into national law is

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1 Judgment of 16 December 2008, *Cartesio*, C-210/06, ECLI:EU:C:2008:723, paragraph 94

2 Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, paragraph 42

3 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 2012 L 351, p. 1)

useless – courts do not apply domestic legislation, even if completely compatible with regulations, when dealing with matters in which there is directly applicable EU regulation. Usefulness of such a practice is less important, though. More serious is the issue of interpretation. As stated earlier, when written in national codes, European norms become national norms and domestic courts could be tempted to interpret them essentially as they wish. Such interpretation may vary in different Member States, hindering the uniform application of the law which originated as European and was intended for unification.

Even though Croatian lawmakers were generally mindful of the fact that EU Treaties and regulations have general application and are binding in their entirety and directly applicable in all Member States, there are some exceptions where EU law was rewritten in domestic codes. The most serious is the one concerning Article 18 of the Criminal Procedure Act which basically copies Article 267 TFEU. The case-law developed and its compatibility with EU law will be analysed latter on in this article.

On the other hand, it is possible to make provisions of EU law applicable to purely internal situations. It is due to reference made by domestic law to the contents of EU provisions.

Recently adopted legislation on private international law potentially creates seemingly confusing situation in which Croatian courts are to apply EU regulations providing that matters at hand fall outside of scope of same EU regulations.

The Act on Private International Law came into force on 29 January 2019.[4] It determines which state law is applicable to situations crossing out the borders of one particular state involving a "foreign element"; which country's courts are the appropriate forum for the dispute; and the recognition and enforcement of judgements rendered by foreign courts.

It is a subsidiary legislation and applies only when the issue at hand is not regulated by directly applicable European law, international agreement or other applicable laws in force.

However, according, for example, to Article 25, which regulates law applicable to contractual obligations, if such obligations fall outside the scope of Regulation Rome I, they are still regulated by the same Regulation (if there is no applicable international agreement or l*ex specialis*).[5]

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4 Official Gazette No 101/2017

5 Regulation (EC) No 593/2008 of the European Parlament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, p. 6.-16.)

Although such a legislative solution may be regarded as progressive and modern, it should be noted that lawmaker did not make European norms subject to entirely domestic interpretation regardless of the fact that the issue at hand falls outside the scope of EU law.

In other words, if the Supreme Court of Croatia is faced with a dispute which falls under the scope of Regulation Rome I, if in doubt on the correct interpretation of Regulation, it is obliged to seek guidance from the CJEU. Just as well, if the same court is dealing with an issue outside of scope of the same Regulation, it still applies the Regulation and is obliged to seek guidance on proper interpretation.

"It is clear, however, from the Court's settled case-law that the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall directly within the field of application of EU law, provisions of EU law have been rendered applicable by domestic law due to renvoi made by that law to the content of those provisions ... In such circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from EU law should be interpreted uniformly ... irrespective of the circumstances in which they are to be applied. Thus, an interpretation by the Court of provisions of EU law in situations not falling within the scope of EU law is warranted where such provisions have been made directly and unconditionally applicable to such situations by national law, in order to ensure that those situations and situations falling within the scope of EU law are treated in the same way".[6]

## 3. REFERENCE PROCEDURE – CROATIAN EXPERIENCE

### 3.1. Foundation – Article 267 TFEU

The interpretation of European norms is given by the CJEU in a special reference procedure that is envisaged as a form of dialogue between national courts and the CJEU.

Foundations are laid down in Article 267 of TFEU.

In fact, preliminary ruling proceedings make the most significant part of CJEU workload. In 2017 alone, out of 739 cases brought before CJEU, 533 were references for preliminary ruling (72 %). In the same year, the CJEU gave judgments

[6] Judgment of 7 November, *C and A*, C257/17, ECLI:EU:C:2018:876, paragraphs 31.-33. See, to that effect and judgement of 18 October 2012, *Nolan*, C583/10, EU:C:2012:638, paragraphs 45.-47. and of 22 March 2018, *Jacob and Lassus*, C327/16 and C-421/16, EU:C:2018:210, paragraph 34

in 447 preliminary ruling proceedings while completing 699 cases all together (63,9 %).[7] In CJEU practice, the references of interpretations are far more numerous than those concerning validity of secondary legislation, so the rulings on validity are not analysed in this paper.

The decision to refer the question of interpretation of EU law to the CJEU is based on cooperation between domestic courts and the CJEU. The ratio of that cooperation is to enable proper and uniform application of European law across the European Union. When the CJEU gives a preliminary ruling on interpretation of some norm of EU law than it essentially explains how that norm should have been understood and applied from the very moment it came into force.[8] That makes the interpretation rulings of CJEU ones with *ex tunc* effect[9] since the given interpretation is applicable even to those legal relations that originated before the ruling was given. The interpretation obliges not only the court seeking the ruling and all other national courts of all instances deciding the dispute which gave rise to the interpretation, but also all the courts of all the Member States in EU (*erga omnes* effect).

The ruling of the CJEU is the ruling solely on interpretation of EU law while the national court remains with the duty to rule on the dispute at hand.

Article 267 TFEU clearly enables lower courts and obliges courts of last resorts to request the CJEU to give a ruling on interpretation of EU law.

The obligation of courts of last resorts (last instance court) to refer questions of interpretation to the CJEU is laid down in Article 276/3 TFEU and is linked to the role which those courts have in their respective Member States – to uniform national case law. When it comes to application of particular provisions of EU law, the development of divergent case law across EU must be avoided.

On the other hand, the opening of the possibility for lower courts to make references for preliminary rulings on interpretation (Article 267/2 TFEU) aims to applying EU law in all instances of adjudication and motivates judges of lower instances to correctly apply EU law. The benefits of such an approach on length of proceedings and procedural economy are obvious.

The fact that Croatian courts of lower instances are well aware of the possibility to refer and of the benefits of such a referral transpires from the fact that so far Croa-

[7] 2017 Annual Report, The year in review, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_pan_2018.0421_en.pdf] Accessed 20.03.2019

[8] Judgement of 7 August 2018., *Hochtief*, C-300/17, ECLI:EU:C:2018:635, paragraph 55

[9] Judgement of 16 January 2014., *Pohl*, C-429/12, ECLI:EU:C:2014:12, paragraph 30

tian courts made a total of nineteen references for preliminary rulings.[10] Seventeen of these were made by courts of first instances - municipal courts made ten references (all in civil procedures), lower misdemeanour courts made two references, commercial courts made four and one reference was made by county court acting as a court of first instance in criminal procedure. High courts made two references (High Administrative Court and High Commercial Court). The Supreme Court made none so far. The CJEU gave twelve decisions with seven procedures still pending.

### 3.2. Preliminary procedure - way around otherwise binding legal opinions of higher courts and constitutional court

The possibility to directly apply for cooperation of the CJEU as the only relevant authority on proper interpretation of EU law gives rise to changes of the position of lower courts in the national judicial hierarchy.

As noted in *Rheinmühlen-Düsseldorf*, a rule of national law, pursuant to which "a court is bound on points of law by the rulings of a superior court cannot deprive inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings... inferior court must be free, if it considers that ruling on law made by the superior court could lead to a judgement contrary to Community law, to refer to the Court questions which concern it. If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of judicial systems of the Member States would be compromised."[11]

The possibility to seek guidance from the CJEU on the interpretation of EU law opens the window for lower courts to circumvent legal rulings of a higher court that are otherwise binding in renewed proceedings after referral from the higher court. It can be used as a tool to resist binding legal opinions of higher courts, but only when these opinions concern EU law.

Recently, a somewhat similar situation occurred in Croatia. The Court of first instance refused to abide by a decision of the Supreme Court of Croatia given in civil proceedings concerning insurance claim for damages. The Supreme Court was of the opinion that the directives relating to insurance against civil liability

[10] References made until April 24 2019

[11] Judgement of 16 January 1974., Case 166/73, *RheinmühlenDüsseldorf* [1974] ECR 33, paragraph 4

in respect of the use of motor vehicles[12] are not applicable to road accident that happened in Croatia in 2002.[13] The same first instance judge deciding on a case brought up by different plaintiffs injured in the same accident decided to refer the question of applicability of the insurance directives to the CJEU with clear disregard to legal ruling given by the Supreme Court on the applicability of EU law on that particular road accident.[14] Comparable situation occurred in a civil procedure that gave rise to the reference made in *Hrvatska radiotelevizija.*[15]

Also, it is well established case-law of the CJEU that "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law".[16] The national rule which obliges national courts to follow the legal position of the national constitutional court cannot prevent the referring court from submitting a request for a preliminary ruling to the CJEU at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the constitutional court which might prove to be contrary to European Union law.[17]

Consequently, Article 267 TFEU enables national court to make, of its own motion, a request for a preliminary ruling to the CJEU. And this "even though it is a ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court".[18]

The obligation of Croatian courts to, in renewed proceedings, resolve the dispute by following the legal opinion of Constitutional Court expressed in the decision

12 Second Council Directive 84/5/EEC of 30 December 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 (OJ 1984 L 8, p. 17.-20.), as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 (OJ 2005 L 149, p. 14) and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33) ('the Third Directive')

13 Supreme Court of Croatia, Rev-x 478/17., 14 February 2018

14 Municipal Court in Sesvete, Pn 652/2019

15 Case C-657/18. Here a decision of the first instance court was to dismiss the claim. It was quashed by appellate court which expressed the opinion that arguments raised by lower court concerning application of EU law were incorrect. In the subsequent procedure the first instance court made request for interpretation to CJEU. The Court made it clear that legal position of appellate court was correct

16 Judgement of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8, paragraph 70

17 Ibid, paragraph 71

18 Ibid, paragraph 73

to set aside decisions of national courts is stipulated in Articles 76 and 77 of Constitutional Act on the Constitutional Court of the Republic of Croatia.[19]

The obligation to follow the legal opinion of the Constitutional Court expressed in the decision repealing the act, does not preclude national courts, when it comes to the interpretation of EU law, to exercise its discretion laid down in Article 267/2 TFEU and request an interpretative decision from the CJEU in the renewed proceedings. Needless to say, the same court is obliged to render its decision based on the interpretation given by the CJEU regardless of the fact that such a decision may not, in a clear breach of Article 77/2 of Constitutional Act on Constitutional Court, follow the legal opinion of the Constitutional Court expressed in the decision repealing earlier act.

CJEU also explained position of national courts in the situations in which the questions of interpretation of EU law coincide with the questions of constitutionality of laws and the constitutionality and legality of other regulations.

“Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling... The national court must remain free to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary ... [and] to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law”.[20]

Turning the attention to the Croatian legal framework determined by Article 37/1 of Constitutional Act on Constitutional Court, if a national court in the course of proceedings before it determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stay the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions.

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19 The consolidated text published in Official Gazette, No 49/02, May 3 2002

20 Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, paragraph 57

The duty to stay the proceedings and request review of the constitutionality of the law, does not, in a view of cited case law of CJEU and the direct effect of Article 267 TFEU, affect the discretion of national courts to seek guidance on interpretation from the CJEU if the matter of constitutionality coincides with the doubts in conformity with the applicable EU law.[21] In other words, if the question of correct application of EU law arises at the same time as the question of conformity of the same national provision with the Constitution, Croatian judges are free to seek guidance from the CJEU on the correct interpretation of EU law. Furthermore, regular courts are free, even after the proposal for revision of constitutionality of national provision is refused, to set aside the same national provision if it is contrary to EU law, as interpreted by the CJEU.

On the other hand, if a national court finds that a provision of national legislation is both unconstitutional and contrary to EU law, it has the discretion to refer the question on interpretation to the CJEU. If the CJEU interprets EU law in a manner that precludes the national provision in question, national courts are bound to set aside the said provision, regardless of the fact that a review of its constitutionality is not initiated.

Consequently, the opinion that the applicability of domestic legislation can only be reviewed by the national constitutional court and not by the CJEU which was expressly stated in a ruling of the County Court in Karlovac, Permanent Division in Gospić[22], is, therefore, unfounded and should not prevail in domestic case-law. While it is true that the CJEU interprets EU law (and not national law), such interpretation can (and it usually does) result in precluding incompatible or not precluding compatible national legislation.

### 3.3. Relevance – whose business is it (not)?

Exercising the right to request preliminary ruling on the interpretation of EU law when the interpretation is necessary to enable it to give judgement is entirely up to the lower court dealing with the proceedings in which such a question on interpretation arises.

Where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the CJEU. Whether the question raised is necessary to enable the national court to give judgment is entirely up to that court to

[21] Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, Judgement of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8

[22] County Court in Karlovac, Permanent Division in Gospić, Gž 212/18-2, 23 May 2018

assess. "It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, necessitating a decision on their part."[23] The system of "references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference for interpretation is appropriate and necessary".[24] Furthermore, there is a presumption of relevance in favour of questions on the interpretation of EU law referred by a national court. Consequently, the CJEU shall, in principle, give ruling whenever there is a reference on interpretation of EU law.

The presumption of relevance of the reference on interpretation can be rebutted only exceptionally and only by the CJEU. "The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it."[25]

Consequently, whether a question which gives rise to reference on interpretation is necessary to enable it to give judgment is entirely for a court dealing with the issue to decide. Given that the relevance of such a question is presumed and the fact that the final decision on relevance lays with the CJEU whose control of relevance is limited, it is clear that domestic courts of higher instances have no direct saying on the relevance of reference on interpretation on EU law given by courts of lower instance.

When ruling on separate procedural issue brought to it by an appeal on the decision of lower court to stay the criminal proceedings until the CJEU rules on the interpretation of EU law, the Supreme Court of Croatia expressed its opinion on the relevance of the reference made by the lower court.[26] Furthermore, the ruling to set aside a decision of a lower court to stay proceedings was reasoned by the view that the higher court took on the relevance of the question referred. Although it was criticized in judicial and academic circles, the right to give opinion on relevance of reference was defended and even reprised in renewed proceedings.

23 Judgement of 16 December 2008, *Cartesio*, C-210/06, ECLI:EU:C:2008:723, paragraph 88

24 Judgement of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8, paragraph 66

25 Judgement od 12 October 2017, *Sleutjes*, C-278/16, ECLI:EU:C:2017:757, paragraph 22

26 Supreme Court of Croatia, I Kž Us 102/2017-4, 19 September 2017, ECLI:HR:VSRH:2017:1328 and I Kž Us 4/2018-4, 22 May 2018, ECLI:HR:VSRH:2018:429

[27] The very principle of assuming jurisdiction on relevance by higher courts is in a clear breach of Article 267/2 and CJEU case-law. The matter of relevance was finally resolved by the CJEU that did not find reasons to rebut the relevance of the question, thus deeming it relevant.[28]

The legal opinion of the Supreme Court was given in light of applicable domestic legislation, namely Article 18/3 – 5 of Criminal Procedure Act.[29]

In view of the fact that the discretion and obligation to request interpretation on EU law arises from primary law (Article 267 UFEU), discretion of lower courts and obligation of the courts of last instances to seek guidance from the CJEU on the matters of interpretation of EU law exist regardless of the fact that such an obligation or discretion is or is not envisaged in domestic procedural codes. That is the reason why it is unnecessary and completely redundant to rewrite Article 267 in national legislation. If a provision of national legislation is redundant and irrelevant (since it literally rewrites EU law that is directly applicable, as is the case with Article 267) or must be disregarded (since it does not literally rewrite – limits or expands - EU law with direct effect) it is better not to have it all together.

The Croatian Civil Procedure Act[30] does not contain provisions that regulate discretion or obligation to refer questions of interpretation of EU law to the CJEU or conditions that must be met as a result. Given the fact that the CJEU has ruled on references for interpretation required by Croatia's civil courts, it is apparent that the system of interpretative rulings in civil procedure cases functions normally based solely on the TFEU without any transposition of Article 267 into domestic Civil Procedure Act.

If, however, the state decides to copy primary law into domestic legislation, that should be done in a matter to preserve the distinctiveness of discretion/obligation from Article 267 and to avoid any possible confusion with existing institutes of domestic procedural law. The reasoning of such firm distinction lies with the fact that request for interpretation of EU law is a unique institute that correlates, either by its content or its scope, to no other legal instrument or institute of domestic legislation. The only similarity arises from the somewhat unfortunate translation

[27] Ćapeta Tamara; Rodin, Siniša, *Osnove prava Europske unije*, Zagreb, Narodne novine, 2018, p. 199. i Okrugli stol održan 24. svibnja 2018. u palači HAZU, *Europska budućnost hrvatskog kaznenog pravosuđa*, Zagreb, HAZU, 2018, p. 71 -75. i 150

[28] Judgement of 25 July 2018, *AY,* C-268/17, ECLI:EU:C:2018:602, paragraphs 24.-31

[29] Official Gazette No 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 and 70/17. Detailed analysis see in work cited in footnote 27, Okrugli stol, p. 69 - 76

[30] Official Gazette No 35/91, 53/91, 91/92, 112/99, 88/01, 117/03, 84/08, 123/08, 57/11, 148/11, 25/13, 43/13 and 89/14

of Article 267 which states that CJEU shall have jurisdiction to give "preliminary rulings". The Croatian translation states that the CJEU shall have jurisdiction to decide on "preliminary questions". Such a translation is the most probable reason why Article 267 TFEU was transposed into Article 18 of the Criminal Procedure Act. Since it came to force, Article 18/1 of CPA regulated preliminary question as a question of law which falls within the jurisdiction of a court in some other type of proceedings or within the jurisdiction of some other authorities providing that the application of criminal law depends on a prior decision of that question.

The criminal court may decide on this question by applying the provisions which regulate the process of proof in criminal proceedings. "The decision of this question of law rendered by a criminal court shall affect only the criminal case which is being tried before this court. If such a prior question has already been decided by a court in some other type of proceedings or by another authority, such a decision shall not be binding on the criminal court when deciding on whether a criminal offence has been committed" (Article 18/1 and 2 of Criminal Procedure Act).

When compared with the earlier cited provisions of Article 267 TFEU it is clear that the preliminary question from Article 18/1 – 2 does not correlate to requests for preliminary rulings from Article 267.

Firstly, unlike with "domestic" preliminary questions, in cases of requests for preliminary rulings of interpretation on EU law, the criminal court remains with jurisdiction to decide question of law on which the application of criminal law depends and the CJEU does not assume jurisdiction to rule on that legal question. Rather, it is a situation in which criminal courts acting inside their jurisdiction seek guidance on EU law, the application of which falls within the jurisdiction of the referring court.

It is clear, especially bearing in mind the *erga omnes* effect of preliminary rulings, that request for interpretation of EU law should not be confused with "domestic" preliminary question since the differences of nature and scope of these institutes are obvious. Regulating these two institutes in the same article of domestic code was erroneous. The matter asks for different regulation *de lege ferenda.* At the very least provisions on discretion of lower courts and obligations of the highest courts to seek guidance from the CJEU on interpretation of EU law (Article 18/3 and 4) should be omitted altogether giving the direct applicability of Article 267 TFEU. The staying of the procedure should be regulated in a manner that respects the principle of effectiveness of EU law and the appeal system should be framed in a manner that precludes examination of the relevance of the issue raised for interpretation.

## 4. STAYING OF DOMESTIC PROCEDURE(S) – ISSUE OF SIMILAR PROCEEDINGS

Article 267 contains no provisions as regards the status of procedure pending before domestic courts which gave rise to the interpretation of EU law. The question of staying the procedure is a procedural one and Member States enjoy procedural autonomy to independently regulate the effects of preliminary procedure on national procedure. However, national procedural autonomy is limited by the principles of equivalence and effectiveness of EU law. "... [I]t is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)".[31]

It is hard to imagine how a principle of effectiveness of EU law can be preserved if the referring court is obliged to render a judgement before the ruling on proper interpretation of EU law. It is in view of such a notion that *Recommendations of CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*[32] state that „Although the referring court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity, the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court has given its ruling. [...] The national courts and tribunals should also note that the withdrawal of a request for a preliminary ruling may have an impact on the management of similar cases (or of a series of cases) by the referring court or tribunal. Where the outcome of a number of cases pending before the referring court or tribunal depends on the reply to be given by the Court to the questions submitted by that court or tribunal, it is appropriate for that court or tribunal to join those cases in the request for a preliminary ruling in order to enable the Court to reply to the questions referred notwithstanding any withdrawal of one or more cases."[33]

Croatian procedure acts (both Criminal and Civil) contain provisions on mandatory staying of the procedure in case of a reference for interpretation to CJEU.[34]

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31 Judgement of 11 July 2002, *Marks&Spencer*, C-62/00, ECLI:EU:C:2002:435, paragraph 34

32 OJ 2018 C 257, p. 1-6

33 Articles 23 and 25, *ibid.*

34 Article 18/5 of Criminal Procedure Act, *op. cit.*, note 20 and Article 213/1 of Civili Procedure Act, *op. cit.*, note 21

Although clearly compatible with the principle of effectiveness of EU law, these particular procedural provisions did raise some issues in national case-law as regards civil procedure. The staying of the procedure which gave rise to interpretation is clear. What remains unclear, though, is the managing of other similar cases pending before the referring and other courts in the country. Where the outcome of a number of similar cases pending before the referring or other courts depends on the reply to be given by the CJEU to the questions submitted by one court in one civil procedure, the staying of similar proceedings seems reasonable. At least more reasonable than referring the same question in all other similar cases with identical factual and legal grounds, since those can be numerous. In that aspect the decision of the County Court in Karlovac, Permanent Divison in Gospić[35], quashing the staying of the proceedings of similar case pending before a court which is different than the one that made a reference on interpretation, may seem overly formalistic, providing that the dispute and hand was indeed factually and legally similar. Although the situation may be resolved with informal staying of the proceedings, that is to say by mere inactivity of courts, it would be opportune to regulate the staying of similar civil proceedings *de lege ferenda*.

## 5. APPLICATION OF EU LAW WITHOUT PRIOR PRELIMINARY RULINGS FROM CJEU - *ACTE CLAIRE* AND *ACTE ÉCLAIRÉ*

The obligation to request preliminary ruling on the interpretation of EU law is not absolute, even for the courts of last resorts. There are certain situations, determined by the CJEU case-law, in which even the court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, are free to apply EU law without seeking guidance on interpretation. This freedom of national courts of last resorts to apply EU law without prior preliminary rulings from the CJEU was analyzed in *Cilfit.*[36] "Court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

[35] See in note 14

[36] Judgement of 6 October 1982, *Cilfit*, Case 283/81, ECLI:EU:C:1982:335, paragraph 21

Courts of last instances are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 267, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical (*acte* ***éclairé***). However, even in such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 267, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so. "Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it" (*acte claire*).[37]

In the latter situation, to be able to properly interpret EU law and apply it without making a reference for interpretation to the CJEU deeming it *acte claire*, national court must be convinced that the matter is equally obvious to as it is to the courts of the other Member States and to the Court of Justice. "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic.

An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".[38]

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[37] *Ibid.*, paragraphs 16

[38] *Ibid.,* paragraphs 17.-20

## 6. PARTIES' DISPOSITIONS AND ARTICLE 6 OF ECHR

As stated before, whether or not it will seek guidance on interpretation is entirely on the national court to decide. In this regard, it must be pointed out in the first place that Article 267 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 267. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

However, the fact that a party to a case pending before a national court did demand staying of the proceedings and requesting a preliminary ruling on the interpretation on EU law may in certain situations when such a demand is declined, reflect on the concerned party's right to a fair hearing guaranteed by Article 6 of European Convention on Human Rights (hereafter: ECHR).

Article 6 § 1 of the ECHR does not guarantee an absolute right to have a case referred by a domestic court to the Court of Justice of the European Union. "Where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings (*Ullens de Schooten and Rezabek v. Belgium*, §§ 57-67, with further references). This is so where the refusal proves arbitrary:

- where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto;
- where the refusal is based on reasons other than those provided for by the rules;
- or where the refusal has not been duly reasoned in accordance with those rules." [39]

This means that national courts within the European Union against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU.

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[39] Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated to 31 December 2018, Council of Europe/European Court of Human Rights, 2018, paragraphs 275 -276, [https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf] Accessed 15.04.2019

They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

Following these principles, in *Dhahbi v. Italy*[40] the European Court of Human Rights for the first time found a violation of Article 6 because of the lack of reasons given by a domestic court for refusing to refer a question to the CJEU for a preliminary ruling. The Court of Cassation had made no reference to the applicant's request for a preliminary ruling or to the reasons why it had considered that the question raised did not warrant referral to the CJEU, or reference to the CJEU's case-law. It was therefore unclear from the reasoning of the impugned judgment whether that question had been considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it had simply been ignored. This fact alone was enough for the Strasbourg Court to find violation of Article 6. Whether the decision not to refer to the CJEU was in fact a correct one was irrelevant.

## 7. CONCLUSION - EMPOWERMENT OF JUDICIAL AUTHORITY

The importance of preserving the uniformity of the EU legal order, which the preliminary reference procedure is designed to uphold, has been expressly emphasized by the Court of Justice on many occasions.

This obligation and responsibility strengthens the judicial branch of the state authority in relation to the legislature – another novelty worth paying attention to. Provisions of EU law apply directly in the Croatian legal order and have legal effect by the mere fact of Croatia's membership in European Union. Obligation of national courts to set aside national provision in conflict to EU law in order to protect rights and interest of individuals that are protected by EU provisions undoubtedly cause the shift between state powers – judiciary and legislature. The principle of direct effect of EU provisions with general application (e.g. regulations) calls for no national legislative activity. Moreover, supremacy of EU law derogates any such activity if incompatible to EU law.

In fact, as seen in *Milivojević*[41], reference procedure initiated by court of lower instance can essentially annul intended effects of legislation which was unanimously passed by legislature. And this since crucial provisions of Law on the invalidity of

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40 *Dhahbi v. Italy*, no. 17120/09, 8 April 2014, ECLI:CE:ECHR:2014:0408JUD001712009, paragraphs 31-34

41 Judgement of 14 February 2019, *Milivojević*, C-630/17, ECLI:EU:C:2019:123

credit agreements featuring international elements concluded in the Republic of Croatia with non-authorised lender[42], have been declared incompatible with EU law and thus utterly ineffective for the most of the purposes intended. It was not done in a legislative process of amending laws or in lieu of the review of its constitutionality. Rather, it was a result of pure judicial activity which was bestowed upon national judges by primary EU law regardless of their level of jurisdiction.

New power brings new responsibilities in respecting the legal order inherent to the membership in the EU. Judiciary case-law remains the last resort in enforcing European legal order in any Member State and Croatia is no exception. The adoption of national legislative measures, even those correctly implementing a directive, does not exhaust the effects of the directive, as the state remains bound to ensure its full application even after the adoption of those measures. Judiciary case-law based on uniform interpretation is crucial to that end and it is indispensable in achieving results sought by applicable EU law.

There is no doubt that professional training of Croatian practitioners is important because it contributes to correct application of law. It is important to continue and further develop professional training in respect of EU law interpretation and application. Proper and foreseeable application of EU law as interpreted by the CJEU in domestic proceedings raises the level of integrity of national courts and boosts public's confidence in national judicial institutions, as well as in EU institutions.

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[42] Official Gazzete No 72/17

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2. *Dhahbi v. Italy*, no. 17120/09, 8 April 2014, ECLI:CE:ECHR:2014:0408JUD001712009
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# SCOTLAND'S INDEPENDENCE MOVEMENTS – THE MAIN CHALLENGES IN THE ECONOMIC SPHERE IN THE ASPECT OF POTENTIAL SEPARATION OF SCOTLAND FROM THE UNITED KINGDOM

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***ABSTRACT***

*The purpose of the article is to analyze the process of Scotland`s independence movements and to identify the main challenges in the economic sphere in the aspect of potential separation of Scotland from United Kingdom. As a basis for the research method a study based on the analysis of selected information sources was used. The attempts by Scotland to separation from the Great Britain, taken over the centuries, ended in failure, but have contributed to increase of Scottish autonomy. The results of the referendum on the United Kingdom's continuing membership of the European Union have become the impulse for intensification of Scottish activity towards secession from the Great Britain. Scotland wants to decide independently on its own economic development based mainly on oil and natural gas as well as renewable energy sources. The EU membership would enable Scotland to attain the goals set up by Scottish government. The benefits of being a member of the EU, such as access to the Single European Market, structural funds, ect., Scotland may lose if it stays within the United Kingdom. The government in London is fully committed to maintaining the unity of the United Kingdom and blocks Scottish activities aimed at independence. Further scenario will depend on the results of the future directions, forms and principles for further co-operation between the United Kingdom and the European Union.*

***Keywords****: Scotland, independence, autonomy, United Kingdom, Great Britain, European Union, economy*

## 1. INTRODUCTION

Scotland covers the northern part of the island of Great Britain and the Hebrides, Orkney and Shetland and is a part of the United Kingdom, along with England, Wales and Northern Ireland. According to National Records of Scotland, Scotland has a population of 5,373,000 residents.[1] In the European Union membership referendum on June 23, 2016, the majority (51.9 per cent) of the British voted in

[1] *National Records of Scotland.* 2016. [http://www.nrscotland.gov.uk/] Accessed 15.11.2018

favour of leaving the European Union, which was primarily decided by the voters from England. 62 per cent of Scots with a turnout of 67.2 per cent supported the UK's remain in the EU, 38 per cent of them were against.[2] Over the years, Scotland has gained more and more autonomy within the United Kingdom. However, many decisions are still in the hands of the British government, which - according to the Scots - restricts the development of Scotland. The results of the referendum have become an important impulse for the intensification of Scotland's actions in favour of secession. The Scottish government has announced that it will do everything to prevent Scotland from leaving the EU and is seeking to repeat the 2014 Scottish independence referendum counting on its positive outcome. The actions of Scotland and Northern Ireland seeking their independence are a threat to maintaining the unity of the United Kingdom. The situation is complex because several processes overlap at the same time. Finding the solution needs time. Moreover, it is difficult to disagree with the opinion of specialists, commentators and observers that various scenarios are possible.

In the article the author tries to answer the main questions: *What are the main reasons for Scotland's withdrawal from the United Kingdom and how have they changed over the years? What pillars does Scotland base its economic development on and what are the main economic challenges facing Scotland in terms of potential exit from the United Kingdom? Are current conditions conducive to the Scots' aspirations for independence and accession to the EU?* The questions are deliberately generic in order to highlight the most important issues in the complexity and multidimensionality of the issues.

The analysis is based on a review of available publications, including government documents, speeches by Scottish and English politicians, the results of research and analyses, the reports from various institutions and research centres, including UCL European Institute, Centre for European Policy Studies, Centre for Policy Studies, Frankfurt School - UNEP Collaborating Centre for Climate & Sustainable Energy Finance, Bloomberg New Energy Finance. In the conditions of the process of Great Britain leaving the European Union, the issue raised in the article is the starting point for conducting further in-depth analyses taking into account the economic aspect of the potential secession of Scotland from the United Kingdom.

The structure of the article: the first part presents the current actions of Scotland in order to become independent from Great Britain. Hence, the historical context

[2] Jamieson, A., *Scotland Seeks Independence Again After U.K. 'Brexit' Vote,* NBC News, 24 June 2016. [http://www.nbcnews.com/storyline/brexit-referendum/scotland-could-seek-independence-again-after-u-k-brexit-vote-n598166] Accessed 17.11.2018

is essential to understand grounds of these actions. In the second part, the main challenges for Scotland in the economic sphere are identified in the case of the possible separation from the United Kingdom. For Scotland, economic issues are the basis of its efforts on the way to independence. They have already been the subject of analysis before the 2014 Scottish independence referendum, but located in a different time and context than at present.

## 2. SCOTLAND IN THE UNITED KINGDOM. ACTIONS TO BECOME INDEPENDENT FROM GREAT BRITAIN

The Kingdom of England and the Kingdom of Scotland as separate states have been united since 1603 by a personal union. They became one organism on May 1, 1707.[3] The Treaty of Union, ratified by the parliaments of both countries, de facto complemented the personal union. It brought to life the United Kingdom of Great Britain, which also incorporated Wales.[4] In 1800, the next Acts of Union were signed. On its basis, Ireland joined England, Wales and Scotland. In this way the United Kingdom of Great Britain and Ireland was established. The next important historical moment was the signing of the Anglo-Irish Treaty on December 6, 1921 by representatives of the British State and the Irish Republic, which existed in the years 1919-1922. It enabled the creation of the Irish Free State, which remained in a personal union with the United Kingdom as its dominion. This caused gaining independence from the English authorities. On December 6, 1922, after the entry into force of the treaty, Northern Ireland separated from the Irish Free State (later in 1937, the name of the state was changed to Ireland, and in 1949 Ireland was transformed into a republic) and reunited with Great Britain. In 1927 the United Kingdom has changed its name for the third time, this time to become the United Kingdom of Great Britain and Northern Ireland.

Since the establishment of the United Kingdom, the Scots have tried several times to become independent from Great Britain. The particularly violent actions were taken in the eighteenth century. The most significant of them was the so-called the Forty-Five Rebellion in 1745.[5] After suppressing the uprising, the British introduced repressions. They forbid, among others, clan system, weapon possession, the use of national dress and Gaelic language. At the end of the nineteenth century, there was a shift to the idea of Scottish autonomy, proposed in 1885 by William Gladstone, which would grant Scotland its own government. He had the

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3 Colley, L., *Britons: Forging the Nation, 1707-1837,* New Haven, Yale, 1992, p. 11

4 Bogdanor, V., *Devolution in the United Kingdom,* Oxford, 1999, p. 7

5 Ichijo, A., *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation,* New York, 2004, p. 33

support of the Liberal Party.[6] However, it brought no changes. Nationalism grew during the Great Depression, when Scottish mines and smelters were declining, and the prohibition in the USA affected Scottish whisky producers. In 1934, the Scottish National Party (SNP) was formed from the merger of two parties: the National Party of Scotland, which aimed at winning independence for Scotland, and of the Scottish Party calling for greater Scottish autonomy within the United Kingdom.[7] In the 1960s, when oil and gas deposits in the North Sea were discovered, the Scottish National Party intensified its activities. The actions were not in favour of increasing Scotland's autonomy and giving it more rights, but for the independence: to become independent from Great Britain. On the political scene, the party came into existence in 1970, when its candidate Winnie Ewing won a seat in the supplementary election to the House of Commons. In 1974, the party's support was already 30 per cent. Its members won 11 seats in the House of Commons.[8] After the Second World War, the basis of the Anglo-Scottish consensus was to build a "welfare state" and the idea of state ownership of the industry. The period from the mid-1940s to the mid-1970s was for the union of Scotland with England "the silence before the storm", and this storm was the rule of Prime Minister Margaret Thatcher (1979-1990), when the support of the Scots for conservatives fell significantly.[9] Scotland has been perceived for years as a bastion of the left. Opinions are commonly expressed there that the economic policy of the next British conservative offices, especially Thatcher, led to the dismantling of a significant part of the local industry, contributed to the occurrence of many negative social and economic effects. The reluctance for conservatives deepened during the administration of Prime Minister John Major (1990-1997). According to Craig McAngus, a lecturer in political science at the University of Aberdeen, the existing differences in the approach of Scotland and England to economic issues have become an important impulse for the independence of Scotland.[10] The Scots advocating secession from the United Kingdom readily refer to the example of the Republic of Ireland. In 1921, then the Free Republic of Ireland became independent from the British authorities. Although contemporary conditions are

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6 McCrone, D., *Understanding the Nation: The Scottish Question,* w: *The Fate of the Nation-State,* Montreal, 2004, p. 217

7 Hanham, H.J., *Scottish Nationalism,* London, 1969, p. 163

8 Duerr, G., *Scottish Secession: Prospects for Independence after Blair?,* paper presented at the conference *Britain after Blair, The Legacy and the Future*, The Gleacher Center, University of Chicago Business School, Chicago, 29 August 2007

9 Troitino, D.R., *Margaret Thatcher and the EU,* Proceedings for the Institute for European Studies, No. 6, 2009, pp. 124-150

10 McAngus, C., *Scottish independence back in play after Brexit shock – with a note of caution*, The Conversation, 24 June 2016. [http://theconversation.com/scottish-independence-back-in-play-after-brexit-shock-with-a-note-of-caution-61457] Accessed 05.12.2018

different, this comparison is reiterated, considering that the small Republic of Ireland, a member state of the European Union, is doing very well as an independent state. David McCrone draws attention to the similarities between the Republic of Ireland and Scotland: a similar "Celtic" history, a similar number of inhabitants, experience in being "under the control" of Westminster.[11] On the basis of the conducted research, he assessed that the Scots feature in "mature nationalism" in the sense of a strong sense of identity. "Being a Scot" is more important than "being British."

### 2.1 The 1997 Independence Referendum - greater autonomy

Although the postulate to restore the Scottish parliament in the context of increasing autonomy appeared already in the second half of the nineteenth century and considered to be reactivated before World War I, its establishment became possible only in the 1990s. during the administration of Tony Blair (1997-2007). Decentralisation was one of the points of the Labour Party program. The Scots, using the change of English policy, in 1997 held a referendum in which 74 per cent voters supported Scotland's own parliament.[12] As a result, the British parliament passed a constitutional law, the Scotland Act, which granted Scotland autonomy. The Scottish parliament has been in operation since 1999. It has gained the power to make decisions on economy, education, health care, agriculture and environmental protection. Foreign policy and defence policy remained under the control of London. With time, the critical voices of England's residents appeared in relation to subsidies from the central budget for Scotland of about £ 6 billion, funding higher education for young Scots, free bus tickets for pensioners and bedridden, elderly citizens (such privileges were not enjoyed by the people of England). Another dislike was the presence of Scottish MPs in the House of Commons that had influence on the resolution of health and education issues in England , in a situation where English MPs had no right to regulate these areas in Scotland. According to former British Prime Minister, John Major, the consent for Scotland's autonomy and its own parliament became a "Trojan horse" in Scotland's quest for independence.[13] The actions for the independence continued, while in England anxiety was growing. The Scottish National Party continued its efforts for winning independence in the conditions of increased support for the people of Scotland in favour of leaving the United Kingdom. In a survey by the YouGov research company from September 2006, 44 per cent of Scots were in favour of independence,

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11 McCrone, *op. cit.,* note 6, p. 215

12 Robbins, K., *Britain and Europe: Devolution and Foreign Policy,* International Affairs, *Vol.* 74, No. 1, 1998, pp. 105-118

13 Major, J., *John Major: the Autobiography,* New York, 1999

and 42 per cent for remaining in the United Kingdom. This was not a result that would guarantee the success of the independence referendum, but it became an important signal that the Scots do not exclude such an option.[14]

## 2.2 2014 Scottish independence referendum

The project of the bill on the independence referendum was presented in 2007 by the First Minister of Scotland and the leader of the Scottish National Party, Alex Salmond. It was not until four years later that the Scottish National Party obtained most of the seats (69 out of 129) in the Scottish Parliament, which allowed it to return to the idea of announcing a referendum. At the beginning of 2012, the Scottish Government and the British Government began consultations regarding the referendum. The information was also given that the referendum would take place in autumn 2014, and the question will be: "Should Scotland be an independent country?" On October 15, 2012, the Prime Ministers of Scotland and the UK signed the so-called Edinburgh Agreement[15] allowing the Scottish government to hold a referendum. A year later, the Bill for the Scottish Independence Referendum Act 2013 was approved by the Scottish Parliament, which was treated as an exception (constitutional matters are the responsibility of Westminster), and granted the so-called Royal Assent.[16] Formally, the road to the campaign and the referendum was opened. In November 2013, the Scottish government published a study on Scotland's future after independence, *"Scotland's Future. The Guide to an Independent Scotland "*[17] . Its records are still valid. It draws attention to the potential benefits of replacing the union within the United Kingdom by intensifying economic cooperation with the Scandinavian countries, the Baltic republics and the countries of Central and Eastern Europe. Scotland also perceives its strength in membership in the European Union, access to the Single European Market and its freedoms (movement of goods, services, capital and labour) and the EU regional policy instruments. Drawing on the smaller EU states, Slovenia, Denmark, the Republic of Ireland and Estonia, Scotland wants to develop through the cooperation with other members of the Community. The economic policy is to be based primarily on oil and gas deposits. They would form the basis of the energy cooperation network with Scandinavia, while at the same time con-

[14] Duerr, *op. cit.,* note 8, p. 3

[15] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence of Scotland,* Edinburgh, 15 October 2012

[16] McInnes, R.; Ayres, S.; Hawkins, O., *Scottish Independence Referendum 2014. Analysis of results*, House of Commons, Research Paper *Vol.*50, No. 50, 2014, p. 22

[17] *Scotland`s Future. The Guide to an Independent Scotland,* Scottish Government, Edinburgh, November 2013. [http://www.gov.scot/resource/0043/00439021pdf] Accessed 17.12.2018

tinuing the cooperation in this respect with other parts of Great Britain, but on other conditions than up to this time. For many years, the advocates of Scottish independence criticised London for inefficient spending of taxes paid by companies extracting oil and gas from the North Sea. It was postulated that these funds should be invested in a special fund for future generations in improving the quality of public services. The Scottish Government also counts on taking over all UK assets located in Scotland. It is mainly about armed forces, or base of submarines in Faslane, Scottish air forces with bases in Lossiemouth and Kinloss, and Royal Regiment of Scotland, whose battalions would form the core of the army of the independent country. The Scottish government has promised that after gaining the independence, it will begin its efforts to grant Scotland a membership in the European Union.[18]

The campaign before the 2014 referendum focused on the threat of deterioration in the quality of public services (primarily health care) in Scotland under the rule of Tories. Salmond sensed the fears of most of his countrymen. The supporters of independent Scotland said that if they won the referendum, their country would be richer thanks to oil and gas deposits in the North Sea. According to the opponents of the secession, Scotland - if gained the independence - would economically decline, foreign capital would withdraw from it, and the recession would occur. They accused the separatists of basing taxes on oil and gas revenues which will eventually shrink because the deposits were running out and prices were falling. It is not possible to build welfare states on decreasing resources - they assessed. The pre-referendum campaign was focused on reducing fears and highlighting the benefits associated with the secession. It was more of a wishful nature than supported by multilateral, reliable analyses taking into account different scenarios. In the last period of its duration, the predominance of opponents of the secession who use the slogan *"Better Together"* decreased. Therefore, the British government has promised to extend Scottish autonomy within a common state, so that the Scots would want to stay in it. The Unionists hoped that this would allow the scenario of the 1995 Quebec referendum to be repeated,[19] granting greater autonomy to the province, formulated at the last minute, contributed to the rejection of secession. This is also the case in Scotland.

The referendum was held on September 18, 2014 during the administration of Prime Minister David Cameron (2010-2016). What were the results? "No" to independence, "yes" to wider changes and greater autonomy. Nearly 84.6 per cent

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18 *ibid.*

19 Lynch, P., *Scottish Independence, the Quebec Model of Secession and the Political Future of the Scottish National Party,* Nationalism and Ethnic Politics, *Vol.* 11, No. 4, 2005, pp. 503-531

of Scots took part in the referendum. In many districts, the turnout reached 90 per cent. 55.3 per cent of the voters (2, 001,926 votes cast) was against the independence of Scotland. They feared that without England, Scotland could not handle. At that time, many of them assessed that Scotland was too weak to create its own state, that the European Union might not accept it, while the membership in this group is very important for pro-European Scots. The support of the secession by 44.7 per cent. of Scots (1,617,989 votes cast) were not enough for Scotland to separate from the United Kingdom.[20] As the commentators pointed out, the results of the referendum ensured Great Britain, at least the temporary, the maintenance of the United Kingdom. The Scottish decision also gave Great Britain a chance to avoid financial instability foreseen by some experts in the case of secession in Scotland and to maintain the strength of British voice in international organisations.

### 2.3 The United Kingdom European Union membership referendum

A speech by Prime Minister David Cameron on January 23, 2013 in London[21] focusing on the need to reform the European Union, was also a programmatic speech of the leader of the Conservative Party seeking to maintain his leadership among conservatives and to win supporters before the parliamentary elections in Great Britain. In the Conservative Party, a strong faction of opponents of Great Britain's membership in the European Union was strengthening. Euroscepticism was growing in the conservative electorate. The independence aspirations of the Scottish separatists became clear. In such complex conditions, the speech brought success to Cameron, ensuring in 2015 the renewal of the mandate of the Prime Minister.[22] The postulate of renewing the legitimacy of the government to continue UK participation in the process of European integration through a national referendum is in line with the principles of democracy. However, it is hard not to notice that Cameron treated the EU Referendum in terms of the bargaining chip in negotiations on the United Kingdom 's participation in the Union "on its terms." It was a risky operation. Michael Emerson from the Centre for European Policy Studies (CEPS) called the Prime Minister's actions: "a game of Russian

[20] McInnes *at al., op. cit.,* note 16, p. 1

[21] *David Cameron's EU speech,* 23 January 2013. [http://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum] Accessed 28.12.2018

[22] Erlanger, S.; Castle, S., *David Cameron and Conservatives Get Majority in British Election,* The New York Times, 8 May 2015. [http://www.nytimes.com/2015/05/09/world/europe/david-cameron-and-conservatives-emerge-victorious-in-british-election.html] Accessed 06.01.2019

roulette".[23] As a result of the referendum of June 23, 2016, the supporters of leaving the European Union by the United Kingdom won. Brexit became a fact.

### 2.4 Scottish reaction to the referendum results

Following the announcement of the referendum results, the First Scottish Minister and the Scottish National Party chairman, Alex Salmond, resigned, followed by Nicola Sturgeon, the advocate of Scottish independence and Scotland's membership in the European Union. She attended the inaugural session of the parliament with a speech in which she emphasised that Scotland outside the European Union is democratically unacceptable, and that the integration does good to Scotland. She returned to the idea of announcing the second independence referendum. The polls for the local media carried out after the referendum on Brexit show that 54 per cent (according to the "Daily Record" from Glasgow) and 59 per cent ("Sunday Post" from Dundee) of the Scots would vote for the independence. According to the observers, the referendum would make sense if at least 60 per cent of the Scots voted in polls for the independence.[24] The Scottish Parliament supported the initiation by Sturgeon direct talks on the future of Scotland both with the European Commission and with the government in London. On June 26, 2016, the First Minister of Scotland spoke in Brussels with the Presidents of the European Commission and the European Parliament on the future place of Scotland in the EU.[25] They both expressed their readiness to listen to Scotland, making it clear that the arrangements must first be made between the government in Scotland and the government in London. According to prof. Michaela Keating from the University of Aberdeen, it can be expected that the current EU member states, including Spain, will block Scotland's accession to the European Union.[26] The Spanish government fears that the "Scottish route" may be followed by Catalonia or Basque, which would endanger the unity of Spain. The facts are the independence tendencies in Europe are growing.[27] In July 2016, Sturgeon announced that

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[23] Emerson, M., *Cameron's 'renegotiations' (or Russian roulette) with the EU. An interim assessment,* CEPS – Centre for European Policy Studies Working Documents, No. 413, 2015, p. 1

[24] McAngus, *op. cit.,* note 10

[25] Rankin, J.; Carrell, S.; Oltermann, Ph., *Nicola Sturgeon's plea to EU leaders meets with sympathy but little hope,* The Guardian*,* 29 June 2016. [http://www.theguardian.com/politics/2016/jun/29/nicola-sturgeon-scotland-plea-eu-leaders-sympathy-little-hope] Accessed 08.01.2019

[26] Keating, M., B*rexit Reflections - How could Scotland remain in the EU?,* Centre on Constitutional Change, University of Edinburgh, Edinburgh, 8 July 2016. [http://www.centreonconstitutionalchange.ac.uk/blog/brexit-reflections-how-could-scotland-remain-eu] Accessed 21.01.2019

[27] Colomb, C.; Bakke, K.; Tomaney, J., *Shaping the territory in Scotland, Catalonia and Flanders. Analysing contemporary debates on devolution and independence from a spatial planning and territorial cohesion lens,* UCL European Institute, Working Paper, No. 5, 2014, pp. 1-12

she was planning to start preparations for the next referendum.[28] In March 2017, the Scottish Government's proposal to organise a second independence referendum was supported by the majority of deputies representing the Scottish National Party and the Green Party, thus giving the Scottish First Minister Nicola Sturgeon a mandate to start negotiations on the preparation of the referendum (it requires the consent of the government in London).

### 2.5 The reaction of England to the activities of Scotland for its independence

After the United Kingdom European Union membership referendum, before his resignation as Prime Minister, David Cameron urged the British Parliament to maintain the unity of the United Kingdom.[29] On July 2, 2016, at a session opening the next term of Holyrood - the Scottish parliament, the British Queen Elizabeth II did not raise the issue of the referendum and its results. She spoke about "stay calm and collected" when the events take on "remarkable speed".[30] The Queen's words were read as an appeal to rethink the need to repeat the referendum on the independence of Scotland. Before the 2014 referendum, experts and British politicians, including the president of the Bank of England and the Prime Minister, warned that the case of Scotland leaving the UK would have negative economic consequences. Already in 2012, Cameron during the visit to Edinburgh argued that the United Kingdom should last uninterruptedly, as both England and Scotland only jointly are able to maintain a strong position in the international arena. He assessed then that independent Scotland would not be as strong, secure, rich and just as it is today as part of the United Kingdom. The secession of Scotland would cause Great Britain to lose one third of its territory, resulting in marginalisation in NATO and the UN Security Council, because it counts as one of the most important countries in Europe only in the union with Scotland.[31] Although the Prime Minister did not mention it, the fact that Great Britain is the largest producer of crude oil and gas in the European Union is also important. Most of this production comes from the areas that can be taken over by independent Scotland. According to Scottish politicians, since Britain is afraid of undermining

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28 Cramb, A., *Nicola Sturgeon: Scottish referendum could be held next year,* The Telegraph, 17 July 2016. [http://www.telegraph.co.uk/news/2016/07/17/sturgeon-scottish-referendum-could-be-held-next-year/] Accessed 23.01.2019

29 *PM Commons statement on the result of the EU referendum,* 27 June 2016. [https://www.gov.uk/government/speeches/pm-commons-statement-on-the-result-of-the-eu-referendum-27-june-2016] Accessed 25.01.2019

30 *The Queen's address to the Scottish Parliament,* 2 July 2016. [https://www.royal.uk/queens-address-scottish-parliament-2nd-july-2016] Accessed 30.01.2019

31 *PM Scotland speech,* 16 February 2012. [https://www.gov.uk/government/speeches/transcript-pm-scotland-speech] Accessed 01.02.2019

the stability of its economy after Scotland has become independent, it means that England needs Scottish economy more than Scotland - British economy. Prime Minister Theresa May stated in March 2017 that she would not agree to repeat the Scottish independence referendum as long as the negotiations with the EU on Brexit last. The negotiating period began on 29 March 2017, when the United Kingdom served the withdrawal notice under Article 50 of the Treaty on European Union; under the two-year deadline, the period was originally to end on 29 March 2019. Negotiations on the withdrawal agreement (which includes a transitional period and an outline of the objectives for a future relationship between the UK and the EU) were concluded in November 2018, with the European Union indicating that no further negotiation or changes before the UK legally leaves will be possible. The UK and leaders of the 27 other EU countries have agreed to delay Brexit moving the deadline from 29 March to 31 October 2019. The official objective is to allow time for the withdrawal agreement to be ratified. The divorce deal struck by the EU and the British government has repeatedly been rejected by the UK parliament.[32] Scotland's First Minister, Nicola Sturgeon has said on 21 April 2019, that she would back to the idea of the next independence referendum (on May 2021): "Independence would allow us to protect our place in Europe. It would enable us to nurture our most important relationships - those with the other countries of the British Isles - on the basis of equality. And it would mean that decisions against our will and contrary to our interests cannot be imposed on us by Westminster. It would put our future into our own hands - with the decisions that shape our future and determine our relationship with other countries taken here in our own parliament. That is the essence of independence (…) If Scotland is taken out of the EU, the option of a referendum on independence within that timescale must be open to us".[33] T. May has rejected any discussion on the new Scottish independence referendum plans. Repeated opinion polls show a narrow majority of Scottish people are against independence, with only a minority backing a referendum in the next two years. Others show a majority of Scottish voters would support a referendum over the next decade. N. Sturgeon appeared to acknowledge there was not yet a majority in favour of leaving the UK and said she wanted to build a consensus with opposition parties on Scotland's constitutional and political future.[34]

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[32] *Brexit: UK and EU agree delay to 31 October,* BBC, 11 April 2019. [https://www.bbc.com/news/uk-politics-47889404] Accessed 02.05.2019

[33] *Brexit and Scotland's future: First Minister statement,* 24 April 2019. [https://www.gov.scot/publications/first-minister-statement-brexit-scotlands-future/] Accessed 03.05.2019

[34] Carrell, S., *Sturgeon outlines new Scottish independence referendum plans*, The Guardian, 24 April 2019. [https://www.theguardian.com/politics/2019/apr/24/sturgeon-outlines-new-scottish-independence-referendum-plans] Accessed 03.05.2019

## 3. THE MAIN CHALLENGES FOR SCOTLAND IN THE ECONOMIC SPHERE IN TERMS OF THE POSSIBLE SEPARATION OF SCOTLAND FROM THE UNITED KINGDOM

Leaving the European Union (EU) represents the greatest change to the UK and Scottish economies. The Fraser of Allander Institute has set out the long term economic implications of Brexit on Scottish Economy.[35] Its analysis describes how trade opens businesses to new opportunities for exporting and investment and how labour mobility boosts labour supply, helping to increase productivity and address demographic challenges in countries, with an ageing population. Competition helps efficiency, product specialisation and growth and financial integration deepens and broadens capital markets. All these are expected to be impacted in one way or another by becoming less integrated with the EU. Three scenarios for the future relationship with the EU post-Brexit are modelled: a Norway model, a Switzerland model and a WTO model. All these scenarios show significant negative impacts of Brexit on the Scottish economy (Table 1).

Table 1. Impact of Post-Brexit Scenarios on Scottish Economy after 10 years

| | **Norway model** | **Switzerland model** | **WTO model** |
|---|---|---|---|
| Exports of Goods | -12% to -18% | -12% to -18% | -26% |
| Exports of Services | -11% to -18% | -18% to -22% | -25% |
| GDP (%) | 2-3% lower | 3-4% lower | 5% lower |
| GDP £ compared to 2015-16 | £3-5bn lower | £4-6bn lower | £8bn lower |
| Real wages (%) | 3-4% lower | 5-6% lower | 7% lower |
| Real wages (£ full-time earnings) | £800-1,200 lower | £1,200-1,600 lower | £2,000 lower |
| Employment level | 1-2% reduction | 1-2% reduction | 3% reduction |
| Numbers of jobs | 30,000 jobs lost | 30,000 jobs lost | 80,000 jobs lost |

Source: Fraser of Allander Institute, Long-term Economic Implications of Brexit, October 2016.

Scottish Government analysis ("Scotland's Place in Europe: People, Jobs and Investment") show, that Brexit will significantly weaken Scottish economy and result in slower economic growth and lower incomes than otherwise, but also that a UK outside the European Single Market and Customs Union will have the most damaging consequences for Scotland.[36]

Scotland's aspirations for the independence, despite being blocked by the British government, have been particularly strong in recent years. The Scottish authorities are aware that with the possible independence, there is a thorough reconstruction

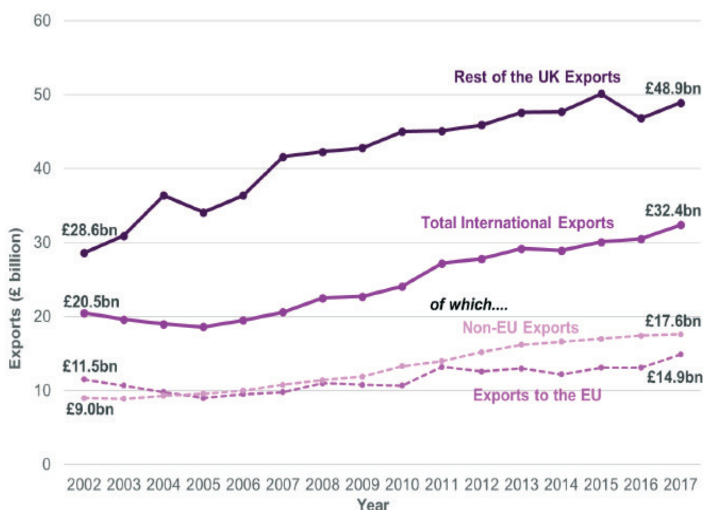
[35] Fraser of Allander Institute, *Long-term Economic Implications of Brexit,* October 2016

[36] *Scotland's Place in Europe: People Jobs and Investment. Summary,* Scottish Government, January 2018, p.3

of the state's structures and policy. Scotland strives to become independent from the United Kingdom in the economic sphere and decide independently on the directions of economic development. This does not mean suspending the cooperation, but diversifying it and placing a greater emphasis on cooperation within the European Union. The next part of the article highlights the main challenges facing Scotland in terms of possible detachment from the United Kingdom. The issues raised in this part of the article do not exhaust the subject, they include selected aspects (relating to trade, currency, energy industry and renewable energy sector, financial sector) and require further in-depth analyses and research.

The development of foreign trade affects the economy in many ways. It brings benefits in terms of specialisation and increasing the scale of production, entails an increase in investment (increasing export production requires additional capital accumulation), enables the transfer of new technologies and knowledge to the country (in the case of countries with a lower degree of technological advancement, it contributes to productivity growth and acceleration of economic development). The freedom to trade goods and services across the UK supports greater productivity through knowledge sharing, specialisation and economies of scale. Majority of Scottish exports are directed to England and other parts of Great Britain (Wales and Northern Ireland).[37]

Figure 1. Scotland's Exports (excluding oil and gas) to the Rest of the UK, EU and Non-EU, 2002-2017




Source: Export Statistics Scotland 2019.

[37] Mahoney, D.; Knox, T., *Scotland: Could it become Greece without the sun?,* Centre for Policy Studies, Economic Bulletin, No. 80, 2016, p. 4

The United Kingdom is Scotland's main market. The top five export sectors for Scotland's exports to the rest of the UK include: financial and insurance activities, wholesale and retail trade; repair of motor vehicles and motorcycles, utilities, professional, scientific and technical activities, manufacture of food products and beverages.[38] In the event of Scottish independence, an international border would be introduced between an independent Scottish state and the continuing UK. This would create barriers to cross-border transactions and lead to increased costs for businesses and households operating or travelling across the border. These effects would cumulate across the economy and trigger a "border effect" – the barrier to flows of trade, labour and capital created by the weakening of economic integration. Different types of barriers (economic, legal, etc.) can cause that the development of trade will not happen in the same degree as expected. For instance, a factor hindering trade between Scotland and England would be the changes in customs policy with a wider use of protectionism instruments. The introduction of the border between Scotland and England would also not be favourable to bilateral exchange. Changing direction (shift) of trade is possible, but it requires time. However, it is not enough, it should involve the creation (increase) of trade. Various factors influence the development of foreign trade, including government policy (affects the direction of trade), exchange rate developments, demand for specific products/ services on the domestic market and on foreign markets, the economy's demand for products/ services needed for development individual sectors of the economy. This aspect should also be treated as a challenge for Scotland. In-depth analyses require not only potential effects in the sphere of trade in the conditions of Scotland's exit from the United Kingdom. They should also take into account the option of joining independent Scotland to the European Union in a situation where links with the markets of EU countries (except Great Britain) are currently relatively weak. In addition, the analyses should take into account the real possibilities of changing directions of trade and its increase (characteristic for a short period) and other long-term changes along with their potential effects on the Scottish economy.

Before the 2014 referendum, the then First Minister of Scotland, Alex Salmond, supported the monetary union with the rest of the United Kingdom: England, Wales and Northern Ireland, to be overseen by the Bank of England. According to the representatives of the Bank of England, in the event of Scotland gaining independence, Scotland will not be able to count on ending political union with the United Kingdom and remaining in the monetary union. If Scotland's monetary union was established with the rest of the United Kingdom, Scotland

[38] According to the Export Statistics Scotland, in 2017, the top five largest sectors accounted for 59% of the total exports to the rest of the UK

would be required to comply with the decisions of the British Ministry of Finance and the Bank of England in fiscal (budgetary) policy, monetary policy, regulation of the banking sector.[39] Additionally, for such a union to be functional, special cross-border agreements on tax and banking regulations would become necessary. Establishing Scotland's membership of the European Union, a possible monetary union and its own currency would only be a transitional stage preceding the adoption of the single euro currency. Scotland is not ready for this scenario yet. The own currency or possible adoption of the euro by Scotland should be based on strong foundations of the economy, including rational fiscal (budgetary) policy. The government will not be able to maintain a large budget deficit and public debt. The question arises: Will independent Scotland be able to finance free higher education, health care and planned increase in social spending? The results of experts' analyses from the Centre for Policy Studies indicate that in the optimistic variant, the fiscal net effect would be neutral, and in the pessimistic one, there would be a large shortage. Other parts of the United Kingdom can no longer afford to increase social spending. Maintaining social spending would be a considerable challenge for the independent government of Scotland, also in terms of the level of British debt, which after the possible secession of Scotland will have to be divided. The British government, in order to calm the financial markets, announced before the 2014 referendum that it would honour all debts, including those from Scotland, which means that independent Scotland will owe England approximately 23 billion British pounds.[40] These were the estimates in 2014. This debt has been increasing since then.

Scotland is called the heart of Britain's energy industry. The deposits at the bottom of the North Sea (estimated to cover about 24 billion barrels of oil equivalent) do not belong to the United Kingdom, but to private enterprises that have found and exploited these deposits. The United Kingdom derives income from tax revenues on the activities of these enterprises. According to expert estimates from the Centre for Policy Studies, tax revenues from the operation of oil companies from the North Sea bottom, which in 2016 were estimated to reach 7.9 billion pounds, decreased to 500 million pounds.[41] One of the main reasons is the drop in oil prices in the world. This means that the budget deficit in Scotland will remain stable in the coming years, definitely higher in the independent Scotland option than in the option of remaining Scotland in the UK. According to Scottish politi-

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[39] Carrell, S., *Independent Scotland would face immediate £23bn debt,* The Guardian, 8 April 2014 [http://www.theguardian.com/politics/2014/apr/08/independent-scotland-debt-thinktank] Accessed 05.02.2019

[40] ibid.

[41] Mahoney *at al*, *op. cit,* note 32, p. 3

cians and economists, Scotland can handle these problems if tax revenues from oil extraction remain in Scotland. They are aware that oil and gas deposits are getting smaller, mining costs are rising and prices are falling. If the possible higher taxes on oil production raise, there is a risk that some enterprises may decide to withdraw from operation. The resources of energy are treated as one of the main pillars of Scotland's economic development after a possible exit from the United Kingdom. Before the 2014 independence referendum it was estimated that in the event of the victory of independence supporters, Scotland could take up as much as 84 per cent of UK oil resources. This issue in the case of secession in Scotland will have to be negotiated.

The renewable energy sector in Scotland has enormous potential, which has been pointed out, among others analysts from Bloomberg New Energy Finance before the 2014 referendum.[42] At the beginning of the twenty-first century, the Scottish energy system was based mainly on hydroelectric, nuclear and coal power plants as well as the CCGT gas-fired power plant. In the new system, renewable energy sources have taken the priority place (RES). Their share in the Scottish energy mix (mainly due to wind energy) belongs to the highest in Europe now. The studies from already 2003 mentioned Scots' demand of energy was to be provided in 100 per cent by renewable sources of energy, but only the publication of *''Scotland`s Future. The Guide to an Independent Scotland* " from November 2013 on the future of Scotland after gaining the independence, clearly underlined the development of renewable energy. This claim attracted investors who started to build wind farms on land and on the Scottish coast. The investors were also encouraged by the government subsidy system from London and Scotland's access to co-finance projects for the development of renewable energy from the EU structural funds (the UK's exit from the EU means a real possibility of losing these funds). A new energy strategy for Scotland published in January 2017 sustains the previous goal of developing renewable energy sources.[43] Onshore wind energy is to develop without subsidising the energy produced by onshore wind farms. In return, the Scottish government plans its development by promoting the sale of energy from wind farms through long-term energy sales contracts, the so-called PPA (Power Purchase Agreements) concluded by the public and private sectors. If offshore wind energy has become competitive in relation to other energy production methods, specialists have no doubts that it is necessary to increase

42 Glickman, N., *Clean energy investment at risk from Scottish referendum vote,* Bloomberg New Energy Finance, 15 September 2014. [http://about.bnef.com/press-releases/clean-energy-investment-risk-scottish-referendum-vote/] Accessed 07.02.2019

43 *Scottish Energy Strategy: The future of energy in Scotland,* Scottish Government, Edinburgh, January 2017. [https://beta.gov.scot/publications/scottish-energy-strategy-future-energy-scotland/pages/5/] Accessed 09.02.2019

its profitability. Greater commitment is needed to improve energy efficiency, expand energy storage capacity and increase the potential of so-called demand mechanism, ie voluntary reduction of consumption during periods of peak demand. The security of deliveries in emergency situations is now primarily provided by an interconnector linking the Scottish network with the English network. For several years, however, the government in London has been less and less enthusiastic about the costs of maintaining ready-made generating capacity in the event of insufficient electricity production in Scotland. The Scottish government convinces that it will not cause the drops of voltage or power outages. As part of the new strategy, the construction of interconnectors with Iceland and Norway is considered. For the Scottish Government, it is another step in the quest to become independent from England. According to the report published by specialists from the Frankfurt School - UNEP Collaborating Centre for Climate & Sustainable Energy Finance and Bloomberg New Energy Finance in 2014, Great Britain took first place in Europe in terms of investments in the renewable energy sector.[44] London government is unlikely to withdraw from financing new investments in Scottish wind farms. If it did, it would also be detrimental to its own interests. A large part of the British demand for renewable energy is satisfied thanks to Scottish wind farms. With the development of RES, Scotland is planning to remain a significant energy exporter. According to the data from 2016, approx. 24 per cent of electricity generated by wind farms is consumed in Scotland alone, and 76 per cent is exported (also to England) or does not enter the network at all. In order to increase the export potential, it is necessary to increase wind farm generation capacity, which is realistic considering the implemented and planned investments. The Scottish government has also set the aim of reducing greenhouse gas emissions by 66 per cent before 2032. The increase in the sales of electric cars should have an impact on stabilising the energy demand in the transport sector.[45] The Scottish Government has also announced the support for innovation in clean energy technologies. The scientists from Scottish universities have also got involved in the cooperation in the research and development field supporting the development of innovation in the sector. Scotland expects that thanks to the involvement of foreign investors and EU structural funds (assuming Scotland's membership in the EU), it will be possible to implement the objectives of the new energy strategy in the long term, and renewable energy sources will become one of the pillars of independent Scotland's economic development.

The financial sector plays an important role in the economy of Scotland. Investors and consumers have felt the negative effects of the global financial crisis. In this

[44] *Global trends in renewable energy investment 2016,* Frankfurt School - UNEP Collaborating Centre for Climate & Sustainable Energy Finance & Bloomberg New Energy Finance, Frankfurt, 2016, p. 23

[45] *Scottish Energy Strategy…, op. cit.,* note 37, p. 58

context, before the 2014 referendum, the concerns about the future of the Scottish financial sector were voiced in the event of secession decisions. There is a real possibility of risk of assets relocation (after gaining the independence, the banks based in Scotland may withdraw from Scotland for greater security guaranteed by the Bank of England, and only possibly leaving local branches), withdrawal of savings deposits from banks, introduction of restrictions in the free movement of capital. The authors of the report *"Scotland analysis: Macroeconomic and fiscal performance"* point out this fact.[46] Also, the partially nationalised banking groups of RBS (Royal Bank of Scotland) and LBG (Lloyds Banking Group) have announced that in the event of a possible exit of Scotland from the United Kingdom, they will relocate assets, and transfer their seats from Edinburgh to London. These banks were recapitalised in the years 2008-2009 during the crisis on the financial markets, they received multibillion aid from the British budget. The British Treasury is a shareholder of both banks.[47] The independence of Scotland can affect the valuation of Scotland's credit rating, fiscal (budgetary) policy, monetary system, law and other elements that shape the environment in which the banks operate. Market participants function today in conditions of uncertainty, and are able to accept a certain level of it. In the short-term, the negative consequences for the financial system of Scotland would have an impact on the rate of economic growth and other macroeconomic indicators.

## SUMMARY

Over the centuries, Scotland has made several attempts to become independent from Great Britain. They ended in failure for various reasons, although they have contributed to the increase of Scottish autonomy. Since the discovery of oil and gas deposits at the bottom of the North Sea and the growing importance of the Scottish National Party on the political scene and its supporters, the intensification of Scotland's efforts to separate from the United Kingdom can be seen. They have become particularly strong after the results of the EU referendum were announced. The basis for independence pursuits in Scotland is primarily the desire to become independent from the United Kingdom in the economic sphere. Scotland is determined to decide for itself about its own development as an independent state, and member-

46 *Scotland analysis: Macroeconomic and fiscal performance,* HM Government, London, September 2013, p. 23 [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236579/scotland_analysis_macroeconomic_and_fiscal_performance.pdf] Accessed 12.02.2019

47 Trotman, A.; Roland, D.; Titcomb, J., *RBS and Lloyds will leave Scotland if it votes for independence,* The Telegraph, 11 September 11 2014 [http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11088643/RBS-and-Lloyds-will-leave-Scotland-if-it-votes-for-independence.html] Accessed 13.02.2019

ship in the European Union is treated as an important support for the implementation of the adopted concept of economic development based mainly on oil and gas and renewable energy sources. These efforts are a complex process in the present conditions. England is blocking the secession process of Scotland in order to maintain the unity of the United Kingdom. Assuming the achievement of the second independence referendum and its positive outcome for Scotland, bilateral negotiations and arrangements will be necessary regarding the conditions of secession: the economic, financial and institutional-legal exit of Scotland from the United Kingdom. The United Kingdom is a member of, among others UN, NATO, Council of Europe. Independent Scotland would have to negotiate and sign new agreements with many international organisations.[48] Concerning Scotland's membership in the European Union, it does not seem to be enough to change treaties so that Scotland can remain a member of the Union. Scotland will need to apply as a new country for the admission to the European Union. In accordance with the procedure of accession of a new country to the Union, after starting the accession process, the European Commission will formulate opinions at various stages of this process (so-called avis) regarding the degree of fulfilling the so-called Copenhagen criteria, i.e. conditions for entry into the Union, the so-called screening, ie a review of the law, negotiations will begin in problematic areas until the final arrangements which will be recorded in the accession treaty. Then, the treaty will have to be ratified, only then will it apply. Scotland is a part of Great Britain, which joined the Union in 1973. Since then, it has been customising the so-called acquis communautaire, or the legal acquis of the European Union in these areas, which result from the supremacy of EU law; and on the other hand, are the responsibility of the autonomous government of Scotland. It can be therefore expected that the accession process will be easier than if the country that has no integration experience such as Scotland is trying to join the EU. Some EU countries will not be too favourable for the secession of Scotland from the United Kingdom. Spain is a good example; the country officially expressed its opposition to Scotland's independence fearing that it might provoke and encourage other regions in European countries, including Catalonia, to fight for the legitimacy of referendum processes aimed at secession. There is a danger that this country (perhaps also others) will block Scotland entering the EU at the stage of voting in the Council of the European Union (the accession of a new country to the EU requires unanimity of all EU member states) or ratification of the accession treaty. If Scotland is effectively blocked by England in the aspect of proclaiming an independence referendum, or if the referendum is negative and its result is negative, Scotland will probably strive to further autonomy increase, including the right to

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[48] Aikens, J., *The Legal Consequences of Scottish Independence,* Cambridge Journal of International and Comparative Law, *Vol.* 3, No. 1, 2014, pp. 162-172

decide on such strategic issues as foreign policy, armed forces, and increasing the income from oil and gas exploration from the North Sea floor would be available to the Scots. There are different possible scenarios for the events development. To a large extent, they depend on the content of the withdrawal agreement (which should include i.a. an outline of the objectives for a future relationship between the UK and the EU) regarding the conditions of leaving the Union, as well as further directions, forms and principles of cooperation of the United Kingdom with this group. Scotland will have to conduct a national debate about its further status in the UK or elsewhere, including the relations with the European Union. The possible separation of Scotland from the United Kingdom generates many challenges in the economic sphere. Scotland is currently economically related mainly to the rest of the United Kingdom, including England. The concerns about adverse economic effects after the secession of Scotland are justified, especially in the short term. Scottish politicians are aware of the challenges. If they are undertaken, they are faced with the task of creating a pragmatic development strategy for independent Scotland in the long term. A strategy that will be accepted by the Scottish society, convinced that on the one hand the justified renunciation that will have to cope with during the creation of a new state and the 'rebuilding' of its structures and changes in socio-economic policy; and on the other hand, that the choice they have made provides new opportunities and perspectives for them and their country.

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# THE CAPACITY OF THIRD COUNTRIES TO NEGOTIATE BILATERAL AGREEMENTS WITH THE UK UNDER WITHDRAWAL ARRANGEMENTS

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***ABSTRACT***

*Having in mind that this is the first time that a Member State decided to withdraw from the EU pursuant to Article 50 TEU there are many aspects of this process that attract the attention of scholars studying EU related issues. Regardless of the outcome of the ongoing political debate and the course of action that will be taken eventually, after the CJEU decision in Wightman, we deem the need to further explore the extent of Article 50 and its implications on a number of stakeholders self- evident. In this paper we will deal with the capacity of non-EU countries to negotiate and conclude bilateral agreements with the UK i.e. a country withdrawing from the EU. The analysis is based on the proposed framework under the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the Euratom and the possible interpretation and understanding of terms "the principle of sincere cooperation" and "the Union's interest" in this context, the principles of international law including the provisions of the Vienna Convention on the Law of Treaties and the general principles of Union law. The primary focus is on the legal uncertainty the lack of a more thorough approach creates to non- EU countries, especially to third countries aspiring to join the EU. Considering that they do not participate in the withdrawal negotiations, it is a challenge for them to take part in prospect bilateral negotiations with the UK, while, at the same time, making sure they stay on their EU path. We argue in favor of the deal, as a universally accepted approach in case of future withdrawals, not only for the purpose of establishing a reference for any future application of Article 50, but also for providing legal certainty to those parties that are not prima facie affected by the withdrawal, but that do have to act in accordance with all deals made without the right to be heard.*

***Keywords****: Brexit, Article 50 TEU, bilateral agreements, third countries, sincere cooperation*

## 1. INTRODUCTION

The Brexit debate is, by all means, more complex and difficult than it was initially expected. The debates in the British Parliament and the European institutions put the problem of Brexit in the center of political and economic spheres on both sides of the English Channel. However, after all this time, it seems that every step of the way a new Pandora's box of issues is opened. To this day, the outcome is unpredictable and highly dependent on the influence of the political leaders involved in the process. One thing is certain, the procedure under Article 50[1] has proven itself to be the beginning of a very complicated journey. What this essentially demonstrated is that the EU has been, throughout the years, almost exclusively dedicated to integration and enlargement, completely neglecting the very notion of withdrawal. When this option became a reality, it was clear that the entire process of leaving the EU is based on a single treaty article that simply derives from a universal notion of international law indicating that all states are free to enter treaties and withdraw from them at their own will and in accordance with the rules specified in the treaty. This is obviously insufficient grounds to annul decades of integration and let alone to reverse the effects of long-term harmonization of laws. Hence, a preferred withdrawal method set out by TEU is an agreement between the State exiting the EU and the Union.[2]

The UK, on the other hand, has three choices: a negotiated deal, no deal, and, since *Wightman*[3] - no Brexit. Three choices – None the good.[4] Each choice is more difficult than the other, starting from the Draft Withdrawal Agreement negotiation, hauled by politicians in the UK's and EU's political arenas for months, to a no-deal Brexit, leaving everybody involved in a rather difficult situation. Furthermore, this means that the UK will have to re-develop its international relations through agreements, where large parts of them were already regulated under the auspices of Union's external action. The existing EU division of competences, as well as the principles of sincere cooperation and primacy, also make it difficult for the UK to define its future relations with third countries. This creates uncertainty not only for the UK, but also for a number of third countries that did not have any say in the withdrawal process.

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1 Article 50, TEU (Lisbon)

2 Article 50 (1) TEU

3 Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999 - not yet published (Court Reports - general)

4 *Three choices on Brexit- None the Good*, [https://www.nytimes.com/2018/12/13/opinion/editorials/theresa-may-britain-no-confidence-brexit.html] Accessed 01.03.2019

Imagining that “Britain could implement the (new) deals whenever the fine print is ready”[5] appears to be just wishful thinking, so the dissuasion shifted focus to actual outcomes and solutions regarding future bilateral arrangements of the UK. Following these trends, this article is dedicated to the analysis of the existing solution under the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the Euratom[6] and the possible interpretation and understanding of terms “the principle of sincere cooperation” and “the Union’s interest” in this context *par rapport* the third countries. Relying on fundamental principles of international law, the provisions of the Vienna Convention on the Law of Treaties and the general principles of European Union law, certain shortcomings of the proposed solution and the disadvantages of a no-deal scenario will be discussed. Lastly, the focus is on the legal uncertainty the lack of a more thorough approach brings to those third countries aspiring to join the EU (the ones having SAA or AA agreements in force). Considering that they do not participate in the withdrawal negotiation, nor do they have formal access to EU institutions that may offer some sort of a legally viable interpretation, it presents a challenge for them to engage in prospect bilateral negotiations with the UK without any point of reference whatsoever, while, at the same time, making sure they stay on their EU path.

Although no definite answers can be offered at this stage, it appears important to discuss the difficulties that may arise for third countries as a result of a country withdrawing from the EU. Furthermore, it can be concluded that the states participating in the withdrawal process gave very little consideration to third countries’ interests that cannot be represented in any other way.

## 2. POINTS OF REFERENCE FOR THIRD COUNTRIES UNDER THE DRAFT WITHDRAWAL AGREEMENT

Regardless of the most recent developments, the shift of focus from integration to disintegration lead to much confusion, discontent and legal, social and economic intricacies, that are, at some point, bilaterally tackled only in the Draft Withdrawal Agreement. This agreement is the first step toward understanding what a discussion under Article 50 can produce at a time of disintegration. The withdrawal means that a seemingly unlimited number of issues need to be elaborately resolved

[5] [https://inews.co.uk/news/brexit/no-deal-brexit-preparation-uk-leave-eu-without-deal-consequences-theresa-may/] Accessed 05.02.2019

[6] Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [www.ec.europa.eu] Accessed 22.11.2018

in a single or more agreements, that obtaining approval for mutually acceptable solutions at a national level is not as easy as expected, and that no-deal is also an option. As it is much easier for an individual to walk into a bar than to walk out of one, it appears much easier for a state to become a member rather than to leave the Union. Understandably, the current candidate countries may disagree on the latter. What the withdrawal negotiation also demonstrated is that there was barely enough time and capacity to deal with the internal aspects of the exit and let alone even consider the effects it will have on third countries. If the legal issues of leaving the Union are an uncharted territory[7] then the effects of one state leaving on countries outside the Union is outer space. The Union has exceeded its territory in many aspects and we can now, without reservation, talk about the Union outside the Union. Through its neighboring and enlargement policies, the Union created an entire system of exclusive, preferential relations with a large number of third countries which will, undoubtedly, be affected by one state leaving. Furthermore, the Union indirectly expanded the effects of its law beyond its territory in a way that creates a firm bond based on mutual, primarily economic in nature, interests. It is safe to assume that the UK would be more than interested in maintaining those preferences. On the other hand, third countries are not at liberty to grant those preferences to non-EU states without bearing the *de facto* consequences in relation to their policy toward the Union, which is, in some cases, prospective membership. If, say, a third country with a very elaborate association agreement with the Union and its Member States, would want "to do the right thing" and be a *bona fide* negotiator in all future deals with a country exiting the EU, it would be very hard for it to find a viable legally binding reference or even some simple guidelines upon which to rely. For the time being, it could rely on the general rules of international law and the little we can derive from the existing Draft Withdrawal Agreement.

The first question to be addressed in order to explain what a third country needs to consider in its future bilateral negotiations with the UK is what the actual status of this country is. Is it "business as usual"?[8] Or should the UK be regarded if it is already out? The issue is further more complicated after the decision in *Wightman* confirming that a state can unilaterally revoke the notification which results in ending the withdrawal procedure. Either way, a third country is facing a difficult question even at the very start of any future negotiations: With whom are we ne-

[7] Craig P., *Brexit: A Drama in Six Acts*, a lecture delivered at St. John's College, 2016, p. 28, [www.ora.ox.ac.uk] Accessed 07.12.2018

[8] Lazowski, A.; Wessel, R.A., *The External Dimension of Withdrawal from the European Union*, Revue des Affaires européennes. 2016 (4), p. 625, [www.westminsterresearch.wesminster.ac.uk] Accessed 30.11.2018

gotiating the agreement? A Member State? A former Member State within a transition period? Or a Member State soon to be former yet again in position to revoke notification and stay a Member State? Having in mind that a number of third countries, especially those aspiring to join the EU, do not have the negotiating capacities matching those of the UK and that the negotiation of an international agreement is a cost- inflicting activity that is a certain financial strain if conducted in vain, these questions need to be addressed based on at least a minimum of solid legal framework. The Draft Withdrawal Agreement, in that sense, is the sole available document that can offer a clearer indication on how third countries should engage with the UK in the future. At least, its very entry into force would trigger the cessation of application of the Treaties under Article 50 and the revocation of notification would no longer be on the table.

After analyzing the overall state of affairs, *arguendo*, we can examine the content of the Draft Withdrawal Agreement offering some legal basis third countries can derive from in case of bilateral agreement negotiations with the UK. As a general reference, the Draft Withdrawal Agreement sets out the obligation of good faith and sincere cooperation.[9] The UK should refrain from any action or initiative that is likely to be prejudicial to Union's interest.[10] This can be a useful broader obligation for the country exiting the EU to avoid initiating and participating in negotiation that can be contrary to these provisions, however, the "Union's interest" is somewhat hard to define. Furthermore, the transition period established is a relevant timeframe even for third countries. According to Article 126, the transition period starts with entry into force and ends on a specific date[11] and all restrictions imposed in terms of the UK's external action are limited to the determined period of time. This leads us to the only provision that directly deals with the capacity of the UK to sign and ratify international agreements in the areas of exclusive competence of the Union which is Article 129 (4). The UK is free to sign and ratify international agreements in its own capacity "provided those agreements do not enter into force or apply during the transition period, unless so authorized by the Union". Although this is an obligation imposed on the UK, it is, at the same time, a relevant piece of information to all third countries approached by the UK with the aim to conclude bilateral agreements falling under the scope of Union's competences. It permits the conduct of negotiations, and even the ratification of the agreements concluded, while establishing a definable timeframe for entry into force of such agreements. Deriving from what is defined, the Draft Withdrawal

[9] Article 5, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (DAWUK)

[10] Article 129 (3) DAWUK

[11] The end date is December 31, 2020 with possible extensions

Agreement offers some crucial information for a third country to be able to assess its interest in entering negotiation on a certain bilateral agreement with the UK: the UK is no longer a Member State and it cannot go back on its decision and change its status unilaterally starting from the agreed moment in time, and the UK's bilateral agreements concluded within the Union's exclusive competences will not have effect until the end of the transition period unless otherwise approved. This solves a number of potential dilemmas for a large portion of future international agreements, however, some may not fall under the scope of this provision *per se*. The Union has taken measures to increase connectivity in many areas, to name transportation as an example, which are necessary to ensure single market benefits and the application of uniform rules. These arrangements offer a wide range of exclusively granted preferences to third neighboring countries that in return grant preferences to Member States the UK would most probably want to maintain. This may not be contrary to Union's interests but it would interfere with the third country's policy goals toward the Union. A third country would, therefore, have to evaluate whether certain arrangements with the UK would include some preferences that the Union deems exclusive, and whether these arrangements would negatively affect its membership negotiation or the application of some of its international agreements. Moreover, agreements that fall under the scope of the shared competences are not dealt with *en general* which implies that this area is subject to either interpretation or future UK- Union agreements.

Lastly, some conclusions can be drawn from the provision of Article 184 of the Draft Withdrawal Agreement, since both the Union and the UK are obliged to use their best endeavors to take necessary steps to negotiate expeditiously the agreements governing their future relationships. This does not mean much to third countries, especially to the prospective members, however it announces that there will be a legal framework for Union- UK future relationships upon which they could model their own bilateral arrangements with the UK.

As demonstrated, little consideration is given to the fact that the Union entered numerous political and legally binding partnerships with many third countries which extended the number of parties affected by the withdrawal to states that cannot participate in the Brexit negotiation. In case of no- deal exit, international law would apply. Other Union- UK treaties are also an option, with or without a withdrawal agreement. Although this is a subject of a different debate, a more elaborate withdrawal agreement would be the most adequate solution even for third countries since additional treaties may come too late and their relationships with the core agreement[12] may be questionable.

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[12] Craig, *op.cit.,* note 7, p. 38

## 3. NO- DEAL SCENARIO: WHAT CAN A THIRD COUNTRY EXPECT?

In the case of a no-deal Brexit the UK would have to deliver an agenda to both the Union and third countries, considering that this scenario looms large as a possible outcome.[13] The UK will need to demonstrate that it takes its future role seriously both inside and outside the Union. No-deal scenario means that the possibility of "cherry picking",[14] as political experts in the UK dubbed the negotiations with EU27, comes to an end and that UK, at that point, will be a "rule-taker" rather than a "rule- maker".[15] Simply put, it will become a third-party *par rapport* the EU and its members. It will also be hundreds of bilateral and multilateral agreements away from the privileged position it has as a Union member. Obviously, the counterparts do not share the same views on no-deal Brexit: the President of the European Council Donald Tusk calls a "No-deal scenario worst deal of all, especially for the UK",[16] whereas Theresa May repeatedly said that: "No-deal Brexit is "not the end of the world",[17] which renders the outcome even more unpredictable.

Putting aside the political analysis of the no-deal Brexit, there is a plethora of issues that need to be covered in the case of a "cliff-edge Brexit".[18] We will briefly analyze the rules of international law that could apply to those situations where there are no rules laid down by Withdrawal or other transitional agreement(s). This is the remaining point of reference for third countries to derive from in case of no-deal exit.

Firstly, the specificity of the UK's situation could be explained as a limbo between having a transitional period and not having a period to adjust at all. The termination of UK membership is conducted under Article 50 TEU, but the rules of international law must also be taken into consideration. The rules laid down in Vienna Convention on the Law of the Treaties (VCLT),[19] are considered a codifi-

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13 Dr Niblett R. CMG, *Finding a Sensible Brexit*, 2018, [https://www.chathamhouse.org/expert/comment/finding-sensible-brexit] Accessed 21.02.2019

14 *ibid*.

15 *ibid*.

16 [https://www.bbc.com/news/uk-politics-39294904] Accessed 01.03.2019

17 Pickard J., *Theresa May says no-deal Brexit 'not the end of the world'*, 2018, [https://www.ft.com/content/8afc0f88-aa8d-11e8-89a1-e5de165fa619] Accessed 16.02.2019

18 Morris C., *Brexit: What would no-deal look like?*, [https://www.bbc.com/news/uk-politics-39294904] Accessed 10.02.2019

19 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, Vienna, 23 of May 1969. (VCLT)

cation of existing customary law[20] and, in many respects regarded as the primary source of international contract law especially when there are no applicable international rules or customs. Having that in mind, the UK is, in the context of International Law, a party to a Treaty which means: "a State which has consented to be bound by the treaty and for which the treaty is in force"[21] and will be bound until the day it ceases to apply to it, again in conformity with Article 54 (a) VCLT. One of the options that was mentioned is that an altered principle of continuity may apply against any finding of automatic termination,[22] in the case of no-deal Brexit. However, in this case, the rules of international law and VCLT are clearly pointing to state succession, so the succession from an international organization *sui generis* such as the EU to a former member state cannot be assumed.[23] For third countries, it essentially means that the UK cannot maintain the same relationships and positions toward them it had as a Member State which translates to countless pending bilateral negotiations.

Furthermore, in December 2018 the European Commission published a No-deal Contingency Action Plan[24] which includes 14 necessary measures, in order to prevent a major disruption that would ensue as the result of non-deal Brexit. This is not a consolation prize in case the Draft Withdrawal Agreement is not ratified, but a document showing that the Union is preparing in case it needs to protect its interests. The uncertainty of a fading deal outcome was underlined when the European Commission announced having adopted two more proposals regarding Fisheries, in the case of no-deal Brexit in 2019.[25] However, the measures adopted by the Commission are merely a temporary solution, very limited in scope, implying that other solutions have to be considered. Furthermore, the Communication

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20 Brownlie I., *Principles of Public International Law*, Oxford University Press, New York, Sixth Edition, 2003, p. 580

21 Article 2.1 (g) VCLT

22 Dr Gehring W.M., *Brexit and EU-UK Trade Relations od Third States*, 2016, [http://eulawanalysis.blogspot.com/search?q=brexit+and+international+agreements] Accessed 10.03.2019

23 Wessel R., *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, Draft paper – presented at the 60th anniversary conference of the Europa Institute, Brexit and the Future of the European Union, University of Leiden, 30 November 2017, p. 15, [www.utwente.nl] Accessed 29.11.2018

24 Communication From The Commission To The European Parliament, The European Council, The Council, The European Central Bank, The European Economic And Social Committee, The Committee Of The Regions And The European Investment Bank: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, OJ, 19 December 2018

25 Proposal for a Regulation Of The European Parliament And Of The Council amending Regulation (EU) No 508/2014 as regards certain rules relating to the European Maritime and Fisheries Fund by reason of the withdrawal of the United Kingdom from the Union, 23rd of January 2019, [https://ec.europa.eu/info/sites/info/files/com-2019-48-final_en.pdf] Accessed 05.03.2019

from the Commision describing all urgent steps and measures to be taken by the EU and its institutions, in the very last paragraph underlines that all Member states need to refrain «from bilateral arrangements that would be incompatible with EU law and which cannot achieve the same results as action at the EU level. Such arrangements would also complicate the establishment of any future relationship between the EU and the United Kingdom".[26] If a no-deal scenario happens, the UK will no longer be bound by the principles of sincere cooperation and loyalty- the EU values and constitutional principles, that are not only core of the Treaty but also are firmly elaborated and reconfirmed in the case-law of CJEU in judgments *Commission v Germany and Luxembourg*[27] *and PFOS.*[28] With the *PFOS* formula CJEU clarified that loyalty also means abstention from acting under certain circumstances.[29] However, we must not forget, when that happens, on the other side of the negotiating table, concluding bilateral treaties there will be, among others, the Member States and the Union itself, still bound by the same principles acting in or outside of the EU. As briefly demonstrated, the EU is preparing for the impact of no-deal Brexit, still it fails to give due consideration to the interests of third countries with whom it has very elaborate bilateral relations.

Recalling that the UK will, after no-deal Brexit, be considered immediately a third country, the only guidance to regulating bilateral agreements would be the two universally recognized principles laid down in the Preamble and Article 26 of the VCLT- *pacta sunt servanda*[30] and, its main component or the *animus*, the *bona fides* principle. In this regard, however, the maxim *pacta tertiis nec noent nec prosunt* [31] that expresses a fundamental international principle that a treaty applies only between parties, is not fully applicable, when we have in mind that Member States are acting in accordance with the EU division of competences and that they are responsible to the EU as an entity as well as to other Member States. Pursuant to the fact that each Member State is part of the Union and is bound by principle of loyalty, all acts regarding bilateral arrangements of a Member State with the UK need to be negotiated and concluded under international law but also in the spirit of sincere cooperation. Moreover, in the spirit of the *pacta sunt servanda* and other VCLT principles stated, an emphasis should be put not only on bilateral agreements between Member States and the UK, but also on SAA and AA

[26] *Ibid*, p. 9

[27] Case C-433/03 *Commission v Germany*, [2005] ECR I-0698 par. 64 and Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, par. 58

[28] Case C 246/07, *Commission v Sweden*, [2005] ECR I-03317, par. 70

[29] Kuijper P *et. al., The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Acto*r, Oxford University Press, First edition, 2013, p. 202

[30] Article 26, VCLT

[31] Artcle 34, VCLT

agreements.[32] The no- deal scenario does not mean, when it comes to the mixed agreements which the UK signed and concluded in this context, and is a party to alongside the Union and prospective candidate countries, that an umbilical cord is cut. It is clear that those agreements were tailor-made for the EU enlargement purposes situation, but in the no-deal case the question remains: in what capacity the UK stays (or leaves) in those agreements where it is a party as a country, *en face* the third states *i.e* candidate countries? More importantly, this issue has bigger impact on the future conduct of third countries towards the UK in those areas covered by the SAA, since none of the signatories envisaged this situation. Should it be regulated under International law rule of *rebus sic stantibus*[33]? Will it continue to be applied bilaterally or partially in relevant aspects between the UK and a third state? Will it be regulated by one or more *lex posteriori* acts? One thing is sure, this question deems closure and remains to be settled throughout numerous arrangements, and it would be an opportunity for the EU to correct its previous oversight and establish a model for third countries to be included.

## 4. NOT ALL THIRD COUNTRIES ARE THE SAME: HOW ARE THE UNION'S CLOSEST NEIGHBORS AFFECTED?

The Union created a unique legal system that is effective even outside its territory. A certain group of third countries have elaborate relationships with the Union grounded in international agreements governing various modes of application of Union law. Under its Enlargement and Neigbourhood policies the Union develops legally binding relationships with its Southern and Eastern neighbors and with the third countries eligible for membership. An instance of a very elaborate agreement between the Union and an eastern partner is the EU- Georgia Association Agreement including a Deep and Comprehensive Free Trade Area (DCFTA)[34] covering a wide spectrum of issues dealing with political association and economic integration. The signatories also formed a free trade area[35] which may be of interest to the UK to maintain post-exit. It goes without saying that the states are free to enter negotiations and regulate their future trade relations as they wish, however, can this potentially be against Union's interests? Even if not, can it hamper Georgia's

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32 Stabilisation and Association Agreements are concluded in the form of mixed agreements between EU (European Communities), Member States and candidate countries such as Albania, Bosnia and Herzegovina, Montenegro, North Macedonia (ex FYROM) and Serbia. Kosovo* SAA is the only EU-only agreement

33 Shaw N. M., *International Law*, Cambridge University Press, New York, Sixth Edition, 2008, p. 950

34 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of one part, and Georgia, of the other part, Official Journal of the European Union L 261/7, 30/8/2014

35 Article 22 EU- Georgia Association Agreement

future plans to become a candidate for membership? Based on the premise that the Union has, and will continue to have, economic integration as a core value, can Georgia's bilateral agreements concluded today affect its efforts to join the EU in the future? The answers to these questions have a strong political dimension yet they create a number of legal intricacies which cannot be handled without knowing what the status of the UK will be after Brexit.

Arguably, a group of third countries that is expected to be the most affected by Brexit are the countries that fall under the scope of the Enlargement Policy.[36] There appears to be no area of policy left in which the Union and its Member States have not engaged with these third countries and there is hardly any reference in the Union's external framework regulating the involvement of third countries in general, including candidate countries and potential candidates.[37] This means that a third country candidate or potential candidate should align its policies with the Union's external action, however, the modalities of how this should be done are non- existent. On the other hand, disengaging their external action from the course set out by the Union will affect the political dimension of their respective membership negotiations. When dealing with major foreign policy decisions, it is not awfully hard to establish whether they are in line with the Union's external action or not. Still, this could be a demanding task when establishing whether a country applies the same measures as the Union. For instance, as a rather simplified experiment, does a candidate country have to introduce a flight ban against an airliner banned in the Union? The answer is yes, because the odds are that, after years of being a candidate, there must be an agreement that stipulates that. Can a candidate country make the same arrangements with the UK? Can it agree that all airlines banned in the UK will automatically be banned in its territory? This appears to be in order since *prima facie* the Union interest is not affected, because, normally, flight bans are introduced on safety grounds. However, what happens if, while applying its national law that, in the future, may introduce some additional criteria for flight bans unrelated to safety, the UK declares a flight ban against an airliner of a Member State that is allowed to operate within the EU? What is a candidate country to do in this case? Should it introduce the flight ban pertaining to its contractual obligations to the UK, or decline to introduce it pertaining to a multilateral aviation agreement it has with the Union and its Member States within the common aviation area framework? This rudimentary thought experiment depicts a situation that could happen in many Union policy areas with an external component. If a candidate country wanted to protect itself from entering bilateral arrangements that it will need to withdraw from or break in the future,

[36] Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, Serbia and Turkey

[37] Lazowski; Wessel, *op.cit.*, note 8, p. 2

it could not derive much from the Draft Withdrawal Agreement and it could not get any indication whatsoever in case of a no- deal scenario. It could wait for the Union and the UK to conclude individual agreements governing withdrawal issues and hope these issues will be addressed in due time.

For reasons presented above, these two categories of third countries, are, in our view, especially vulnerable to all disturbances Brexit can cause and are exposed to its effects almost as simultaneously as the EU27.

### 4.1 The Implications of Balancing EU Association Arrangements and Bilateral Relations with an Exiting State

The association agreements, and specifically the stabilisation and association agreements (SAA) concluded with the Western Balkans countries, cover many areas which need to be regulated independently with the UK. Even if these new agreements are not reached swiftly, the application of some existing bilateral agreements, temporarily set aside by the *lex posterior* effect of the subsequent agreements with the Union and its Member States, will be automatically activated, which can present a problem due to the fact that they may be anachronous. The UK, as a state with a long tradition in international relations, already assessed the impact of leaving the EU[38] and examined all areas requiring immediate external action, most notably, trade, business and finance, but also criminal justice, defense, migration, science, transportation, environment and others. On the contrary, the candidates and potential candidates, largely focused on their internal issues, seem to be utterly unprepared for participating in extensive bilateral negotiations involving a counterpart with such a substantial political and economic leverage. Yet again they will soon have to find a way to balance their obligations assumed under their respective SAAs and their bilateral negotiations with the state trying to do the exact opposite of what they are doing. Not to mention that they will have to assess their interest in engaging in any negotiation with a country that can have a change of heart and remain in the EU.

Although, this legislative and political limbo created at the time of Brexit can be a major nuisance to the Western Balkans and Turkey, Southern Neighbourhood and Eastern Partnership countries, this is also an aspect that requires a closer inspection from the Union and its members. The proper application of some regulations

[38] Review of the Balance of Competences between the United Kingdom and the European Union presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, [www.official-documents.gov.uk] Accessed 30.01.2019

and directives largely depends on these countries,[39] some of them may eventually become Member States and even disintegration and future withdrawals can be prevented by simply including the prospective members in various policies not only as consumers but also as actors. This clearly indicates that they are being unjustifiably neglected in the Brexit debate. Similarly, these countries appear to have benevolently accepted their disinvolvement and to have been approaching all consequences deriving from it on a case-by-case basis.

### 4.2 Consideration for Others: Why is Exit with a Deal Important Beyond the EU?

The Union is based on the notion of integration but it is also largely based on expansion. To this day, the enlargement aspect has not been fully examined and it has been subject to much debate and conflicting views. The idea of expanding has been a constituent element of the Union even before integration became a priority. With integration, it only became evident that the Union cannot limit itself solely to the territory of its current Member States. The internal market and the proper application of Union law largely depend on maintaining strong bonds with the neighbors. Apart from that, the external action offers a completely different perspective from which some processes within the Union can be observed. Through its external action the Union achieved certain policy goals, however, it also assumed responsibility for the third countries introducing Union law into their legal systems through an elaborate mechanism of legal harmonization. If proper implementation of international agreements concluded with the Union and its Member States depends on internal debates third countries cannot participate in, it is the responsibility of those who can to ensure all potential issues are duly addressed. This obligation derives from the principle of sincere cooperation which needs to be understood as a principle upon which the relations with neighboring countries are also based.

The Union concluded over one thousand agreements with third countries and international organizations according to European External Action Service Treaties Database. The UK will need to take action to re-establish those relationships on its own

[39] There are many instances of this claim. The Energy Community was founded with the aim to properly implement the Electricity Directive adopted around the time of the Athens Memorandum negotiations which preceded the signing of the Treaty. The Union realized that the EU internal energy market cannot exist without the involvement of a number of third neighboring countries which lead to the founding of an entire international organization. Another instance is the most recent European migrant crisis which, once again, clearly indicated that some Union policies cannot be fully effective without an engagement of the countries surrounding it

which will most probably take years, if not even a decade.[40] If they just simply cease to apply at the moment of actual exit that will cause substantial disturbance in many areas of external cooperation. A phase- out is a necessity and some of those agreements would most certainly require additional scrutiny. The UK's ability to conclude agreements with third countries is limited depending on whether the agreement in question falls under the Union's exclusive competences or the shared competences.[41] In that sense, different rules may apply to different agreement negotiations depending on the subject matter and on whether the negotiation is conducted pre-withdrawal, during the transition period, or after exit. Considering that the UK and the EU could conclude additional treaties regulating their future relationships, even post- Brexit can introduce a new dimension to this complex situation.

A third country, even a candidate country, cannot afford to be in a situation that violates Union law, however, the UK could take action that is contrary to the obligations of a Member State. The question remains whether the Union can do something to deal with these infringements. It is suggested that the Commission and the Member States could start infringement procedures under Articles 258 and 260 TFEU[42] which seems undisputable, but the duration of such procedures might easily exceed the transition period which would render them groundless and ineffective. Regardless of how a potential infringement is settled, this is another unforeseen circumstance that a third country needs to factor in when deciding on its bilateral negotiation with the UK.

Finally, the post- Brexit period is also an enigma to those outside the Union. Even if the UK is to become "the best friend and neighbor",[43] this status implies the need for hundreds of agreements to be concluded allowing for Union law to became an integral part of the friend's and neighbor's legal system. Although the initial idea was to work closely on defense and security and work independently on everything else,[44] being a Union's neighbor leaves very little room for complete autonomy. This means that a third country that is already a best friend and neighbor has probably entered relationships with the UK through some of the treaties the Union concludes with its close partners and the UK would eventually have to re-enter them.

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[40] Wessel *op.cit.*, note 23, p. 6

[41] *Ibid.*

[42] *Ibid.,* p. 9

[43] An extract from Theresa May's speech outlining Britain's 12- point plan for Brexit, [https://www.politicshome.com/news/europe/eu-policy-agenda/brexit/news/82451/read-theresa-mays-full-speech-outlining-britains-12] Accessed 23.11.2018

[44] Henökl T., *How Brexit affects EU External Action: the UK's legacy in European international cooperation*, 2017, p. 9, [https://www.researchgate.net/publication/318476547] Accessed 26.02.2019

## 5. CONCLUSION

Having in mind these *prima facie* difficulties in relation to UK- third countries future contractual endeavors, it is clear that it is both the responsibility of the Union and the exiting state to make sure due consideration is given to third countries and their respective agreements with the EU, as an obligation deriving from *pacta sunt servanda* i.e. the basic principle of the law of treaties. The Draft Withdrawal Agreement expresses some consideration for these issues, and the accompanying Political Declaration[45] also references the application of Article 218 TFEU as a model for shaping future relations post- Brexit, while touching upon the issues of dispute settlement and institutional and horizontal arrangements. In that sense, the EU27, the UK and the Union are clearly aware of the obligations deriving from their external action and hopefully they will follow through with them.

One thing is certain, deal or no deal, the UK cannot be "all things to all people",[46] which was proved numerous times during the last two years with all ups and downs that Brexit brought. However, it needs to bear in mind that most rights are followed by obligations, and in this case, these obligations are the ones toward its international partners. Moreover, the Union has an even greater responsibility to a number of actors outside its territory whose participation in various political and economic arrangements throughout the years has been a significant contributor to its political stability, economy, security, migration challenges and proper application of its law. The fact that all these partners have been merely courteously mentioned during Brexit negotiation appears to be contrary to the Union's and the Member States' obligations. In that sense, a withdrawal agreement is a must, not only in the best interest of its signatories, legal certainty, proper way of handling international affairs and avoiding a legal, economic and social havoc that could otherwise ensue, but also to make sure the Union's third country partners are not regarded with disdain which could result in their tendencies to withdraw from their respective modes of cooperation with the EU.

However, the issues presented in this paper are merely an indication of what can befall a third country as a result of Brexit and expanding this research is to be expected. Although the issue of UK's bilateral relations post- Brexit with the United States, China, the Caribbean nations and many other significant EU partners around the globe have already been discussed, it is important to identify a group

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[45] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ C 66I, 19.2.2019, pp. 185–198

[46] Wright G., *Britain Must Decide What Kind of Power It Wants to be After Brexit*, 2018, [https://www.chathamhouse.org/expert/comment/britain-must-decide-what-kind-power-it-wants-be-after-brexit] Accessed 15.02.2019

of third countries that are arguably the most affected i.e. those with a prospective membership. It is beyond conceivable to imagine a model that will allow for all third countries to be involved in the withdrawal negotiation, still it would be useful for the Union to find a mechanism to have at least the aspiring members interests addressed in order to avoid future withdrawals and overall instability. While analyzing the situation in which the aspiring members found themselves, we can see more clearly the impact the Union has outside its territory which can, ultimately, help assess the actual outreach of a withdrawal and all its legal consequences. Nevertheless, both the UK and the Union demonstrated a considerable neglect for the interests of its international partners which is understandable bearing in mind the internal impact expected, but most certainly not recommended in terms of handling business post- Brexit. It should not be forgotten that the external component is of pivotal importance for the Union to function properly. Furthermore, over the years the Union established itself as a prominent figure in the international arena, assuming a very significant role in various negotiations. On the other hand, the Member States, including the UK, relied heavily on the Union's external activities which means they have spent many years off-court. Evidently, changing this order of things will not go smoothly and without affecting numerous interests both inside and outside the Union.

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# DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND THE MEMBER STATE

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***ABSTRACT***

*Starting from the very name of the Scientific Conference "The European Union and the Member States - Legal and Economic Issues", the authors consider that the legislative division of competences between the European Union and the Member States is a key issue for their actions and their mutual relations. Therefore, the aim of the work is to establish a vertical distribution of powers in the European Union and to analyse comparatively the constitutional division of competences between different territorial levels of government in selected European states with federal regulation. The vertical division of competences within the Union is a question of constitutional importance as one of the principles of the structure of authority within its territory. The importance of a vertical division of competences is reflected in particular in the fact that it involves the adoption of very complex decisions on whether a matter should be regulated at a central (European) or at national (state) level. It is important to point out that the process of transferring competence from the higher level (European Union) to the lower forms of territorial organization (Member States) presupposes the instrument and the premise of democratization. At the same time, the range of competences is a form of limitation of the powers of the European Union, within the limits of the competences assigned to it by a primary act. The division of the jurisdiction, apart from legal regulation, has an economic effect. The better the division is, the more effective are the Union and the member states in providing faster and*

*better public services to citizens, without spending much of the state resources, leading to better balance and the prevention of abuse of power.*

*Work is divided into several interrelated chapters. After the introduction, it is primarily concerned with clarifying general questions about the vertical division of competences between different territorial levels of government. Within this chapter, it starts from the consideration of conceptual definitions, through the analysis of the way of determining competence between territorial levels of authority, the competence to allocate affairs between territorial levels of authority to the vertical division of jurisdiction as a constraint of power.*

*The central part of the paper deals with the analysis of the delimitation of competences between the European Union and the Member States as defined in the Lisbon Treaty, which includes: a) exclusive competence of the European Union, b) shared competences between the European Union and the Member States and c) competence to support, coordinate and complement Member States' actions. Particular emphasis is placed on the following principles: the conferred powers and subsidiarity and proportionality. They are based on the implementation of competences between the Union and the Member States. These principles represent the basic principles for the functioning of the European Union and the creation of its law. Within this framework, the exclusive competence of the Member States, the functioning of the Union outside its established jurisdictions, the principle of genuine co-operation between the European Union and the Member States, as well as the obligation to apply European Union legislation adopted in the area of jurisdiction are considered.*

*Particularly, it deals with the issue of control of the principles of authority, subsidiarity and proportionality before the Court of Justice of the European Union.*

*The method of comparative analysis analyses the constitutionally defined vertical division of competences in the selected European federal states: the Federal Republic of Germany and Switzerland. On the basis of a comparative method, it is possible to conclude that there are similarities between vertical delimitation within the European Union and vertical distribution of jurisdiction in federal states.*

*In addition to comparative method, regarding research methodology, the paper uses secondary research and normative and historical method.*

***Keywords:*** *Member States, European Union, Lisbon Treaty, principle of conferred powers, vertical division of competences.*

## 1. INTRODUCTION

Historically, the distribution of competences between the EU and the Member States in the period prior to the Lisbon Treaty was not regulated by earlier founding treaties. In this connection, the European Commission has warned in the White Paper on European Governance in 2001 on the problems of a clear delimitation of competences between the European Union and the Member States, stressing that "the Union needs clear principles that identify how competence is shared between the Union and its Member States. In the first place this is to re-

spond to the public's frequent question "who does what in Europe?".[1] Only after the entry into force of the Lisbon Treaty the distribution of powers in the EU was clearly regulated. Namely, the uniqueness of the EU as a special kind of genus (*sui generis*) is manifested through competence, i.e. a part of the sovereignty that the states convey to it.

Some authors argue that the EU is shaped by the experiences of federal states[2]. According to Robert Schütze, the European Community is implicitly based on the German idea of executive federalism, whereby the Community prescribes European law, and the Member States enforce this law[3]. Thus, a comparative representation of the division of competencies in the selected European countries is logical (Federal Republic of Germany and Switzerland).

This paper is based on the underlying hypothesis that there are similarities of vertical delimitation between the European Union and compared states (the Federal Republic of Germany and Switzerland).

## 2. GENERALLY ON VERTICAL DIVISION OF COMPETENCES BETWEEN DIFFERENT TERRITORIAL LEVELS OF GOVERNANCE

Apart from the horizontal division of governance (division in the centre), there is a vertical division (applies to different territorial levels of government). Zvonimir Lauc, under the vertical division of governance, implies vertical relations between higher / wider and lower / narrower territorial units (from local, across regional, national and supranational levels).[4] The aforementioned author considers that competence is not an affair, but a right to decide on certain policies, i.e. competence and responsibility.[5] Vertical division of governance, with the establishment of the basic relations between the territorial levels of governance, primarily encompasses the determination of competences of different levels of government.

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1 White Paper on European Governance, *Commission of the European Communities*, COM (2001) 428, Brussels, 25.7.2001, p. 24

2 Lehmann. W., *Attribution of Powers and Dispute Resolution in Selected Federal Systems,* Working Paper, European Parliament, 2002, p. 1

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4 Lauc, Z., *Temeljni pojmovi lokalne samouprave, Lokalna samouprava: hrvatska i nizozemska iskustva*, Hrvatski institut za lokalnu samoupravu Osijek i Interkerklijk Vredesberad Haag, Osijek, 2001, p. 32

5 Lauc Z., *Odgovornost lokalne demokracije, u Ustavna demokracija i odgovornost*, Okrugli stol održan 22. studenoga 2012. u palači Akademije u Zagrebu, Knjiga 19, Hrvatska akademija znanosti i umjetnosti , Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, Zagreb, 2013, p. 104

In that context, scholars began to elaborate theories of multilevel governance. Not only have they suggested explaining European integration as the outcome of joint decisions of national and European actors, they also have revealed that decisions on the vertical allocation of competences usually result in an interlocking of European, national and sub-national levels. Consequently, the transfer of powers to the EU should no longer be considered as a zero-sum game, rather it is about finding ways to deal with interdependent tasks reaching beyond boundaries of national governments[6].

Te delimitation of competences between the EU and the Member States under the Lisbon Treaty represents a vertical delimitation of powers between the EU and the Member States, as discussed below.

## 3. DISTRIBUTION OF COMPETENCES BETWEEN THE EUROPEAN UNION AND MEMBER STATES, ACCORDING TO THE LISBON AGREEMENT

The European Union is organized on the federal principle, which in particular implies a constitutionally guaranteed division of sovereignty between the two levels of government. Such division of governance requires making complex decisions about whether a matter will be regulated at European or national level.

The EU is based on the principle of transferred / assigned powers from Member States to the EU. This principle is contained in Article 1 (1) TEU, according to which the Member States establish the EU with each other, to which they delegate competences for achieving common goals. In this way, the Member States have limited their autonomy, transferring, based on the membership, their regulatory powers in certain areas of the EU.

Sacha Garben and Inge Govaere, in their book entitled "The Division of Competences Between the EU and its Member States", emphasize that the delimitation of competencies between the EU and the Member States are of fundamental importance as it reflects the "negotiating power" achieved between the Member States and the Union in terms of determining the limits of EU authority and limiting the authority of Member States. According to them, the issue of delimitation of jurisdiction defines the nature of the EU as a state union, as well as the identity of the Member States[7].

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6 Benz, A.: Zimmer, C., *The EU's competences: The 'vertical' perspective on the multilevel system*, Living Reviews in European Governance, *Vol.* 5, No. 1, 2010., p. 18

7 Garben, S., Govaere, I., *The division of competences between the EU and its member states*, Oxford: Hart Publishing, 2017, Modern studies in European law, 2017., p. 1

According to Branko Smerdel, the distribution of competences between the Member States and the Union is a question of constitutional nature".[8] Similar argument is given by Arsen Bačić, stating that the allocation of the classical state functions is also current for the constitutional law of the EU, although the EU is not a state but an international organization *sui generis*.[9]

The basic legally binding act in force on which the EU is based is the Lisbon Treaty[10] consisting of the Treaty on European Union (hereinafter referred to as the "TEU") and the Treaty on the Functioning of the European Union (hereinafter: TFEU). Meanwhile, there have been changes to the aforementioned Treaties and currently revised versions of the TEU and the TFEU from 2016 are in force.[11]

Title I of the TFEU is titled "Categories and Areas of Union Competence" within which the distribution of competences between the EU and the Member States has been carried out on:

- exclusive competence of the European Union (Article 3 of the TFEU)
- shared competence between the EU and the Member States (Article 4 of the TFEU)
- competence to support, coordinate and complement Member States' actions (Article 6 of the TFEU)

Apart from the aforementioned competences, the Lisbon Treaty also recognises:

- the competences of the Member States as defined by the general clause and
- the functioning of the Union beyond its established competences.

### 3.1. Exclusive competences of European Union

In the area of exclusive jurisdiction pursuant, only the Union may create and adopt legally binding acts, while Member States may do so independently such is authorized by the Union or for the purpose of implementing Union acts (Article 2 (1) of the TFEU). In the above issues, the EU has acquired the sole right to decide and the states cannot decide on these issues even if the Union has not resolved it. Areas of exclusive jurisdiction, according are: the customs union, the definition

8 Smerdel, B., *Ustavno uređenje europske* Hrvatske, Official Gazette, Zagreb, 2013, p. 224

9 Bačić; A., *Ustavno pravo Republike Hrvatske, Praktikum*, Pravni fakultet Sveučilišta u Splitu, 2010, p. 559

10 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306 of 17 December 2007

11 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, Volume 59, 07.06. 2016

of the competition rules necessary for the functioning of the internal market, the monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources within the common fisheries policy and the common trade policy (Article 3 (1) of the TFEU).

The very creation of categories of competence inevitably means that there will be problems of demarcating borderlines between the different categories. Such problems can arise in demarcating the line between exclusive and shared competence. There are, for example ambiguities about the relationship between the competition rules which are a species of exclusive competence, and the internal market which is shared competence[12].

Exclusive competences of the Union are also related to its external competences. In that regard, Hoffmeister emphasizes that Article 2(1) of the TEU expresses the rule that Member States can no longer act in such exclusive Union policies unless if so empowered by the Union. Accordingly, Union law contains a strong indication that in areas of exclusive external Union competence action of either Union institutions or the Member States should be attributed to the Union, as only the Union has the legal power to act in this field and to remedy a potential breach of international law[13].

### 3.2. Shared competences between European Union and Member States

In the area of shared competence, legally binding acts may be created and adopted by the Union and the Member States. In doing so, the Member States exercise their competence to the extent that the Union does not exercise. In addition, Member States re-enforce their jurisdiction to the extent that the Union has decided to terminate its jurisdiction (Article 2 (2) TFEU). This implies that Member States can only act if the EU decides not to act in a given area. In this case, it is about interdependence between the levels of government, since it is allowed to the EU to adopt certain legal acts, and for those acts to be implemented by member states.

The shared competences between the EU and the Member States include: internal market, social policy for the aspects laid down in the Treaty, economic, social and territorial cohesion, agriculture and fisheries, with the exception of preserving marine biological resources, environmental protection, consumer protection,

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[12] Craig, P., *The Lisbon Treaty Law, Politics and Treaty Reform*, Oxford University Press, 2010, p. 159-161

[13] Hoffmeister, F., L*itigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*, The European Journal of International Law *Vol*. 21, No. 3, © EJIL 2010, p 743

transport, trans-European networks, the area of freedom, security and justice, and common security issues in public health, for the aspects laid down in the Treaty (Article 4 TFEU).

It is in the area of shared competences that most difficulties arise where it can still be unclear whether the Union or the member states have the competence for a particular action. Furthermore, the degree of sharing also alters according to the subject matter: for example in areas such as the internal market, as soon as the Union acts under its competence, it assumes exclusive power to act in conflict. If, however the Union chooses not to acts, the member states retain the power to act[14].

In the area of shared competence, the EU in relation to the Member States has a primacy in the exercise of competence, but it can do so only with the application of the principle of subsidiarity and proportionality. The legal basis for applying the subsidiarity principle is the first part of Article 5 (3) UEU, according to which, in areas not within the exclusive competence of the EU, the Union acts only if, and in the extent that Member States cannot achieve, the objectives contained in the proposed measures at the central, regional or local level cannot be achieved in a satisfactory manner, which can, due to the scope or the effect of the proposed measure, be better achieved at the Union level.

From the TEU regulation above it can be concluded that Article 5(3) encapsulates a double test for the enforcement of the principle of subsidiarity, allowing the EU to act when it has the power to do so. It is presumed that Member States have priority to take action in the domains of shared competences unless this presumption is rebutted by passing the double test. This double test encompasses, as its first prong, a sufficiency test permitting the EU to act "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States". As its second prong, there is a value-added test: the EU 's action "by reason of the scale or effects of the proposed action (can) be better achieved at the Union level". Both tests are cumulative, and the sufficiency test is the sine qua non condition to the valueadded test[15].

Subsidiarity decides, where there are multiple layers of government at which level policy decisions will be made. There is this distinction between question of wheth-

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14 Foster, N., *Eu Law Directions*, Oxford University Press, Oxford, 2016, p 79

15 Portues, A., *The* principle of subsidiarity as a principle of economic efficiency, Columbia Journal of European Law, *Vol.* 17, 2012., p. 244

er EU competence exists and the question of whether the EU should be taken as closely exercise that competence[16].

In addition to respecting the principle of subsidiarity, the EU must also respect the principle of proportionality, according to which the content and form of measures taken by the Union must not go beyond what is necessary to achieve the objectives of the Treaty (Article 5 (4) TFEU).

Traditionally, federally structured systems of shared regulatory powers presume a set of conflicting rules. Therefore, potential conflicts between multiple levels of management are possible. In this respect, the EU system is not an exception[17].

### 3.3. Competence to support, coordinate and complement Member States' actions

In within these competences, "the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas" (Article 2 (5) TFEU). Regulatory relations remain within the competence of the Member States under these competences.

Areas covered by the competence to support, coordinate and complement Member States' actions are: protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation.

The creation of categories of competence inevitably means that there will be boundary problems as between them. Thus for example, regulation of the media might come under the internal market which is shared competence, or it might be regarded as falling within culture, where only supporting, etc action is allowed. There are moreover difficulties in deciding which aspects of social policy fall within shared competence, and which come within this category[18].

### 3.4. Competences of Member States as set out in general clause

The competences that the Treaties have not given to the Union shall be retained by the Member States (Article 5, paragraph 2, second sentence of the TEU). It is ap-

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16 Steiner, J., Woods, L., *EU Law,* 11th edn Oxford University Press, Oxford, 2012, p. 56-57

17 Van Cleynenbreugel, P., *Sharing powers within exclusive competences: Rethinking EU Antitrust Law Enforcement*, CYELP, *Vol.* 12, 2016, pp. 49-79, p. 69

18 Craig, P., De Búrca G., *EU Law*, Oxford University Press, Oxford, 2011., p. 86

parent from this contractual provision that the competences of the Member States are defined by the general clause, since they are all affairs that do not explicitly belong to the EU.

For example, in the EU, responsibilities for redistribution and stabilization measures largely lie with Member States because there is no true EU policy to combat unemployment. At the same time, some Member States are not able to provide incentives to the economy by reducing interest rates, since this responsibility has been transferred to the European level (European Central Bank). Member States are trying to, in certain extent, coordinate macroeconomic policies, but this coordination still does not meet the usual coordination of macroeconomic policies at central government level within the existing federations, such as is the case in the Federal Republic of Germany and Switzerland[19].

### 3.5. Union's operations outside its established competences

If, within the framework of the policies laid down in the Treaties, the Union is required to achieve one of the objectives set out in the Treaties, and the Treaties do not provide the necessary powers, the Council, acting unanimously on a proposal from the Commission and with the prior consent of the European Parliament, shall adopt appropriate measures (Article 352 (1) TFEU).

The Court of Justice of the European Union has made clear that Article 352 TFEU, „being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of (Union) powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the (Union). These article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose“[20]. This case law is recalled in declaration number 42 to the Treaties[21]. The Court of Justice of the European Union has contributed to the respect of the principle of delegated powers, in the broader contractual terms (Article 352 TFEU), stating that provision of Article 352 of the TFEU cannot serve as a basis for spreading the Union's competences through the Treaty as a whole.

19 Börzel, T. A.; Hosli, M. O., *Brussels between Bern and Berlin: Comparative Federalism Meets the European Union*, Governance, *Vol.* 16, No. 2, 2203, pp. 179–202, 188

20 The role of the „Flexibility clause“: Article 352, [https://ec.europa.eu/commission/sites/beta-political/files/role-flexibility-clause_en.pdf] Accessed 03.05.2019

21 Declaration on Article 352 of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, Volume 59, 07.06. 2016

### 3.6. Obligation to apply European Union regulations adopted in area of competence distribution

For European legislation, which is adopted within the division of competences between the EU and the Member States, it is characteristic that it is binding in its entirety and is applicable directly in all Member States.

Craig i De Búrca emphasize that the doctrine direct effect applies in principle to all binding EU law including the Treaties, secondary legislation, and international agreements. Thereby, the aforementioned authors warn that the most problematic issues concern directives and international agreements[22]. Tamara Ćapeta and Siniša Rodin write that the EU legislation has a direct effect in the Member States, and is applied by national courts, i.e. in out-of-court situations, national public administration[23]. Direct effect, in legal order of the EU emanates from generally accepted practice of the Court of Justice of the European Union, which started with its judgment in Van Gend end Loos case from 1963. In the aforementioned judgment, it was concluded that the Article 12 of the Treaty establishing the European Economic Community creates direct effects and gives legal entities subjective rights that national courts are obliged to protect.[24]

In general, the relationship between the EU and the Member States, in accordance with Article 4 (2) of the TEU, "the Union respects the equality of Member States before the Treaties and their national identity which is inextricably linked to their fundamental structures, political and constitutional, including regional and local self-government. The Union respects the fundamental powers of the state, including ensuring territorial integrity of the state, maintaining law and order, and preserving national security. In particular, national security remains the exclusive competence of each Member State."

## 4. CONTROL OF PRINCIPLES OF ASSIGNED COMPETENCES, SUBSIDIARITY AND PROPORTIONALITY BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union has a strong influence on the legislative activity of the Union which can be attributed to the fact that the European legal system, in particular at its inception, was incomplete and unscru-

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22 Craig,; De Búrca, *op.cit.*, note 18, p. 180

23 Ćapeta, T.; Rodin, S., *Osnove prava EU*, II. izmijenjeno i dopunjeno izdanje, Narodne novine d.d., Zagreb, 2011, str. 29

24 Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos vNetherlands Inland Revenue Administration, ECR(English special edition) 1

pulous and lacked precise criteria for the division of competences between the then Community and the Member States.[25] The answer to the question of vertical distribution of competences in the EU, according to Tamara Ćapeti, is extremely politically important and sensitive issue for the Court of Justice of the European Union.[26] Namely, disputes involving the validity of the EU act, if the EU regulates a matter outside its jurisdiction, is a new phenomenon at the EU level.

Proceedings against acts of European political institutions have been initiated before the Court of Justice of the European Union on the grounds of transgressions of competences.[27] In this connection, Trevor Hartley notes that it is rare that the Court of Justice of the European Union will rule the nullity of the measure due to lack of competence. On the contrary, the usual basis for its adoption in the wrong process or on the wrong legal basis or the violation of a higher legal rule[28]. Famous is the case of Tabacco Products[29], in which Germany initiated proceedings before the Court of Justice of the European Union for the annulment of a directive imposing a general prohibition on the advertising or sponsorship of tobacco products in the EU. In that case, the Court upheld an interpretation allowing the Community to adopt measures on the labelling of tobacco products with the alleged purpose of functioning of the common market, the by-product of which was a disturbance of trade patterns, which could reasonably be suspected that the true purpose of the measure was not the functioning of the market but the health protection (but its harmonization by the Community is prohibited by the Treaty).[30] Namely, since the Union is bound by the principle of assigned competences, it has no exclusive competence to legislate in the area of public health but can adopt incentive measures.

However over the next few years the concept was refined and developed so that exclusive and non-exclusive implied powers emerge. We have already seen that in Kramer the Court found that the Community may possess implied powers even where there hat not been any prior development of common rules[31]. However –

25 Rodin, M., *Temeljna načela koja određuju odnos prava Europske unije i prava država članica*, Hrvatska pravna revija, 2012, pp. 1-14, 5

26 Ćapeta, T., *Sudska zaštita u Europskoj uniji nakon Lisabonskog ugovora*, in: Reforma Europske Unije-Lisabonski ugovor, Official Gazette, Zagreb, 2009, p. 101

27 Perišin, T., *Razgraničenje ovlasti Europske unije i država članica*, in: Reforma Europske Unije-Lisabonski ugovor, Official Gazette, Zagreb, 2009, p. 219

28 Hartley, T., *Temelji prava Europske zajednice: uvod u ustavno i upravno pravo Europske zajednice,* 2. hrv. izd. Rijeka, Pravni fakultet Sveučilišta, 2004, p. 118

29 Case C-376/98 Germany v Parliament and Council (Tobacco Advertising I) [2000]

30 Perišin, T., *Ima li Europska unija ovlast regulirati privatno (posebice ugovorno) pravo?,* Zbornik Pravnog fakulteta Zagreb, *Vol.* 62, No. 5-6, 2012, p. 1799-1822

31 Cases 3, 4, and 6/76 Kramer (n 11 above) [30]–[33]

in order to avoid a legislative vacuum-the Court recognized the continued (concurrent) existence of Member States competence for as long as the Community competence had not yet been exercised. Exclusive Community competence was not compatible with the mere potential for Community action. This concurrent competence was transitional only and subject to the overall obligation to comply with Community rules found what was then Article 5 off the EEC Treaty (now Article 4(3) TEU) and a more specific obligation coordinate their actions then found in Article 116 EEC[32].

The caseload of the Court of Justice of the European Union depends primarily on factors that are external to the Court, such as the increasing size of the EU after the enlargements, the gradual but constant extension of EU competences into new policies areas, the increased salience of EU action, the growing constellation of economic, political and social interests involved in the enforcement of EU law, the more or less collaborative attitude of the national courts, the Commission's willingness to pursue infringement proceedings against Member States, the general phenomenon of "judicialisation" (the tendency to a greater presence of judicial institutions in political and social life), and so on. Internal factors, such as whether the Court takes a liberal or strict attitude to the admissibility of the action, are not the most important elements affecting the caseload[33].

Trevor Hartley also points out that the Court of Justice of the European Union has not yet abolished the regulation based on subsidiarity.[34]

Certain national constitutional courts also question whether the EU complies with the agreed order of competency. In connection with this, Jasna Omejec, cites an example of the German Federal Constitutional Court in controlling the delimitation of competences between the Member States and the EU in each individual case. In these cases, the Federal Constitutional Court is examining whether legal instruments of European institutions remain under the principle of subsidiarity within the limits of the sovereign rights conferred on them by virtue of delegated competences.[35] An example of this is the verdict of the German federal court BVerfGE 123, 267.[36] In this decision, the Federal Constitutional Court ruled that the

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32 Craig, P.; De Búrca, G., *The evolution of EU law*, Oxford, Oxford University Press , 2nd edition 2011, p. 245

33 Itzcovich, G., *The European Court of Justice as a Constitutional Court. Legal Reasoning in a Comparative Perspective*, SANT'ANNA LEGAL STUDIES, STALS RESEARCH PAPER *Vol.* 4, 2014, p. 12

34 Hartley, *op. cit.,* note 28, p. 117

35 Omejec, J., *Veliki njemački ustav i nepromjenjiva ustavna načela u praksi Saveznog ustavnog suda*, 2016., [https://bib.irb.hr/datoteka/792156.OMEJEC_-_GRUNDGESETZ_ _Zbornik_PRAVO_I_PRAVDA_2015_PFBgd.pdf] Accessed 03.03.2019

36 BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil)

Treaty of Lisbon Ratification Act was compatible with the German Federal Constitution. In the aforementioned Decision, an increasing number of competences are highlighted and further subdivisions of the bodies of the European Union. In this respect, the Court considers it necessary to preserve the fundamental principle of limited individual powers subject to the control of the Member States. The Decision also warned that the constitutional identity was established by the Federal Constitution (Article 23, paragraph 1 al.3, Article. 79, paragraph 3) as the inalienable element of democratic self-determination of peoples. It is therefore necessary that the Federal Constitutional Court within its competence watches that the EU, with its modern acts, does not breach competences given to it.

One of the jurisdiction of the Court of Justice of the European Union represents the settlement of disputes between national governments and EU institutions (Article 19 of the TEU). Therefore, the most common procedures before the Court of Justice of the European Union include direct action against the Member States (Article 258 of the TFEU) and direct suits against EU institutions (Article 263 of the TFEU).

The Republic of Poland filed a lawsuit against the European Parliament and the Council of the European Union in Case C-358/14. A series of various provisions adopted at the Union level on the production, presentation and sale of tobacco and related products on the European internal market is also presented by the Directive 2014/40 / EU based on which the Union legislature forbade the sale of menthol cigarettes on the European internal market. Therefore, on 22 July 2014, the Republic of Poland filed a lawsuit against the European Parliament and the Council of the European Union for annulment of the said Directive. In that lawsuit, the Republic of Poland has also violated the principle of subsidiarity, given the local character, which is limited to the narrow group of Member States. Poland considers that this issue should be addressed at the national level only in those Member States where there is a high level of consumption and production of these products. The Court has, with its Judgment of the Court (Second Chamber) of 4 May 2016, dismissed that complaint[37].

In its judgment of 6 September 2017, the Court of Justice of the European Union (Grand Chamber) dismissed the action brought by the Republic of Slovakia (Case C-643/15) and Hungary (Case C-647/15) against the Council of the European Union. Slovakia and Hungary have sought annulment of Council Decision (EU) 2015/1601 of 22 September 2015 on the introduction of provisional measures in the field of international protection in favour of Italy and Greece (SL 2015,

[37] Case C-358/14 Republic of Poland v. European Parliament, Council of the European Union [2016]

L 248, p.80). The grounds for the prosecution were based on the inadmissibility of Article 78, paragraph 3 of the TFEU as the legal basis for making the decision challenged. The Court's assessment of Article 78 paragraph 3 of the TFEU allows only "provisional measures" (point 89) to be adopted, so it is a crisis management measure adopted at the Union level, whose purpose is to guarantee real realization, respecting the Geneva Convention, the fundamental right to asylum (paragraph 343)[38].

In Case C-288/12, the European Commission filed a lawsuit before the Court of Justice of the European Union of Justice against Hungary for breach of the obligation of the Member State. Hungary sued for the infringement of Directive 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 flow of such data. It is the obligation of the Member States to provide that the application of the provisions adopted pursuant to the directives is supervised by one or more public bodies which, in the performance of the functions entrusted to them, operate completely independently. This refers to the alignment of a national regulation that finishes the six-year mandate of a data protection trustee, including the establishment of a national data protection and information freedom authority, and a nine-year mandate for persons other than the Data Protection Commissioner for the presidency of said body. In its judgment of 8 April 2014, the Court ruled that Hungary had infringed its obligations under the aforementioned provisions of Directive 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 persons and the flow of such data, ending the mandate of an independent supervisory body for the protection of personal data[39].

In that context, respect for the principles of assigned competences, subsidiarity and proportionality is subject to the control of the Court of Justice of the European Union. Regulating jurisdiction at different levels (competences are granted legally, not politically) is a cause for conflict of jurisdiction.

An example of the Court of Justice of the European Union is approach to subsidiarity is the judgment in Case C-233/94, Germany v. the European Parliament and the Council, in which the Court accepted implicitly and rather limited justification as sufficient to justify compliance with the principle of subsidiarity. The Court concluded that the Union could act, if the objective cannot be achieved by

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38 Case C-643/15 and Case C-647/15 Slovak Republic and Hungary v Council of the European Union [2017]

39 Case C-288/12 European Commission v Hungary [2014]

the Member States[40]. In the second judgment, of a newer date, the Court of Justice of the European Union has clarified that respecting the obligation to state reasons in respect of the principle of subsidiarity must be judged not only with regard to the wording in the contested act, but also given its context and circumstances in the individual case. In this case, the Court specifically examined whether the Commission's proposal and the assessment of the effects of sufficient information that clearly and unequivocally demonstrate the benefits of Union action at the level of Member States[41].

## 5. COMPARATIVE OVERVIEW OF CONSTITUTIONAL DIVISION OF GOVERNANCE IN SELECTED EUROPEAN COUNTRIES

In the debate on the future European order, the EU was often described as an "emerging federation". The EU is comparable to the Federal Republic of Germany and Switzerland because all three are organized on a federal basis and are constitutionally guaranteed the division of sovereignty between the levels of government. For example, Tanja A. Börzel and Madeleine O. Hosli, relying in particular on the examples of Germany and Switzerland, stressed that greater delegation of authority to the central EU level must be in parallel with strengthened forms of fiscal federalism and enhanced representation of functional interests at the European level. In their view, without such "rebalance", the problems of EU legitimacy would probably be intensified[42].

Among the typology of the form of division of governance, Arsen Bačić, also mentions federal or vertical division of governance.[43] The same author reminds that federalism represents the territorial dimension of a particular political system and the organizational principle for the territorial distribution of governance".[44] The Federal State is a complex state comprising of several states, each of which is a special state with a special state governance. Unlike the unitary state, where power is administered in a unique way, the federative state represents one of the vertical forms of governmental organization, the constitutionally guaranteed division of state power between the federative state and the federal states. The federal states and federal units are political communities that are independent of each other and where there is a partnership relationship. In the federal states, there

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40 Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405

41 Case C-547/14 Philip Morris, EU C: 2016: 325

42 Börzel; Hosli, *op. cit.,* note 19, p. 179

43 Bačić, *op.cit.*, note 9, p. 114

44 Bačić, A., *Politička gramatika federalizma i hrvatsko povijesno iskustvo*, Zbornik radova Pravnog fakulteta u Splitu, *Vol.* 44, No. 2, 2007, p. 166

is a division of sovereignty. This means that there is no hierarchy between the levels of governance in the federal model, and the communities that form it are not in the mutual relationship of supremacy and subordination, but some of them are narrower while others are wider.

German political scientist Franz Neumann argues that federalism is one of the ways of preventing abuse of power by dividing power between a number of competing power-holders[45]. Why is that so? Federalism allows something that Montesquieu has recognized as the goal: limiting the power of the state. According to Montesquieu, power can only be overwhelmed by power, an attitude that will rarely be disputed. Thus, the power of the central government is opposed by the power of federal units.

The consequence of the federal principle is the division of state affairs, within each of the functions. That is why federal scope differs from the scope of units. It is precisely this division of competence, especially legislative power, that is one of the essential features of federalism.[46] According to Arsen Bačić, the goal of the federal constitution is the institutionalization of the balance between state unity and subnational differences.[47] One of the fundamental constitutional features of the federal state according to Branko Smerdel is the federal constitution regulating the division of competences between the federal state and the member states[48] which also points out that the organizational principle of federalism is the non-centralization where diffusion and division of power between many centres is constitutionally implemented and guaranteed[49]

### 5.1. Vertical division of competences in the Federal Republic of Germany

German Federal Constitution (the Basic Act of the Federal Republic of Germany)[50] guarantees federalism as a form of association of political communities that determines:

- creation of the Federal Republic of Germany expressly as a federal state (Article 20 (1),

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[45] Neumann F., *Demokratska i autoritarna država*. Zagreb, Naprijed, 1974, str.181

[46] Vrban, D., *Država i pravo*, Golden marketing, Zagreb, 2003, p.120

[47] Bačić, A., *Ustavno pravo i političke institucije*, Pravni fakultet u Splitu, 2012, p.139

[48] Smerdel, B., *op.cit.,* note 8, p. 201

[49] Smerdel, B. (ed.), *Primjena federalnog načela i pouke ustavne reforme 1971.*, Pravni fakultet Sveučilišta u Zagrebu i Centar za demokraciju i pravo Miko Tripalo, Zagreb, 2007, p. 30

[50] Grundgesetz für die Bundesrepublik Deutschland, 23.05.1949

- the division of the German territory into countries as the basis for their right to participate in the legislation and principles of Article 1 (these principles are: human dignity, inviolability and inalienability of human rights as the foundation of every community, peace and justice, and the division of power into: legislative, executive and judicial) and the abovementioned Article 20 (Article 79 (3)),
- multiple levels of territorial governance.

In addition to the two state levels: a) federal state and (b) provincial level, there are c) districts in the Federal Republic of Germany and d) municipalities. Relationships between the federal state and the countries regulated in part II of the Federal Constitution (Articles 20 to 37). The Federation and the federal states enjoy sovereignty. This dual state is still reflected in the fact that the federal states also have their own competences in legislation, administration and judicature.

Article 30 of the Federal Constitution is a fundamental norm for the division of competences between the Federation and the states, prescribing that the states are responsible for the implementation of state authorizations and execution of state affairs, unless otherwise stipulated by the Federal Constitution. In this case, the affairs of the states are defined by the general clause, because they are all affairs that are not explicitly prescribed to belong to the federal state. The remaining competences have been transferred to states that have their state functions. Each state has its own state constitution and an autonomous internal political structure, and hence independent political institutions of legislative, executive and judicial authority.

Regarding the relationship between the federal state and the states, it should be noted that the Federal Constitution stipulates:

- the primacy of the Federal Constitution over State acts (Article 31), which means that the federal law overrides state law,
- the constitutional position of states must be in accordance with the principles of the federal state (Article 28 (1),
- states have the power to legislate, unless the Federal Constitution placed legislative powers in the competence of the Federation (Article 70 (1)), and
- the competences of the Federation and the states are divided by the provisions of the Federal Constitution, on exclusive and competing legislative powers (Article 70 (2)).

The Federal State can perform only those affairs that are explicitly defined in the Basic Act as federal governmental affairs. The exclusive powers (legislative power)

of the Federal State are defined in Article 73 of the Constitution, which includes 14 areas: 1) external affairs and defences, including the protection of civilians; 2) federal citizenship; 3) freedom of movement, issuance of passports, immigration and emigration, extradition; 4) monetary policy, money laundering, units of measurement and timing; 5) unity of the customs and trade area, merchant and maritime contracts, free movement of goods and foreign and international goods and customs, customs protection and border protection; 6) federal railways and air traffic; 7) post office and telecommunications; 8) legal relations of persons employed in federal and public legal bodies directly dependent on the Federation; 9) protection of industrial property rights, copyright and publishing rights; 10) Federation and state cooperation; a) in the area of criminal police, b) to protect the foundations of free democratic organization, stability and security of the Federation or states, c) to defend against attempts to threaten the interests of Germany abroad trough force or prepared violence in the federal territory, and to establish Federal Criminalistics offices and international fight against crime; 11) collecting statistical data for federal purposes; 12) explosives legislation; 13) the issue of war invalids and war victims and care for former prisoners of war; 14) the production and use of nuclear energy for peaceful purposes, the construction and operation of facilities serving for such purposes, protection against the dangers arising from the release of nuclear energy or ionizing radiation and the disposal of radioactive substances.

Pursuant to Article 30 of the Federal Constitution, the states have exclusive jurisdiction in all matters not attributed to the Federation by the Constitution. The constitutions of states have determined which state level is competent for which function. Accordingly, federal states carry out a large number of public affairs in the field of police, education (primary and secondary), law enforcement, radio and television broadcasting, culture and communal affairs. Higher education is also under the jurisdiction of the federal states and is dominated by public faculties, with just a few private ones.

Article 83 of the Federal Constitution determines that the application of federal laws is the competence of the states, unless the Federal Constitution states otherwise. In this regard, if the federal law application is the competence of the states, they themselves regulate the organization of the government and the administrative procedure, unless the federal law, adopted with the consent of the Federal Council, provides otherwise (Article 84 (1)).

Article 72 of the Basic Act regulates competing legislation between the Federation and the states, as follows:

1) in the area of competing legislative powers of the Federation, the states have the power to legislate for so long and to the extent that the Federation has not exercised its legislative competence (Article 72 (1));

2) in the areas referred to in Article 74, paragraph 1, points 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of the Federal Constitution[51], the Federation has the right to legislate until such time as equal living conditions are established throughout the federal territory, or in order to maintain legal or economic unity of the national interest (Article 72 (2));

3) If the Federation has used its legal powers, the states may legislate in the field of hunting, nature conservation and landscape management, land allocation, spatial / regional planning, water regulation and higher education (Article 72 (3));

4) a federal act may prescribe that federal regulations which are no longer needed, within the meaning of paragraph 2, may be replaced by a national act (Article 72 (4)).

Article 74 defines 33 areas of competing legislative authority of the Federation: 1) civil law, criminal law and execution of penalties, organization of courts, court proceedings, attorney's office, notary office and legal advisory service; 2) personal data; 3) the right of association and assembly; 4) the right of aliens to stay and settle; 5) repealed; 6) refugees and displaced persons; 7) public care (without maintenance); 8) repealed; 9) war damages and repairs; 10) care for war veterans, war widows and orphans and former prisoners of war, tombs of soldiers and other victims of war and terror; 11) economic law (mining, industry, energy, crafts, small business, trade, banking and securities market, private-law insurance institutes); 12) labour law, including organization of enterprises, labour and employment protection and social security, including unemployment insurance; 13) establishing support for education and enhancement of scientific research; 14) the right to expropriation, if it does not apply to the areas referred to in Articles 73 and 74; 15) transfer of land, natural resources and public goods production and other forms of public economy; 16) the prevention of abuse of economic power; 17) promotion of agriculture and forestry, food security, import and export of agricultural products, outdoor and offshore fishing, coastal protection; 18) land traffic, land law, rent of agricultural goods, housing policy, settlement and allocation of family property for special categories of population; 19) measures against community

[51] These areas are listed by the following points: 4) the place of residence and the right of establishment of aliens; 7) social welfare, 11) Economy-mining, industry, energy, trade , 13) science; 15) transfer of land, natural resources and publicly owned production facilities, 19a) healthcare; 20) food area; 22) road traffic; 25) and responsibility of the state

and community illnesses, medical and other occupational health and therapeutic activities, medicines, medicines, anaesthetics and poisons; 20) the protection of life-giving products and stimulating means, objects for everyday use, fodder, seed and seedlings in agriculture and forestry, protection of plant diseases and pests and animal protection; 21) long and coastal navigation and maritime signs, river and lake navigation, meteorological services, sea routes, river and lake waterways intended for public transport; 22) road traffic and traffic by motor vehicles, construction and maintenance of roads for interurban and interstate traffic and collection and distribution of road use fees; 23) rail vehicles, not belonging to the Federal Railways, except for mountain railways; 24) waste removal, combating air pollution and combating noise; 25) responsibility of the state; 26) medical assisted fertilization of human life, study and artificial alteration of genetic information as well as rules for transplantation of organs, tissues and cells; 27) the status and duties of officials of provinces, municipalities and other state bodies as well as judges in countries with the exception of career, wages and salaries; 28) hunting; 29) conservation of nature and landscaping; 30) land allocation; 31) planning; 32) water resources and 33) education and academic degrees.

Competing competence is such a competence that can be regulated normatively by the Federation and federal units, but not by both categories simultaneously. This means that in the Federal Republic of Germany federal units are allowed to adopt certain regulations, until the Federation decides to adopt uniform standards for the whole country.

Pursuant to Article 30 of the Federal Constitution, the states have exclusive competence in all affairs that are not assigned to the Federation. State affairs, with application of the principle of subsidiarity, are considered to be all affairs that directly meet the needs of the population of the state.

The relationship of the Federal Republic of Germany with the EU is regulated by the Federal Constitution, which stipulates that Germany is committed to the creation of a united Europe based on democratic, social and federal principles, the rule of law, and is aimed at protecting the principle of subsidiarity and the protection of fundamental human rights. Article 23 of the Federal Constitution regulates the relationship of the Federation to the EU with regard to the implementation of the principle of subsidiarity. In this connection, the Bundestag and the German countries, through the Bundesrat, are involved in solving EU issues. Regarding EU-related issues, the federal government is responsible for regularly informing the Bundestag and the Bundesrat.

Federal Constitutional Court of the Federal Republic of Germany decides on:

- disputes relating to the rights and obligations of the Federation and states, particularly in the enforcement of federal laws by the states and on the conduct of federal oversight;
- in other disputes involving public law between the Federation and the states and between the states or within the states (Article 93, paragraph 1, points 3 and 4 of the Federal Constitution).

In the jubilee edition of the Selected Decisions of the German Federal Constitutional Court, federal disputes between the Federation and the states as well as between individual countries are marked as the first group of powers of the Federal Constitutional Court, within six groups of jurisdiction.[52] In federal disputes, it is actually about disputes between the Federation and the states (Article 93 paragraph 1, point 3 of the Federal Constitution) and mutual disputes between the states (Article 93 paragraph 1, points 4 and 2 of the Federal Constitution). Mutual disputes between the states also enter into the scope of federal disputes, as all German states also have their own constitutional courts that settle mutual disputes. In this case, the subsidiarity of the suitability of the Federal Constitutional Court is only to be considered if the jurisdiction of the terrestrial constitutional courts is excluded due to the authorized initiators of the proceedings.

An example of the dispute between the Federal State and the states is the Decision of the German Federal Constitutional Court, dated 30 July 1958, which declared the invalidity of the Hamburg and Bremen Law on Referendums on the Use and Storing Nuclear Weapons. The Court explained its decision as authorizing the federal government to exclusively regulate certain issues, so a referendum on nuclear should be seen as an addition to the federal defence policy and belongs to the exclusive competence of the Federation[53].

### 5.2. Vertical division of competence in Switzerland

The authority in Switzerland, in accordance with the Third Title of the Federal Constitution of Switzerland[54] is structured on three territorial-political levels: Federal state (Bund), cantons and municipalities.

The federal constitution has divided the competence between the Federal State and cantons as follows:

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52 Schwabe, J., *Izabrane odluke njemačkog Saveznog Ustavnog suda*, Jubilarno izdanje, p. 40-41, [http://www.kas.de/wf/doc/kas_18056-1522-19-30.pdf?100517140444] Accessed 10.03.2019

53 Das Bundesverfassungsgericht BVerfGE 8, 104

54 Federal Constitution of the Swiss Confederation, of 18 April 1999 (Status as of 7th March 2010)

- the Federal State carries out the competences assigned to it by the Constitution (Article 42),
- all other competences not assigned to the Federal State are in the competence of the cantons, and cantons determine which affairs are within their competence (Article 43). This means that the competence of the Federal State is determined by the Federal Constitution, while all other competences under the general clause method belong to the cantons. The Federal State mainly has competences in the area of foreign policy, defences, monetary and foreign exchange system, customs, while the cantons are competent for education, culture, development, etc.

There is a relatively small number of exclusive competences of the first of the second of government, they are mostly divided, whereby the Federal State takes on those affairs that require uniform regulation and the cantons supplement their acts with the provisions of federal acts.

As part of the debate on the European Convention, particular issues were discussed concerning the division of powers between the European Union and its Member States, with an example of Switzerland in the working document for the European Parliament. The document noted that Switzerland offers an interesting variant: the list of exclusive competences is rather short, and the Swiss constitutional system places an emphasis on competing competences. The Swiss system of federal jurisdiction includes competences that are limited to principles, related competences without restriction and powers that allow parallel cantonal competencies[55].

In 2014, the Federal Council presented the Report on Compliance with the NFA Principles (Subsidiarity, Fiscal Equivalence and Respect for Cantonal Organizational and Financial Autonomy)[56]. In this way, the Federal Council is tasked with systematically analysing all tasks in which responsibility and / or funding belongs to the federal state and cantons, and the cantons actively contribute to their ideas in preparing this report. Financial equalization and division of tasks between the Federation and cantons (German: Neugestaltung des Finanzausgleichs und der Aufgabenteilung zwischen Bund und Kantonen - NFA) is regulated by four-year program agreements. Cantons allocate funds allocated to them by the Federal Government.

[55] Lehmann, *op.cit.,* note 2, p. IV

[56] Bericht des Bundesrates vom 12. September 2014 über die Einhaltung der Grundsätze der NFA

The principle of subsidiarity, in Switzerland, protects the canton's jurisdiction from usurpation by the central authorities. In accordance with Article 5 of the Swiss Constitution it is stipulated that "in the allocation and affairs of state functions, the subsidiarity principle must be respected". According to the Swiss Constitution, the cantons are the dominant political actors, and they have a significant autonomy. The constitutional balance of the Swiss federal state is achieved through the principle of subsidiarity. The Swiss constitutional system is based on loyalty to the idea that power should be transferred in the greatest possible extent and that, unless otherwise defined, all authority remains in the cantons. In accordance with the principle of subsidiarity, the federal state can intervene only in the event of the impossibility of achieving a specific objective of the Swiss cantons. The intervention is not justified by the fact that the lower level is helpless, but whether the federal state can properly achieve the same goal. Moreover, in such cases, it is necessary to wait and see if cantons can on their own reach what they need.

Historically, the Federal Supreme Court of Switzerland was largely responsible for the application of federal law in the cantons. The Federal Supreme Court of Switzerland as the highest judicial authority, pursuant to Article 189 (2) of the Federal Constitution of Switzerland decides on disputes between the federal government and the canton or between the cantons.

Regarding the conflict between the Federation and cantons, in the jurisprudence of the Federal Supreme Court, it is important to remember:

- recognition of the superiority of federal laws over cantonal laws[57] and
- appointment of voting rights to women in Appenzell Innerrhoden canton, contrary to the provisions of the cantonal law[58].

Here we can also use the case of the Geneva canton dispute against the Federal Government regarding security issues. Geneva canton has filed a lawsuit against the Federal Government, claiming that it has violated its constitutional powers. The Federal Supreme Court has decided that it is natural for a federal government to be responsible for external and internal security. The Court therefore concluded that the Federal Government has inherent jurisdiction in the area of internal and external security, which excludes the remaining jurisdiction of the cantons in this area. However, cantons, due to their sovereignty, have an obligation to ensure security in their territory, given the parallel jurisdiction in police affairs[59]. This court decision influenced the amendment of Article 57 of the 1999 Constitution, which

[57] BGE 127 I 60 E

[58] BGE 116 Ia 359

[59] Judgement of the Supreme Federal Court of 29 May 1991; ATF, 117 Ia 221, 228

stipulates that the federal government and the cantons, within their jurisdictions, ensure the security of the country and its population. In addition, cantons must coordinate their efforts in the area of internal security.

## 6. CONCLUSION

Competence, above all, is a legal term because it determines the ability of a valid action, given the legal order of the EU, i.e. a specific state. The way of dealing with the legislation is inextricably linked with the question of competence. This narrows the level of freedom of government, but achieves a greater legal certainty, i.e. limitation of power. Finally, the existence of pre-established competences raises the legal certainty of citizens at a higher level and allows them contact with different levels of government.

The vertical division of competencies presupposes a clearer separation of responsibilities between different levels of government and a clear definition of their funding. Clear responsibilities bring greater efficiency and transparency in the fulfilment of responsibilities between levels of government.

The vertical distribution of competences between the EU and the Member States under the provisions of the Lisbon Treaty shows that a number of competences and responsibilities are shared between different levels of management within the EU. In this context, two principles emerge: equal legitimacy and responsibility of all levels of management, within their powers and the principle of fair cooperation. This results in the need for partnership work, which means that no level can directly answer on its own to the needs and challenges that the EU faces.

Based on the analysis of the delimitation of competences between the European Union and the Member States, it is evident from the Lisbon Treaty that Member States continue to retain a large number of competences. Of particular importance for the Member States is a provision of the EU which constitutes a general clause, according to which the competences not provided to the Union by the Treaties are retained by the Member States.

After almost ten years from the entry into force of the Lisbon Treaty, the division of competences between the EU and the Member States has resulted in a clearer, more coherent and better EU system.

The hypothesis set out in the introduction is confirmed as valid, because the federal states (Federal Republic of Germany and Switzerland) are the most similar to the pattern of competence distribution within the EU. They mark the model of guaranteed constitutional distribution of competences between the federal states

and federal units, and there is no hierarchy between the political communities (the relationship of superiority and subordinations). As far as the position of local self-government is concerned, it is primarily governed by a regulation adopted by the federal unit. It is about equality of all levels of government and there is no place for a more powerful autonomous status of local units in relation to the federal state and federal units. This assumes non-centralization and a significantly higher level of cooperation between the levels of government. Within all three analysed models of vertical distribution of competencies (EU, Federal Republic of Germany and Switzerland) it is possible to see how the limitation of authority comes to the fore as one of the most important constitutional functions. From this it can be concluded that the principle of the limitation of authority is not applied only on the horizontal, but also on the actual and the vertical level. This results in a vertical delimitation of jurisdiction by area, i.e. limiting management from a single centre, which would rule over narrower levels of territorial authority. Vertical division of power implies the establishment of more authorities, among which competencies are divided and vary according to their content, scope and quality. In the vertical division of authority, the level of territorial authority, within the territorial political system, operates in accordance with its limited powers under a certain constitution. All three models are dominated by shared competencies between different levels of government.

In particular, it is possible to perceive the similarities between the EU, Germany and Switzerland in the general clause, which is on the side of affairs of narrower territorial units (EU Member States, German federal states and Swiss cantons). In general, the exclusive powers of the federal states usually include: foreign affairs, armed forces, means of communication and transport, monetary policy, customs and the federal judiciary. All affairs that are not assigned to the central government belong to the narrower units. The general clause defines competences in the basic acts:

- TEU (Article 5, paragraph 2, second sentence),
- The Basic Act of the Federal Republic of Germany (Article 30),
- Federal Constitution of Switzerland (Article 43).

In addition, all three basic acts contain the legal basis for applying the principle of subsidiarity:

- TEU (Article 5, paragraph 3),
- Basic Act of the Federal Republic of Germany (Article 23),
- Federal Constitution of Switzerland (Article 5). According to the principle of subsidiarity, public authorities must be entrusted to those authorities closest to citizens and that can perform efficiently and economically.

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# PRESIDENCY OF THE REPUBLIC OF CROATIA TO THE COUNCIL OF THE EUROPEAN UNION IN 2020 - A CHALLENGE FOR THE REPUBLIC OF CROATIA


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***ABSTRACT***

*The Republic of Croatia will chair the Council of the European Union from 1 January to 30 June 2020, within the framework of the Joint Presidency Programme with Romania and Finland for a period of 18 months. On 5 July 2018, the Government of the Republic of Croatia adopted a Decision on the Establishment of the Structure for the Preparation and Implementation of the Presidency of the Republic of Croatia of the Council of the European Union in 2020 and declared all preparatory activities for the Presidency to be of special importance for the Republic of Croatia. It is anticipated that around 1,400 meetings will be held in Brussels during the presidency of the Republic of Croatia, along with 1 to 2 summits of Heads of State and Government of the EU member states, about 20 meetings and conferences at the ministerial level and about 200 lower level meetings. Given the requirements and the necessary preparatory and especially implementation activities and a relatively short time for preparation and organization, we believe that the presidency will be a major financial, organizational, logistical, personnel and political challenge for the Government and the Republic of Croatia. On the other hand, the presidency is a chance and an opportunity for the Republic of Croatia to influence the creation and direction of common European policies. Since the Slovenia encountered similar challenges when they have been chairing the Council of the European Union for the first time, we will look at their problems and solutions.*

*The purpose of the research is to identify the key challenges and problems the Republic of Croatia will face when organizing and implementing the Presidency of the Council of the European Union.*

*The aim of the paper is to make recommendations and to define the specific conditions that must be met to successfully organize and implement the Presidency of the Republic of Croatia of the Council of the European Union.*

*Establishment of the presented governance structure of the Croatian Presidency can be positively assessed and it can be assumed that for the successful preparation and implementation of the Presidency of the Council, it is good that the members of the governing body are high-ranking government officials who will be able to use their influence to ensure the anticipated priority of the presidency-related affairs in state administration bodies. On the other hand, it is operationally essential to ensure good and continuous cooperation between and within ministries and other state administration bodies.*

*The research methodology will be based on the secondary, desk study, decisions and programme of the Government of the Republic of Croatia and the comparison of programme and results of the Slovenian Presidency.*

***Keywords:*** *Presidency, The Council of the European Union, The Republic of Croatia, Slovenia, Preparation and Implementation, Challenge*

## 1. INTRODUCTION

Due to the referendum decision of the United Kingdom to leave the Union and resign from the planned Presidency of the Council, based on the Council Decision,[1] the Republic of Croatia will be chairing the Council from 1 January 2020, unplanned, instead in the second half of 2026.

Given the numerous duties of the presiding state, from the organization of a large number of events and meetings, to the financing of the Presidency itself and, on the other hand, the relatively modest experience of the Croatian administration in similar events, the preparation and implementation of the Presidency will be a major challenge for the Republic of Croatia. The issue of Brexit and the unknown composition of the next European Parliament summit are just some of the additional challenges that Croatia will face in the upcoming period.

The paper will present the organizational, financial and administrative aspect of the Presidency of the Council and will compare it with the example of Slovenia. Slovenia's experience in preparing and chairing the Council, in the opinion of the authors, can largely be applied to the Republic of Croatia and used to predict potential problems and solutions. The example of Slovenia was chosen because

[1] Council Decision (EU) 2016/1316 amending Decision 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, [2016] OJ L 208/42

of the fact that it was also the first Presidency of the Council for Slovenia, as it is going be for Croatia, and that both states are "small" states, emerged from the former common state, with a relatively similar system of public administration. Slovenia has been chairing the Council since 1 January 2008, as part of the first Presidential Trio and, like Croatia is now, was a relatively young EU member state. [2] Also, Slovenia and Croatia have both opted for the "Brussels" model of chairing the Council, where a significant part of the events and meetings are organized in Brussels. Furthermore, Slovenia and Croatia have established a similar organizational system for the preparation and implementation of the Presidency, a similar financial framework for the Presidency, and planned a similar human resource management policy and training of state and public officials who will participate in the preparation and implementation of the Presidency.

Due to these similarities, it can be assumed that the problems and challenges that Slovenia faced, in the same or similar form and scope, will very likely pose problems and challenges for the Republic of Croatia during the preparation and implementation of the Presidency of the Council.

## 2. THE COUNCIL OF THE EUROPEAN UNION

The Council of the European Union (further on; The Council) is a legislative institution of the Union which at the same time has certain executive powers. The Council, together with the European Parliament, participates in the creation and adoption of the Union's laws and budgets, aligns the policies of the EU Member States, develops EU foreign and security policies in line with the European Council's guidelines. Also, the Council is responsible for concluding international agreements between the EU and other states or international organizations.[3]

The Council is chaired by the Member States so as they rotate every 6 months. During the six-month period, the Presidency chairs meetings at all levels in the Council. The presidency is conducted through three-member groups, known as the "trio" that was introduced by The Lisbon Treaty.[4] The Trio sets long-term goals and prepares a joint programme by defining the topics and main issues to be addressed by the Council over a period of 18 months.

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2 The Republic of Slovenia is a member state of the EU since 1 May 2004

3 Đerđa, D., *Institucionalni ustroj izvršne i upravne vlasti u Europskoj uniji*, Proceedings of the Faculty of Law at the University of Rijeka, v. 28, no. 2., 2007, p. 1194.

4 European Commission, *The European Union explained: How the EU works,* 2014 [https://publications.europa.eu/hr/publication-detail/-/publication/9a6a89dc-4ed7-4bb9-a9f7-53d7f1fb1dae]
Accessed 15.04.2019

Based on this programme, all three countries prepare their detailed six-month programmes. The presiding country can influence EU policy by defining topics and creating agenda of the Council's meetings according to its own priorities. The Council does not have a permanent composition, but it is made up by the ministers of the EU Member States depending on the issues discussed at the session, i.e. it operates through ten different configurations,[5] with the exception of the Foreign Affairs Council, which has a permanent chairman - the High Representative for Foreign Affairs and Security Policy. Representatives (Ministers or State Secretaries) of the Member States in the Council are authorized to assume the obligations on behalf of their state government.[6]

### 2.1 The programme of the Romanian, Finnish and Croatian Presidency of the Council

The 18-month programme[7] of the Romanian, Finnish and Croatian Presidencies of the Council the member states confirmed on 11 December 2018 at a meeting of the General Affairs Council in Brussels. The Programme emphasizes the importance of the common values of the Union: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, among other rights of minorities. One of the priorities of the Presidencies will be the effective handling of the Brexit process. Also, one of the key tasks of the three Presidencies will be to help finalize the negotiations on the Multiannual Financial Framework for the period 2021-2027. The Joint Programme is based on five key priority areas: A Union for Jobs, Growth and Competitiveness,[8] a Union That Empowers and Protects All Its Citizens,[9] Towards an Energy Union with a Forward-looking

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5 General Affairs Council; Foreign Affairs Council; Economic and Financial Affairs Council; Justice and Home Affairs Council; Employment, Social Policy, Health and Consumer Affairs Council; Competitiveness Council; Transport, Telecommunications and Energy Council; Agriculture and Fisheries Council; Environment Council; Education, Youth, Culture and Sport Council

6 Decisions in the Council are made by voting; by simple majority, by qualified majority and unanimity, depending on which matter they decide and in accordance with the treaties

7 Council of the European Union, *18-month Programme of the Council (1 January 2019 - 30 June 2020)*, 2018 [http://data.consilium.europa.eu/doc/document/ST-14518-2018-INIT/en/pdf] Accessed 12.03.2019

8 The Presidency will work on a single market and more integrated service market and digital economy, completing the digital single market

9 The three Presidencies will continue to work on implementation of policies aimed at strengthening social dimension, tackling skills mismatch

Climate Policy,[10] A Union of Freedom, Security and Justice,[11] and the Union as a Strong Global Actor.[12]

Romania is the only country in the Trio of Presidencies that has so far presented its programme for Presidency to the EU Council by 30 June, 2019, as it began with the Presidency on 1 January this year. The official slogan of the Romanian Presidency is "Cohesion as a Common European Value". This programme is based on four main pillars; A convergence Europe, A safer Europe, Europe as a stronger global actor and A Europe of common values.

## 3. THE ORGANIZATIONAL ASPECT OF THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION

The Slovenian government established an organizational structure for the preparation and implementation of the Presidency already in January 2005,[13] three whole years before the Presidency. Compared to Croatia, which did so 18 months before the Presidency, they had done it very early.

The Slovenian organizational structure consisted of the Task Force for Preparing for Presidency of the Council, which was tasked with making political decisions and establishing the programme and priorities of the Presidency, led by then Prime Minister Janez Janša. A Wider Working Group for Presidency of the Council was established as the main operating body to supervise the work of ministries and other state and public bodies. In addition to the Wider Working Group, a Working Group for Coordination of the Presidency Preparation was established, which cooperated with Germany and Portugal. Thematic subgroups have also been set up; Presidency Programme Subgroup, Human Resources Subgroup, Presidency Budget Subgroup, Public Relations and Promotion Subgroup, and Presidency Organization Subgroup.[14]

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[10] The three Presidencies intend to finalise the negotiations on the Clean Energy package, and on the proposals under the mobility packages, including in particular the climate-related initiatives

[11] Since the period of application of the current Strategic Guidelines for the development of the area of freedom security and justice comes to an end together with the end of the institutional cycle, the three Presidencies have scheduled in the programme to take up the new guidelines to be elaborated by the European Council

[12] The three Presidencies will work on taking forward the agreed priorities of the EU Global Strategy, ensuring the consistency of the EU's external policies

[13] The Decision of the Government of the Republic of Slovenia no. 901 - 04 / 2004-2, 2005, *Obrazložitev finančnega načrta Služba vlade Republike Slovenije za evropske zadeve*, SPU 158, 2006, p. 7

[14] *Predlog za uvrstitev gradiva „Priprave na predsedovanje Slovenije EU"*, Republic of Slovenia, Government Office for European Affairs, 2005, p. 3

After the Slovenian Presidency ended, Kajnč and Svetličić[15] conducted a research in 2008 to identify the key issues faced by the participants in the process of preparing and implementing the Presidency of the Council and the disadvantages of the Slovenian state and public administration, which hampered the preparation and implementation of the Presidency. Namely, according to the order of problems given by the research participants, poor vertical cooperation between the ministries is in the second place (15.6%), followed by insufficient inter-institutional cooperation (14.3%) and institutional hierarchy that prevents individual initiatives (12%). Further, the same research has shown that the possible cause of the above-mentioned problems, which is the general conclusion of the research, is relatively weak cooperation between the ministries and within the ministry during the Presidency. Namely, the devastating is the fact that only 8% of respondents rated cooperation between ministries as excellent and 27.7% as good. Also, the research revealed that the Slovenian diplomatic network had not been sufficiently exploited, as 27.2% of respondents rated it very bad or bad. On the other hand, respondents rated best the cooperation with representatives of the Permanent Representation of the Republic of Slovenia to the European Union (47.1% excellent, 26% good).

The Republic of Croatia has established a structure for the preparation and implementation of the Presidency of the Council by the Government Decision of July 2018[16]. In accordance to the decision, the structure consists of the Steering Committee for Presidency which issues strategic decisions and guidelines for the preparation and implementation of the Presidency, whose permanent members are the President and Vice Presidents of the Government, the Permanent Representative of the Republic of Croatia to the EU, an official delegated to represent the Council in the EU Parliament and the Secretary of the Steering Committee, then the Inter-Ministerial Coordination Body[17] which makes operational decisions, prepares strategic decisions, and coordinates activities for the preparation and implementation of the sessions. Members of this body are State Secretaries of Ministries, Head of Government Office, Permanent Representative of the Repub-

[15] Kajnč, S.; Svetličić, M., *What it Takes to Run an EU Presidency: Study of Competences in Slovenia's Public Administration*. University of Ljubljana, Halduskultuur – Administrative Culture 11 (1), 2010, p. 99; research was conducted as an anonymous electronic survey with 40 questions sent to 667 addresses of state and public officials who participated in the Presidency. 407 responses were received (235 complete and 172 incomplete)

[16] *Odluka o uspostavi strukture za pripremu i provedbu Predsjedanja Republike Hrvatske Vijećem Europske Unije 2020*, Narodne Novine, no. 60/2018

[17] According to Point 6 of the Decision on the Establishment of the Structure for the Preparation and Implementation of the Presidency of the Republic of Croatia of the Council of the European Union in 2020

lic of Croatia to the EU and Secretary of the Inter-Ministerial Coordination Body. The Secretariat of the Presidency of the Republic of Croatia of The Council of Europe in 2020 as a constituent unit of the Ministry of the Foreign and European Affairs will perform the tasks of the Secretariat of the Steering Committee and the Inter-Ministerial Coordination Body. The Presidency Secretariat has established the Office for Organization and Logistics for Presidential Affairs, the Human Resources and Training Services for Presidency Affairs, the Communications Services and Cultural Activities for Presidency Affairs, the Procurement Department for Presidential Affairs.[18] The Secretariat of the Presidency of the Republic of Croatia of the Council of the EU is supposed to have a total of 65 employees.

From the above it can be concluded that the Republic of Croatia, similarly to Slovenia, has opted for a highly ranked political body to govern the process of preparation and implementation of the Presidency. It certainly speaks about the importance of the Presidency for the Government of the Republic of Croatia.

Slovenia, at least when the current situation is considered, had been preparing for the Presidency longer and more systematically. Namely, at this point, 8 months before the Presidency, apart from the Action Plan for the Presidency, Croatia has no detailed elaborated planning and thematic documents. In an organizational sense, the Republic of Croatia will face, on the one hand, logistics activities, from space planning to the acquisition of cars for the Presidency, and on the other hand, more demanding tasks such as preparation of materials, documents and board meetings of the Council. Also, setting the agenda alone will be a challenge for the Republic of Croatia, since the experiences of other countries show that they have largely been forced to take on inherited agendas, which greatly affects the success of the Presidency and promotion of national interests. The assumption is that Croatia will not be able to resist it either.

## 4. FINANCIAL ASPECT OF THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION

The Presidency of the Council of the European Union is an expense funded from the national budget, and only a small part intended for staff training can be financed by the EU funds. In 2005, Slovenia has opened an item in the budget intended for the expenses of the activities of the Presidency. Slovenian Presidency expenses were initially estimated at EUR 57,169,087.00,[19] while the total actu-

[18] Art.14 of Uredba o izmjenama i dopunama Uredbe o unutarnjem ustrojstvu Ministarstva vanjskih i europskih poslova, Narodne novine, no. 58/2018

[19] Jerebič Minka, M., *Priprave na predsedovanje Slovenije Evropski uniji,* Uprava, Letnik, V, 2007, p.134

al cost of the Slovenian Presidency amounted to EUR 62,374,158.00.[20] For the comparison the expected expenditures for the Czech Presidency amount of EUR 73[21] milion or Hungarian Presidency to EUR 80[22] milion. The planned budget for the Slovenian presidency was well projected, which is a great success and an indication that coordination at the Slovenian budget line has been implemented efficiently.

In November 2018, the Government of the Republic of Croatia published a document Explanation of the State Budget of the Republic of Croatia for 2019 and the Projections for 2020 and 2021, [23] which states that, according to sources of funding, the expenditures of the Presidency are financed from general revenues and receipts, contributions and dedicated receipts and for 2019 they amounted to EUR 15 million, an increase of 2.6 percent compared to the expenditures financed from these sources in the State Budget of the Republic of Croatia for 2018. In 2020, these expenditures are planned at the level of EUR 15.1 million, and in 2021 at the level of EUR 15.3 million.

The increase in the level of expenditures for 2019 is, among other things, justified by the provision of funds for the costs of preparing the Presidency of the Council in the amount of EUR 21.6 million. It should be noted that the cost involved includes the cost of organizing the Congress Centre of the National and University Library.[24] Most ministries have ensured a separate item in the budget, which provided funds for the costs of activities related to the Presidency of the Council. Table no. 1. presents the sums of budget items for the Presidency of the Council of the European Union in 2020 by ministries. It is important to note that the Ministry of State Property and the Ministry of Croatian Veterans' Affairs do not have the funds for this activity, while the Ministry of the Interior does not have ensured separate budget activity directly related to the Presidency of the Council,

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[20] Predsedovanje Slovenije Svetu EU 2008 – v številkah [http://www.eu2008.si/si/News_and_Documents/Press_Releases/June/0630UKOMstevilkePEU.html] Accessed 22.03.2019

[21] Czech Presidency of the European Union [http://www.eu2009.cz/en/czech-presidency/presidency-budget/presidency-budget-497/index.html] Accessed 30.03.2019

[22] Institute for World Economics of the Hungarian Academy of Sciences, The Hungarian Presidency of the EU Council in a Nutshell, 2011 [www.vki.hu/sn_eng/sn-eng-29.pdf] Accessed 30.03.2019

[23] Obrazloženje državnog proračuna Republike Hrvatske za 2019. godinu i projekcije za 2020. i 2021. godinu. Government of the Republic of Croatia, Zagreb, 2018., calculated at the Croatian National Bank's average exchange rate on 30 April 2019

[24] *Odluka o utvrđivanju nacionalne i sveučilišne knjižnice u Zagrebu jednim od središnjih prostora za provedbu aktivnosti predsjedanja Republike Hrvatske Vijećem Europske unije 2020 u Republici Hrvatskoj*. Narodne Novine, no. 60/2018

but has increased funds within the position of NATO and EU Activities allocated for expenses of staff stationed on duty abroad, for preparation and implementation of Council Presidency activities. This is similar to the budgets of the Ministry of Defence and the Ministry of Science and Education, which have increased resources for chairing activities within regular activities.

**Table 1:** Planned funds for the Presidency of the Council of the EU by the respective ministries (in million EUR)

| Budget user | The amount of secured funds in 2019 | The amount of secured funds in 2020 | TOTAL | User's share |
|---|---|---|---|---|
| Ministry of Finance | 221.423 | 322.757 | 544.180 | 1,4% |
| Ministry of the Foreign and European Affairs | 8.865.013 | 14.340.062 | 23.205.074 | 59,2% |
| Ministry of Economy, Enterprise and Crafts | 546.473 | 654.419 | 1.200.892 | 3,1% |
| Ministry of Culture | 32.303 | 32.461 | 64.763 | 0,2% |
| Ministry of Agriculture | 409.645 | 1.028.073 | 1.437.718 | 3,7% |
| Ministry of Regional Development and EU Funds | 86.032 | 43.003 | 129.035 | 0,3% |
| Ministry of the Sea, Transport and Infrastructure | 2.089.488 | 2.171.051 | 4.260.539 | 10,9% |
| Ministry of Environmental Protection and Energy | 1.367.428 | 1.730.716 | 3.098.144 | 7,9% |
| Ministry of Construction and Physical Planning | 389.278 | 379.833 | 769.111 | 2,0% |
| Ministry of Labour and Pension System | 360.807 | 360.807 | 721.615 | 1,8% |
| Ministry of Justice | 787.461 | 1.015.901 | 1.803.362 | 4,6% |
| Ministry of Public Administration | 53.973 | 82.578 | 136.551 | 0,3% |
| Ministry of Health | 633.699 | 696.491 | 1.330.190 | 3,4% |
| Ministry of Demography, Family, Youth and Social Poli | 181.955 | 181.955 | 363.911 | 0,9% |
| Ministry of Tourism | 43.853 | 78.463 | 122.316 | 0,3% |
| **TOTAL** | **16.068.831** | **23.118.570** | **39.187.400** | **100,0%** |

Source: Made by the authors according to *Explanation of the State Budget of the Republic of Croatia for 2019 and the Projections for 2020 and 2021*

From the table above, it is apparent that the ministries secured EUR 16 million in the 2019 budget for the Presidency activities, while in 2020 they plan to spend EUR 23.1 million, i.e. the total costs of chairing for the ministries are planned at the level of EUR 39.1 million. Ministry of the Foreign and European Affairs as the main coordinating body of the state administration for preparing the Presidency of the Council is also the largest budget beneficiary with a share of 59.2%, that is, with secured funds of EUR 23.2 million in 2019 and 2020. The ministries that allocated the largest amounts for the Presidency activities in the Budget are the Ministry of the Sea, Transport and Infrastructure with EUR 4.3 million and the Ministry of Environmental Protection and Energy with the planned EUR 3.1 million. The funds planned in the Budget for the activities of the Presidency mainly refer to the costs of paying the newly employed experts in working groups who will be staying in Brussels and associated material costs such as the cost of relocating staff and their family members, accommodation, transportation, health care etc. It is important to emphasize that ministries also included the costs of

organizing meetings and conferences, education, procurement of IT-related and communication equipment.

From this it can be concluded that the financial plan for the Presidency is well planned and according to the experiences of other countries, realistic. It is not expected that there will be major deviations from the planned budget, nor will the financing of the Presidency significantly affect the economic image of the Republic of Croatia.

## 5. ADMINISTRATIVE ASPECT OF THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION

The Government of the Republic of Slovenia had the task of finding the most optimal way of organizing human resource management, training of existing employees and new employment. Slovenia optimised the working processes in three ways: merging working fields, having one person in charge of several domains and entrusting the staff with preliminary experience of the field to handle the tasks at hand.[25] According to the Slovenian Government's 2009 report[26] 2755 civil and public officials,[27] 133 external experts and 245 students participated in the Presidency of Slovenia. The Government of the Republic of Slovenia had planned 315 new jobs solely for the Presidency, and ultimately achieved the number of 289 newly employed.[28]

In order to train the personnel for the Presidency, the Slovenian Government had adopted the Personnel Plan for the Slovenian Presidency of the EU Council.[29] The plan provided a training programme divided into three groups: the functioning of the EU and its institutions, the development of skills for organization and implementation and improving foreign languages (English and French). 856 officials and state and public servants participated in the training programme.[30]

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25 Svetličić, M.; Cerjak, K., *Small Countries' EU Council Presidency and the Realisation of their National Interests: The Case of Slovenia*, CIRP XXI, 74, 2015, p. 15

26 *Kadrovsko poročilo za leto 2008*. Ministarstvo za javno upravo, Ljubljana, 2009, p.18

27 2610 civil servants in Ljubljana and 165 in the Permanent Representation of the Republic of Slovenia to the EU, of which 1151 civil servants were included in the programme part, and the other 1624 in the organizational and logistic part of the preparation and implementation

28 148 in Ljubljana, 116 in Permanent Representation, and 25 in diplomatic missions

29 The Decision of the Government of the Republic of Slovenia no. 10002-5 / 2005/27, 2005: *Obrazložitev finančnega načrta Služba vlade Republike Slovenije za evropske zadeve*, SPU 31, 2008, p. 8

30 Participants of the training were ministers and state secretaries (34), chairmen of European committees and deputies (240), national representatives and experts (250), administrative staff (160), official speakers and public relations experts (50), coordinators 50), translators and interpreters (72)

In addition to the training programme, the following manuals for the Slovenian Presidency were issued, which facilitated the participants accomplishment of their tasks: General Guide to the Ministers on the Presidency of the Council of the EU, Handbook for Presidency of Working Groups of the Council of the European Union, Handbook for Cooperation with the European Parliament, Handbook for Assistance in Organizing Events at the Ministerial and High Levels During the Slovenian Presidency of the Council of the EU, Handbook for Assisting in Organizing Events Below the Ministerial Level During the Slovenian Presidency of the Council of Europe, and Handbook for Officials and Speakers and Public Relations Offices.[31]

Slovenian experience shows that the greatest problem and challenge during the preparation and implementation of the Presidency of the Council is a lack of skilled and trained public and civil servants. This is supported by the results of the research[32] conducted by Kajnč and Svetličić in 2008, where as many as 18.4% of respondents rated the human capacity deficit as the biggest problem. Insufficient knowledge of similar areas was also highlighted as a problem (10.5%), followed by the lack of information on the relevant issue (8.6%), internal political issues (8.6%), poor knowledge of the functioning of EU institutions (6.6%) and insufficient knowledge of the area of activity (5.3%).

The Ministry of the Foreign and European Affairs of Croatia has already in its Strategic Plan for the period 2018-2020[33] highlighted civil servants training as a key challenge for successful preparation and implementation of the Presidency. In 2016, the Government of the Republic of Croatia adopted the Action Plan for Implementation of the Public Administration Development Strategy, which stipulates that in the second quarter of 2019, 450 civil servants will be trained to work in the preparatory bodies of the Council and on preparing the Presidency programme.[34] Civil servants will be educated through the project "Enhancing knowledge, skills and professional competences of state and public officials for representation of national interests"[35] carried out by the Ministry of the For-

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31 Zadnik, V., *Predsedovanje slovenije Svetu EU*, Ljubljana, 2009, master's thesis, p. 76

32 Kajnč; Svetličić, *op. cit.,* note 15, p. 99

33 *Strate*ški *plan za razdoblje 2018.-2020*. Ministry of the Foreign and European Affairs, Zagreb, 2018, p. 32

34 *Mjera 3.8. Akcijskog plana provedbe strategije razvoja javne uprave za razdoblje od 2017. do 2020. godine*, The Government of the Republic of Croatia, 2016, p.16

35 State Public Administration School [https://dsju.hr/dsju/news_detail/potpisan-ugovor-o-dodjeli-bespovratnih-sredstava-za-projekt-unaprjedenje-znanja-vjestina-i-strucnih-kompetencija-drzavnih-i-javnih-sluzbenika-za-zastupanje-nacionalnih-interesa-17-12-2018] Accessed 05.03.2019

eign and European Affairs in cooperation with the State Public Administration School.[36]

The aim of the project is to enable state and public officials, as well as the Permanent Representation of Croatia to the EU personnel, to prepare and implement the Croatian Presidency of the Council. The project plans the training of 800 officials through 276 days of education. Unlike Slovenian, the Croatian training programme includes two types of education: the first refers to improving knowledge of EU functioning and decision-making within institutions, and the second type of education is aimed at improving negotiation skills at EU working groups, written reporting techniques, meetings management and improving knowledge of professional English and French.

Similar to Slovenia, it can be assumed that there will be a need for recruiting additional qualified personnel in the public administration for the purpose of preparing and implementing the Presidency of the Council. Accordingly, the Budget is designed with new employment in mind in most ministries, and in particular the Ministry of the Foreign and European Affairs that will employ additional 40 employees for diplomatic-protocol activities in the Permanent Representation of Croatia to the EU, the Ministry of Environmental Protection and Energy with the planned 49 new jobs, then the Ministry of Health with 20 newly employed persons, the Ministry of the Sea, Transport and Infrastructure with 15 newly employed persons and the Ministry of Demography with 3 new advisors and 3 expert associates.[37]

The authors' recommendation is that as soon as possible Croatia should make specific decisions on human resource management for the needs of the Presidency and special guidebooks to provide specific guidelines for the activities of officials, employees and external experts.

Existing staff training will be key to successful preparation and implementation of the Presidency, especially if we consider the results of Slovenian research as well as the inexperience in organizing and implementing similar events. Also, the challenge for the Republic of Croatia will be the motivation of skilled employees, as well as external experts to be ready to participate in the implementation of the Presidency, therefore it is very important to establish a rewarding system for the best employees.

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36 The project is funded from the European Funds under the Operational Programme Human Resources 2014-2020. The total budget of the project is HRK 7,353,364, of which the EU co-financing amounts to 85% and the national share to 15%

37 *Obrazloženje državnog proračuna Republike Hrvatske za 2019. godinu i projekcije za 2020. i 2021. godinu*, The Government of the Republic of Croatia, Zagreb, 2018

## 6. CONCLUSION

In the context of the Croatian Presidency of the Council, a research conducted by Think Tank EUROPA[38] is interesting, according to which the ministers of the Government of the Republic of Croatia participated in only 56% of the Council meetings, which is considerably less than the average of 76%. This information is not representative of Croatia as a relatively young member state, which does not have sufficient influence on the EU policy-making or coalition potential, and on the other hand, it is now preparing the Presidency of the Council. Similar situation is with the Slovenian ministers, who participated in 55% of the Council meetings.

Bearing in mind that Slovenia started its preparations for the Presidency of the Council already in January 2005, relatively early, three years before the Presidency, and on the other hand, that Croatia's term of the Presidency was not officially confirmed until 2016 and the Government has set up the organizational structure for the preparation and implementation of the Presidency in July 2018, we can conclude that the 18 months period is a very short time for the organization of the Presidency and that Croatia is in a "time crunch".

It can be assumed that organizationally, financially and administrative-logistically, preparation and implementation of the Presidency will be extremely demanding for the Republic of Croatia. Slovenia's experiences and research results suggest that the biggest problems for the Republic of Croatia will be organizational and administrative-logistic capacities. First of all, the problem could be the lack of specialized skills and experience of state and public officials for the preparation and implementation of events such as chairing the Council, lack of knowledge of the subject, i.e. poor knowledge of public and civil servants on the EU, the way of functioning of EU institutions, decision-making and policy implementation. Therefore, it is extremely important that the selection of officials and external experts who will participate in the preparation and implementation of the Presidency is deprived of political criteria, but to be carried out solely on the criteria of professional qualifications and competences. This will also minimize the impact of internal political issues and possible political turbulence on the process of the preparation and implementation of the Presidency of the Council. Furthermore, it is of utmost importance to have a high-quality and efficient implementation of education and training programmes for state and civil servants in order to maxi-

[38] Think Tank EUROPA, [http://english.thinkeuropa.dk/politics/danish-ministers-show-less-average-council-meetings] Accessed 05.03.2019. The research was conducted according to the list of participants in the period from June 2015 to August 2018

mize their degree of readiness and at least partially avoid or reduce the problems with the human resources that Slovenia had encountered.

To conclude, establishment of the presented governance structure of the Croatian Presidency can be positively assessed and it can be assumed that for the successful preparation and implementation of the Presidency of the Council, it is good that the members of the governing body are high-ranking government officials who will be able to use their influence to ensure the anticipated priority of the presidency-related affairs in state administration bodies. On the

other hand, it is operationally essential to ensure good and continuous cooperation between and within ministries and other state administration bodies in order to avoid repeating the problems Slovenia faced during the Presidency.

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# LEGAL AND ECONOMIC ASPECTS OF INTEGRATION OF BOSNIA AND HERZEGOVINA IN THE EUROPEAN UNION

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***ABSTRACT***

*The authors in this article primarily seek to clarify the functioning of the legal and economic factors for the future integration of Bosnia and Herzegovina into the European Union. Accordingly, under the conditions of modern market and technological change, it is difficult to imagine the integration process in the sense of globalization, without the more active role of developed countries to assist countries in transition on their European path. Thus, diplomacy has a major impact on economic and legal and political integration in the EU, and on the other hand, Bosnia and Herzegovina has a political, legal and economic interest in joining the EU, and has already started using EU funds according to programs, based on the Framework Agreement between the EU and Bosnia and Herzegovina. It is quite logical that the EU funds are invested with intention to create a competitive B&H economy for the EU Single Market (internal market). However, economic co-operation is only the "first pillar" of the European integration process.*

*A big step forward, with regard to foreign-political cooperation and security, was achieved through the Maastricht Agreement, by introducing the "second pillar" within the European Union. So, it is quite logical to conclude that the Maastricht Agreement joined the security to the Foreign Policy, which then allowed Member States to actively and unreservedly support the realization of the "second pillar".*

*The foreign policy and security of the EU member states cannot be at an adequate level if no internal security is established in each country. For this reason, it is very important to establish appropriate judicial cooperation and cooperation between the police, in the creation of a European judicial space, whose constituent part Bosnia and Herzegovina tend to be a part of. In this way, a "third pillar" of co-operation in the field of law and internal affairs is created.*

***Key words:*** *European Union, Bosnia and Herzegovina, economy, development funds, accession, enlargement*

## 1. INTRODUCTION

The authors point out to the fact that access to the European Union implies a contractual relationship that allows country with no membership to have certain rights which are, of course, only available to member states. From that point of view, it is clear that preparation for future membership acquires adoption of certain rules - standards, which will primarily help to be part of the internal single market, but also to assume other obligations arising from membership. Joining EU (European Union) a member gets rights to approach the "club of successful."[1] However, it is often forgotten that joining, and even more, the membership, means the fulfillment of the conditions and the assumption of obligations that result from that work. These obligations are of a legal, economic and political nature, as well as specific, created for each of the affiliated States individually, in accordance with their individual situations, and are part of an agenda that supports the success of legal, economic and political reforms and thus leads to more organized, more stable, predictable and more prosperous societies.[2] The state can and should strive for these standards without seeking to enter into full membership, but it is easier to have an ally on the reform path, whose technical and material help is a great support in making the necessary steps. In addition, the adoption of standards that lead to closer and more balanced relations with the European Union is easier if there is a prospect of participation in their formulation, and voting rights are something that can be possible by the membership.[3]

To access the European Union, de facto, there are two essential processes, namely: 1.) the accession process, on the basis of the Association Agreement (Stabilization and Association Agreement - SAA)[4] and 2.) the negotiation process for EU access. The main objective of the SAA is to provide a framework for the process of harmonization of legal norms with the legal framework of the European Union, as well as a framework for their implementation. The process of negotiating of the access to European Union is a process in which a candidate country for accession to the European Union must reach an agreement with EU member states on the conditions of its accession to the Union. At present, this process is formalized in

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1 Kapetanović, A.; Latinović, Đ., *Bosna i Hercegovina od regionalnih integracija do Evropske unije*, Fondacija „Friedrich Ebert Stiftung", Sarajevo, 2005, pp. 88-90

2 Dedić, H., *Bosna i Hercegovina i Evropska unija: pretpostavke i dosezi integracije*, Bosanska riječ, Tuzla, 2015, pp. 146

3 Misita, N., *Osnovi prava Evropske unije*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2007, pp. 324

4 For the Central European and Eastern European countries, the agreement is called the Association Agreement, while for the countries of Southeast Europe - the Stabilization and Association Agreement - the SAA

35 chapters.[5] The above-mentioned two processes are acquired at one point, but should be considered separately because they are based on different legal bases that deal with different tasks.

In accordance with the aforementioned, the authors in the article stress the determination of the real possibility of Bosnia and Herzegovina for joining the European Union and present the aggravating circumstances that contribute to the impossibility of harmonizing the Bosnian-Herzegovinian legal order with the European Union law. In the second part, it presents the path of Bosnia and Herzegovina to the European Union, detailing the legal and economic aspects of the full integration of Bosnia and Herzegovina into the European Union. In the next part of the paper, the authors emphasize the presentation of the perspective of full membership of Bosnia and Herzegovina in the European Union. Thus, the article itself seeks to present the current position of Bosnia and Herzegovina on its way to the EU.

## 2. BOSNIA AND HERZEGOVINA IN THE EUROPEAN UNION: STATUS QUO

In 1997, the European Union had established legal, economic and political conditions for the development of bilateral relations with Bosnia and Herzegovina. Accordingly, Bosnia and Herzegovina have been given the option of using autonomous trade preferences. In the coming years, relationship of these two entities, can be called successful. Subsequently, Bosnia and Herzegovina started the process of stabilization and association, activities under the Stability Pact for South Eastern Europe were launched, with the primary goal being the stabilization and strengthening of regional cooperation. The EU Road Map for the B&H membership application to the European Union from the March 2000 defined 18 essential steps for Bosnia and Herzegovina.[6] Furthermore, the Feasibility Study for the start of Stabilization and Association Agreement negotiations has been initiated, which has, in the end, been successfully implemented. During the year 2000, the duty-free access of the products from B&H to the EU, Autonomous Trade Measure, was introduced. Following this, the European Partnerships were adopted in the planned sequence, namely: 1.) The Stabilization and Association Agreement (SAA) was signed and ratified by the Presidency of Bosnia and Herzegovina on 6

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5 Countries that have been admitted to the EU until 2008 have been negotiating within 31 chapters, while 35 chapters were introduced after that period, respectively, for Croatia, Turkey, later Island, Montenegro, Bosnia and Herzegovina and Serbia

6 Chronology of relations between Bosnia and Herzegovina and the European Union. Directorate for European Integration of Bosnia and Herzegovina. [http: //www.dei.gov.ba/dei/bih_eu/default.aspx? Id = 9808 & langTag = bs-BA] Accessed 11.02.2019

November 2008 and subsequently ratified by all EU Member States and 2.) The Temporary Trade Agreement entered into force on 1 July 2008, and on the basis of that Agreement, joint bodies of the European Union and Bosnia and Herzegovina were established.[7]

Of course, Professor Meškić emphasizes that the Agreement was concluded as a so-called "The Mixed Agreement", ie the ratification of the European Union, as well as of each Member State, the European Parliament and the potential member states, is necessary.[8] Essentially, the EU ratification process implies, according to Art. 218 § 6 and 8 of the UFEU Parliament's consent as well as the unanimous decision of the Council. Immediately after the signing of the SAA, the Interim Agreement on Stabilization and Association entered into force, which contains the most important obligations of the SAA itself and serves as a legal framework for the preparation of potential candidates for the entry into force of the SAA.[9]

Consequently, following high-level negotiation on the accession process of Bosnia and Herzegovina to the European Union, the EU Road Map of Bosnia and Herzegovina's application for membership of the European Union[10], Bosnia and Herzegovina has set the basic requirements as preconditions for the entry into force of the Stabilization and Association Agreement (SAA), and after fulfilling these conditions, Bosnia and Herzegovina can submit a credible request for membership in the European Union. It is certain that Bosnia and Herzegovina have shown political immaturity and misunderstanding, and has not fulfilled all the required

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7 It is about the following joint bodies - the Interim Committee and the seven sub-committees for European integration: a.) For the internal market and competition; b.) for agriculture and fisheries; c.) for economic and financial issues and statistics; d.) Subdivision for transport, energy, environment and regional cooperation; e.) support for justice and internal affairs; f) for economic issues and external cooperation and g) for economic and legal issues

8 Meškić, Z., *Osnivanje Vrhovnog suda Bosne i Hercegovine kao uslov za članstvo u Evropskoj uniji*, Fondacija Centar za javno pravo, Sarajevo, 2011, pp. 109-141

9 Haratsch, A.; Koenig, M., *Europarecht*, Tübingen, 2010, pp. 245

10 The requirements of the EU Road Map for Bosnia and Herzegovina's application for membership in the European Union during 2012 are: 1. to submit a proposal to the Parliamentary Assembly of Bosnia and Herzegovina to amend the Constitution of Bosnia and Herzegovina on harmonization of internal legislation with a court decision in the case of Sejdić and Finci vs Bosnia and Herzegovina "; 2.) to hold a meeting of the European Commission in Bosnia and Herzegovina, which will provide a midterm review of the implementation of the "EU Road Maps for Bosnia and Herzegovina's Membership in the European Union"; 3.) holding local elections in Bosnia and Herzegovina; 4.) The European Commission should adopt an annual progress report on Bosnia and Herzegovina; 5.) answers to the two sectoral issues lists (chapters 5 and 27) will be provided, and an effective mechanism for coordination with EU issues will be defined; 6.) by the end of 2012, to amend the Constitution of Bosnia and Herzegovina with a view to be aligned with the court decision in the case "Sejdić and Finci vs Bosnia and Herzegovina" - which until today has not been done

obligations, and until 2019 hasn't solved two problems, and the solution is not to be seen in the near future.

The main feature of the SAA's content is its post-modernity, which is constituted and maintained in time-scale obligations that Bosnia and Herzegovina need to make in its preparations for EU membership. Postponement begins with the very signing of the SAA, so that shortly after the signing of the Interim SAA enters into force with the most basic obligations of the SAA itself, and certain parts of the SAA become effective, although the agreement has not passed the ratification process and its content did not fully come into force. Namely, the entry into force of the SAA seems to be delayed, as Bosnia and Herzegovina have not fulfilled its obligations under the Interim SAA, which is a step ahead. It is a violation of Article 1 of the Provisional SAA - the non-implementation of Sejdić - Finci's decision and the violation of Article 36 of the Provisional SAA without the adoption of the State Aid Act. [11]

The first condition, linked to the Stabilization and Association Agreement (SAA), referred to the implementation of the decision of the Human Rights Court in Strasbourg in the case of "*Sejdić and Finci v Bosnia and Herzegovina*" and the other on the *establishment of an effective co-ordination mechanism*. These are the requirements of the European Union *conditio sine qua non*.

In the "*Sejdić and Finci vs B&H*"[12] verdict, the European Court of Human Rights in Strasbourg stated that Bosnia and Herzegovina violated Article 14 of the Convention on Human Rights and Fundamental Freedoms; Article 3 of Protocol No. 1 to that Convention on the inability of the plaintiff to run for elections to the House of Peoples of Bosnia and Herzegovina; as well as Article 1 of Protocol No. 12 because of the inability of the plaintiff to run for election to the Presidency of Bosnia and Herzegovina. Regardless of the above-mentioned judgment, being a member of the Council of Europe in 2002, Bosnia and Herzegovina committed itself to respect *"European standards"*. Accordingly, Bosnia and Herzegovina undertook that within a year, with the assistance of the European Commission for Democracy through Law (Venice Commission[13]) to align the Election Law of Bosnia and Herzegovina from 2001 (which until today is not done) with the

[11] Kulenović, N.; Hadžialić – Bubalo, I.; Korajlić, M., *Presuda Sejdić i Finci protiv Bosne i Hercegovine: Konkretne posljedice prvi pregled*, Sveske za javno pravo, 1-2/2010, pp.18

[12] Sejdić and Finci vs Bosnia and Herzegovina, Applications no. 27996/06 and 34836/06 of 22 December 2009, [http://www.mhrr.gov.ba/ured_zastupnika/novosti/default.aspx?id=1008&langTag=bs-BA] Accessed 12.02.2019

[13] The Venice Commission (full name European Commission for Democracy through Law) is an advisory body of the Europen Council, an international association, comprising a total of 47 European countries. This international legal body primarily deals with constitutional and electoral issues and generally with the action and engagement of democratic institutions

Council of Europe standards. In addition, by ratifying the 2008 Stabilization and Association Agreement with Bosnia and Herzegovina, Bosnia and Herzegovina has committed to amend the provisions of the Election Law on the Election of Presidency Members and Delegates to the House of Peoples of B&H for a period of one to two years. The verdict, however, opened Pandora's box. The first condition is still an "impossible mission" because even after ten (10) years it has not been implemented in the verdict "*Sejdić and Finci vs Bosnia and Herzegovina*".

The second requirement from the EU Road Map of Bosnia and Herzegovina's application for membership of the European Union, is the establishment of an effective coordination mechanism. This mechanism must enable Bosnia and Herzegovina to speak with one voice in relations with the European Union, especially at the time of the takeover of the acquis communautaire (*acquis communautaire*).[14] By analyzing the provisions of all thirteen (13) constitutions in Bosnia and Herzegovina and the Statute of the Brčko District, however, it comes to the conclusion that these relations understand the direct involvement of the state, but also the entities and the cantons (in accordance with their respective competencies). The key problem in the implementation of this condition, is that all political fractions in Bosnia and Herzegovina consider that within the state, they need to control and coordinate the whole process, forgetting that, in accordance to the provisions of the Constitution of the Federation of Bosnia and Herzegovina and the Republic of Srpska, every form of subordination or arbitrary coordination of the cantons of the Federation of Bosnia and Herzegovina, is in opposition to the existing constitutions and violates the already fragile trust that has been built for years in Bosnia and Herzegovina.[15]

## 3. BOSNIA AND HERZEGOVINA ON HER WAY TO THE EUROPEAN UNION

Bosnia and Herzegovina as a state has a specific structure of power. It is divided into two entities, ten cantons in the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina. Foreign Policy and Internal Affairs in Bosnia and Herzegovina has a great influence on the High Representative appointed by the United Nations Security Council. Of course, a democratic society in Bosnia and Herzegovina can be created through several phases. In the first phase, the European Union should assume an advisory role in Bosnia and Herzegovina in accordance with the principles of its legal system and the creation of conditions for all three pillars to be achieved. Essentially, this would mean abolish-

[14] Gromovs, J.; Vehar, P., *Priručnik za usklađivanje propisa Bosne i Hercegovine sa propisima EU*, East West Consulting, Sarajevo, 2012, pp. 80

[15] *Ibid.*

ing the Office of the High Representative for Bosnia and Herzegovina. In the second phase, it is necessary to strengthen security in the country and introduce the rule of law with full autonomy of the judicial system in Bosnia and Herzegovina. In the third phase, the authorities should take full responsibility for the economic prosperity of the country while taking into account all the measures of internal and external security, to which the European Union fully insists.[16]

The primary objective of Bosnia and Herzegovina is full membership in the European Union. For this purpose, there is a general consensus among public and social entities within Bosnia and Herzegovina. So, the goal is achievable, but great efforts must be made to improve the economy of Bosnia and Herzegovina in order to improve the gross domestic product (GDP). Of course, according to data from gross domestic product in Bosnia and Herzegovina, there is a $ 50 billion war damage, because the GDP per capita has fallen by 60% due to war.[17] Disproportion in economic development is being corrected by the European Regional Development Fund by removing inequalities in the development and structural adjustment of the region, which, unfortunately, lags behind in the economic development as well as the transformation of industrial regions with a shrinking economic structure.[18]

Participation of Bosnia and Herzegovina in the process of stabilization and association assumed responsibility for meeting legal, economic and political stabilization commitments, through the process of gradual integration into the European Union with a view to gaining full membership. According to that, the European Union is beginning to realize these commitments by setting up special investment funds for Western Balkan countries. A positive assessment and recommendation from the European Commission on the start of negotiations followed the signing of the Stabilization and Association Agreement (SAA), and its implementation depends on fulfilling the conditions set by its authorities, primarily through full co-operation for pre-accession assistance. The conditions set for countries in transition are not simple, but they are possible and easily achievable with additional effort by using the European Union funds, which are offered according to prepared programs, with a view to accelerating affirmation and entering into full European Union membership.[19]

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16 Bogunović, A., *Evropska unija – stanje i perspetive*, Ekonomski pregled, *Vol.* 57, No. 1-2, 2006, pp. 31-63

17 Džombić, I., *Ekonomska diplomatija Bosne i Hercegovine*, Univerzitet za poslovni inžinjering i menadžement, Banja Luka, 2008, pp. 223

18 *Ibid.*

19 Derajić, S.; Hodžić, Dž.; Halilović, Z., *Bosna i Hercegovina na putu ka Evropskoj uniji*, Centar za sigurnosne studije Sarajevo, Sarajevo, 2007., pp. 145

### 3.1 Legal aspects of the integration of Bosnia and Herzegovina into the European Union

The European Union determines the application of community law in the Member States' territories. The scope of the founding treaties includes overseas territories in the case of some Member States and the "European territory" for which foreign trade relations are the responsibility of a Member State. In the event of a change of the borders of one of the Member States, the limit of application of Community law is automatically changed. Thus, Community law applies to relations related to the territory of the European Union, where the necessary link is established either by the place where the legal relationship is established, or by the place where they are enforced, or because of the close linkage between the law of a Member State and therefore of Community law. This means that Community law also applies to legal persons whose seat is outside the territory of a Member State if it carries on business in the Union territory in terms of bonding points.[20]

In order to clarify the legal aspects of the integration of Bosnia and Herzegovina into the European Union, the authors in the article pay special attention to the deployment of the Supreme Court of Bosnia and Herzegovina, whose existence is a necessary obligation to the SAA. Thus, one of the provisions that came into force by the very signing of the SAA is the "harmonizing clause" of Article 70 of the SAA. The first paragraph of Article 70 of the SAA obliges Bosnia and Herzegovina to "ensure the gradual alignment of its existing and future legislation with the acquis communautaire. Bosnia and Herzegovina will ensure the proper implementation and application of existing and future legislation."[21] It follows from the next paragraph that alignment will begin on the date of signing the Agreement, which means that this provision has long been valid in Bosnia and Herzegovina. Of course, the obligation deriving from the harmonizing clause of the SAA contained in Article 70 for Bosnia and Herzegovina means harmonization at two levels, namely: a. Harmonization of entity regulations with the purpose of creating the conditions and assumptions for the complete freedom of movement of goods, persons, services and capital in accordance with Article I / 4 of the Constitution of Bosnia and Herzegovina and b.) simultaneously harmonize this legislation with EU law in order to create the conditions for entering this new market.[22]

Before signing the Maastrichty Treaty, within the European Council, legal instruments of European judicial cooperation were established: protection of hu-

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[20] Kasagić, R., *Pravo Evropske unije*, Ekonomski fakultet Banja Luka, Banja Luka, 2005, pp. 320

[21] Popović, V., *Neki aspekti harmonizacije prava Republike Srpske sa Sporazumom o stabilizaciji i pridruživanju*, Pravni život, 7-8/2010, pp. 54

[22] Meškić, *op. cit.* Note 8, pp. 133

man rights and fundamental freedoms, extradition, international recognition of judgments, fight against violence, transfer of criminal proceedings, international consequences loss of motor vehicle driving rights, the fight against terrorism, the transfer of convicted persons and minor offenses related to cultural treasure.[23] Thus, the legal system of the European Union is well-placed, and the same is provided for the free and happy life of citizens. It should be added that Community law (European Union law) allows Member States to exclude, in exceptional cases, from their obligations arising from the founding treaties. They can take unilateral measures when it comes to the vital interests of its security or in the event of a conflict of interest, in the face of the maintenance of the internal order and peace, in the event of a serious international crisis threatening or in order to fulfill the commitments taken to preserve peace and international security. In such cases, the State may deny information that would otherwise be required to undertake measures related to production and trade in weapons, ammunition and war materials and take other measures to protect the (internal) market.[24]

When it comes to the legal aspects of Bosnia and Herzegovina's entry into the EU, it is important to note that the first obligation to harmonize entity regulations under Article I / 4 of the Constitution of Bosnia and Herzegovina implies, inter alia, the adoption of a whole set of private law regulations at the state level. However, the full realization of market freedom will again be facing the obstacle of the absence of a state judicial body that will ensure the uniform application of the so-called state laws passed on the entire territory of Bosnia and Herzegovina. Judicial protection of citizens' rights arising from state regulations such as the Consumer Protection Act and regulations whose adoption will take place at the level of Bosnia and Herzegovina again has the same importance as the adoption of these regulations.[25] In this case, the Constitutional Court of Bosnia and Herzegovina in its endeavors to provide such protection and at the same time remain within the limits of its jurisdiction directly relies on the practice of the EU Court of Justice in the area of EU market freedoms. The ECJ therefore emphasized that the general provision on market freedoms should be interpreted in accordance with the practice of the European Court of Justice, since the Constitution does not define in detail what this responsibility implies. This position of the Constitutional Court, established several years prior to the signing of the SAA, has early recognized that the harmonization of entity regulations with clause I / 4 of the Constitution, with regard to the political objective of Bosnia and Herzegovina for

23 Gasmi, G., *Pravo i osnovi prava Evropske unije*, Univerzitet Singidunum Beograd, Beograd, 2011, pp. 243

24 *Ibid.*

25 Constitutional Court of BiH, 18. 02. 2000, U-5/98-II, Fig. see. BiH no. 17/00, paragraph 29

EU membership, is directly related to further alignment with same clauses within EU law. Consequently, this position of the Constitutional Court makes the link between the first and the second obligations arising from the harmonization clause in accordance with Article 70 of the SAA.[26]

In order for the European Union to be able to effectively implement its policies, the European Union's legal system must be unique and apply equally to the entire territory of the Union. That is why, at the time of entry into the Union, the state must have a legal system that is fully in line with EU law, as it applies in the same way as it is in the other Member States. Thus, the objective of legal alignment in the process of accession is to harmonize domestic law with the overall EU law, which is the ultimate goal of Bosnia and Herzegovina. Concrete obligations in the process of harmonization derive from the different, established phases of EU accession, which make the definite *"EU enlargement policy"*. This policy of enlargement has three general conditions, which at different levels of joining the EU, must meet in different, each time in higher stage. These are the conditions that were defined and adopted at the European summits in Copenhagen in 1993 and in Madrid in 1995.[27]

In addition to these general conditions, each state in the process is going through some necessary phases, in which the degree of convergence of the system (legal, economic and political) becomes more and more similar to the European Union, and mutual obligations with the European Union are created through signed agreements. Summarizing, the stages of state status in the process of European integration are the following: *obtaining a Feasibility Study, Negotiation and Signing of the Stabilization and Association Agreement (SAA), which represents a very close relationship between the associated country of the Union; submitting an official candidacy for membership to the Council of Ministers; sending the Commission's question to the state; State Response to Commission's question; Report of the Commission to the Council of Ministers on the readiness of the candidate country for status; obtaining candidate status by the European Council; the beginning of membership negotiations and, finally, the signing of the EU Accession Treaty, which sets the date on which the candidate country becomes a full member of the Union.*[28]

Concrete obligations in the area of legal harmonization arise from the accession phase in which the state is in. The first obligations deriving from the international

[26] Constitutional Court of BiH, 25. 06. 2004, U-68/02, Fig. see. BiH no. 38/04, Item 41

[27] Ajanović, J.; Nuhodžić, L., *Strategija integriranja Bosne i Hercegovine u Evropsku uniju*, Direkcija za evropske integracije Bosne i Hercegovine – Vijeće ministara Bosne i Hercegovine, Sarajevo, 2006, pp. 89

[28] Fonten, P., *Evropa u 12 lekcija*, Delegacija EU, Beograd, 2011, pp. 45

treaty are the obligations from the SAA, which is the first comprehensive international treaty that the state is practically pursuing through integration. This agreement is complex and is related to many areas of rights and obligations between the candidates and the European Union (political regulations, regional cooperation, regulations on free flows of goods, mutual reduction of tariffs, capital flow, freedom of movement for workers and so on). Among others, for example, Chapter VI of the SAA (Bosnia and Herzegovina[29] and the EU) carries the title "*Harmonization of Regulations, Application of Rights and Competition Rules*", which defines the obligations of harmonizing the legal system of Bosnia and Herzegovina with Community law "in all areas covered by the Agreement", and further states that the harmonization will refer to the basic elements of the Union's legal transactions in the areas of the internal market, justice, freedom and security in trade issues.[30]

In the area of trade, harmonization obligations relate to: protection of competition, state aid, public companies, public procurement, standardization, methodology, accreditation, compatibility evaluation, protection of intellectual property, consumer protection and equal opportunities for employees. Harmonization of legislation in these areas aims to adjust the state system with internal market regime existing in the European Union, in order for the state system to be compatible with those in the European Union and to achieve the free trade zone predicted by this agreement. This agreement is the most important agreement signed by the state with the European Union and it "*opens the door*" to the further integration process.[31] At the stage of the fulfillment of obligations under the SAA, therefore, it is necessary to strive for full alignment with the relevant EU legislation, if possible within the given legal framework, and if such harmonization would not cause major problems and costs of the administrative system at a given moment. Since the beginning of the implementation of the SAA and a certain time of success-

[29] The Stabilization and Association Agreement (SAA) entered into force on 01.06.2015. after the Presidency of Bosnia and Herzegovina and both Houses of the Parliamentary Assembly of BiH confirmed and adopted a Declaration on the commitment of the institutions of Bosnia and Herzegovina to implement the necessary reforms in the framework of the EU accession process, in line with the Conclusions of the EU External Relations Council. By signing and entering into force of the SAA, Bosnia and Herzegovina has a legal obligation to harmonize national legislation with the EU acquis (acquis communautaire). The SAA also provides for the promotion of economic relations between BiH and the EU, with the gradual development of a free trade zone between the two sides. The agreement is regulated (according to chapters): general principles; political dialogue; regional cooperation; free movement of goods, movement of workers, business settlement, provision of services, movement of capital; harmonization of laws, enforcement of laws and competition rules; justice, freedom and security; political cooperation; financial cooperation; institutional, general and final provisions

[30] Bosnia and Herzegovina in the Stabilization and Association Process, Ministry of Foreign Affairs, [http://www.mvp.gov.ba/vanjska_politika_bih/multilateralni_odnosi/evropska_unija/bih_i_eu/bih_u_procesu_stabilizacije_i_pridruzivanja/ ?] Accessed 14.02.2019

[31] *Ibid.*

ful implementation, the next stage of integration of the state into the European Union is the submission of the candidacy of the state and obtaining status from the European Council.

This phase consists of sending a large number of questions from the Commission to a potential candidate country regarding the overall functioning of the state. The state answers these questions and sends them to the Commission (Bosnia and Herzegovina fulfilled this obligation in 2018), on the basis of which it gives an opinion on the readiness of the state to start membership negotiations. This phase, also calls for a general higher level of fulfillment of the Copenhagen criteria, and the Commission may address additional questions to the state or give a negative opinion (Bosnia and Herzegovina is waiting for an answers). If the opinion is positive, the European Council, by unanimous decision, accepts the request of the state to become a candidate and opens a new phase, namely membership negotiations.[32]

The authors detail the position of the Constitutional Court in Decision U-68/02, which points to a very important aspect of alignment with EU law, which implies respect for the practice of the EU Court. This is first confirmed by Article 70 of the SAA, as the EU acquis is seen as a legal acquis by the EU as a source of EU law. Of course, even more direct on the importance of the case-law of the EU Court refers to Article 71 par. 2 of the SAA, which stipulates that any breach of the competition rules in the SAA will be assessed on the basis of criteria deriving from the competition rules applicable (ex) EEC, in particular on the (former) Articles 81, 82, 86 and 87 of the EEC Treaty and the instruments of interpretation adopted by the (former) Community. Here, it directly points to the meaning of these provisions, which the Commission or the Court of Justice gives its interpretation in appropriate proceedings. This provision has already shown impact on domestic legislation, where the Competition Law of Bosnia and Herzegovina in Article 43 provides that the Competition Council as the local authority responsible for the protection of competition in the first instance, *"in the assessment of the case, can use the practice of the European the Court of Justice and the decisions of the European Commission* ".[33] Again, it is evident what significance the EU attaches to the protection of rights arising from the regulations adopted for the purpose of harmonization with EU law and the application of these regulations in accordance with the meaning they have in the EU. It can therefore be concluded that the provisions of the SAA provide a legal basis for concretizing the above-mentioned criteria that Bosnia and Herzegovina has to fulfill in order to become a member of the EU.

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[32] Mujagić, N., *Sedam minuta za BiH i evropske integracije*, Časopis Odjek, *Vol.* 1, No. 1, 2016, pp. 34-38

[33] *Ibid.*

Consequently, Article 70 of the SAA, prescribing the obligation to properly implement and apply existing and future legislation, expressly lays down the criterion on which, in its Annual Progress Reports on Bosnia and Herzegovina, the Commission criticizes the lack of a Supreme Court to provide a single legal application in the entire territory of Bosnia and Herzegovina.[34]

Apart from the adoption of the law, the Commission as an inseparable part of legal adjustment observes its implementation, which must be satisfactory. The law, which is not applied or applied ineffectively, is treated as an unfulfilled obligation and an area that does not work. Efficient implementation of the law is a prerequisite for the Commission to give a positive assessment. In other words, community law must be fully incorporated in the domestic legal system and part of the internal law that is effectively implemented. On the day of entry of a candidate country into the EU, the EU legal system in that country has to function as a part of domestic law and as it does in other Member States. Unlike obligations deriving from the SAA, the process of full harmonization is much more demanding. It refers to the entire EU legal system and to all the regulations that are in force in the EU, which means that it applies to all areas within the jurisdiction of the EU. Harmonization is more demanding because at this stage, full compliance is being sought, which is strictly controlled by the Commission through negotiations. When the negotiations in 35 areas are successfully completed, the "Accession Treaty" is signed, defining the rights and obligations achieved in membership negotiations and determining the date when the candidate country becomes a member of the EU.[35]

### 3.2 Economic aspects of the integration of Bosnia and Herzegovina into the European Union

When we talk about the economic aspects of Bosnia and Herzegovina's integration into the European Union, the international economic situation is characterized by a concrete market where traditional and geographical constraints collapse. Due to the creation of new economic relations, especially new market relations, products and services are internationalized and emerge from national frameworks, resulting in the opening of national borders and the integration of the economic and political character of Bosnia and Herzegovina.[36] The common trade policy of the European Union is based on the unique principles of customs change, the

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[34] *Ibid*.

[35] *Ibid*.

[36] Vukmirica, V.; Špirić, N., *Ekonomska i monetarna integracija Evrope*, Ekonomski fakultet u Banja Luci, Banja Luka, 2005, pp. 44

conclusion of customs and trade agreements, the equalization of export liberalization measures, as well as trade protection measures such as those to be introduced in the case of damping and subsidies.[37] Thus, the single European market enables the gradual integration of the national markets of the Member States into a single market (which is the ultimate goal of Bosnia and Herzegovina), in which the same conditions will be imposed for taking all forms of economic activity for all market entities (regardless of their domicile) or national affiliation. The establishment and functioning of a single market depend on the realization of the freedom of movement of goods, labor, capital and services, respectively, the success in removing all prohibitions and barriers between Member States.[38]

The disturbances that have emerged between the member states in the operation of the single market, the Commission of the European Union grouped the physical, technical and tax obstacles in the White Book. It has been established that the disturbances in the functioning of the European Union's unique market (before - European Economic Community) are of a physical nature or the introduction of different standards for certain goods. Hence the establishment of the internal market required the harmonization of economic regulations by the Member States in order to remove the existing barriers and the ban and the introduction of new barriers in trade between Member States.[39]

Since the end of the twentieth century, until today, the European Union has allocated more than 2.5 billion euro to Bosnia and Herzegovina. Accordingly, the main goals of assisting our country were:

- humanitarian aid,
- assistance in strengthening the peace process and strengthening co-operation between the Entities,
- the reconciliation of ethnic groups, the return of refugees and displaced persons to their homes,
- establishment of functional institutions of the state of Bosnia and Herzegovina and sustainable democracy, based on the rule of law and respect for human rights,

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37 *Ibid.*

38 Kurtćehajić, S., *Kako Evropska unija i Visoki predstavnik mogu pomoći Bosni i Hercegovini u njenoj integraciji*, [https://ssrc.ibu.edu.ba/assets/ssrc/userfiles/files/ZBORNIK-TOM-II.pdf] Accessed 16.02.2019.

39 *Ibid.*

- setting the foundation for sustainable economic development and growth,
- bringing Bosnia and Herzegovina closer to the standards and principles of the European Union.[40]

It can be concluded that the European Union is the main trading partner of Bosnia and Herzegovina. Exchange with the European Union accounts for around 50% of total foreign trade, which emphasizes the importance of Bosnia and Herzegovina's entry into European integration. Most of the products produced in Bosnia and Herzegovina are exempt from paying customs when exporting to the European Union market. Bosnian-Herzegovinian products are mostly sold in Italy, Germany and Slovenia. Imports from the European Union are the most common in these countries and, to a lesser extent, in Austria. It mainly exports products from the metal processing and wood processing sector, mineral products and chemical industry products. Import includes spare parts for machines, minerals, foodstuffs and chemicals, and by joining the EU, Bosnia and Herzegovina would have a stronger and better starting position to strengthen its economic position on the European Union market.[41]

The creation of a single market for EU member states meant closing economic borders for their goods and services. Members of the European Union had mutual freedom of movement of goods and services, and in relation to the goods and services of the Member States, uniform customs tariffs were introduced. In order to match the market conditions provided to companies in the single market, businessmen domiciled outside the market, their governments had to recognize stimulating measures, at least in the import tariffs of EU member states. This was difficult to reconcile, especially because of the export deficit in relation to the exchange of goods and services with the countries belonging to the single European market, which is the ultimate goal of Bosnia and Herzegovina. The Union proclaimed its trade identity with strict reciprocity in its trade relations with third countries, and thus Bosnia and Herzegovina. This can be achieved through bilateral and multilateral agreements between non-member countries and the European Union, unless the Articles 113 and 228 of the TFEU (Treaty on the Functioning of the European Union do not represent a disturbance, in which the European Union has retained exclusive competence in the conduct of trade policy towards third countries, in this case Bosnia and Herzegovina.[42]

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[40] Guide to the European Union - How to bring Bosnia and Herzegovina closer to EU integration, [https://www.rez.ba/bestinvest/publications/VodicEU.pdf] Accessed 16.02.2019

[41] *Ibid.*

[42] *Ibid.*

The European Union's unique market has established standards and each European country, which intends to become a member of the European Union, must gradually adapt to these standards. The technological development of the EU member states sets the framework for business cooperation between Europe's businessmen.

However, Bosnia and Herzegovina can apply to European Union funds for economic prosperity and the creation of a competitive economy in Bosnia and Herzegovina. But that is just one pillar which each state intending to join the European Union has to fulfill. Investing in a country's economy is conditioned by external and internal security, but by a secure legal system and independent judiciary. The CFSP's status of being a "pillar" thus ended. Furthermore, in an effort to ensure greater co-ordination and consistency in EU foreign policy, the Treaty of Lisbon created a High Representative of the Union for Foreign Affairs and Security Policy, de facto merging the post of High Representative for the Common Foreign and Security Policy and European Commissioner for External Relations and European Neighbourhood Policy. Thus, economic aspects must be fully aligned with community law in order to align the B&H legal order with the European legal order.

## 4. PERSPECTIVES OF MEMBERSHIP OF BOSNIA AND HERZEGOVINA IN THE EUROPEAN UNION

The European Union decides to strengthen its program of assistance by giving concrete trade concessions to the countries of the region, thereby fostering greater commodity exchange in the region. In this atmosphere, so-called "legal and economic conditions" for the development of bilateral relations between Bosnia and Herzegovina and the European Union are promoted. In 1998, the EU/B&H *Consultative Task Force (CTF)* was established, providing technical and professional assistance in the area of administration, regulatory framework and policy.

The engagement of the EU towards the Balkan crisis, as an incentive for German diplomacy, has resulted in a new strategic agenda called the *Stability Pact*.[43]

Although Bosnia and Herzegovina started its journey to the European Union formally in 1997, only in December 2002 eighteen conditions from the EU Road Map were met.

The Roadmap is identified 18 directives that Bosnia and Herzegovina needs to fulfill before embarking on a feasibility study to open negotiations on the Stabilization and Association Agreement. In the Map of the European Union, the Eu-

[43] Signed in Sarajevo at the end of July 1999 with the participation of heads of state and government of USA, EU and Russia

ropean Union has defined political, economic and guiding principles for respect for human rights, democracy and the rule of law. The Map Guidelines are the following:

a.) ***Policy Guidelines:*** Adopt election law and ensure election funding; adopt the Law on the State Border Service; to establish a permanent secretariat in the B&H Presidency - to reach an agreement on the Presidency of the B&H Council of Ministers and to adopt the necessary amendments and procedures; to adopt new rules and procedures for the B&H Parliamentary Assembly; adopt a unique passport; to enforce the Law on the State Border Service; Allocate sufficient funds for the Constitutional Court of B&H.

b.) ***Economic Guidelines:*** Deleted Payments Bureaus; establish a state treasury; remove all obstacles to inter-company trade; Establish a unique B&H State Institute for Standardization; to adopt a law on competition and consumer protection; enforce a law on foreign direct investment and adopt a restitution law.

c.) ***Guidelines in the field of democracy, human rights and the rule of law:*** Implement property laws; to strengthen responsibility at all levels in order to create conditions for sustainable return; implement decisions of human rights institutions and ensure adequate funding; adopt and enforce the laws on the judiciary and prosecution of the FB&H/Law on Judicial Services of the RS; the Law on JRTS (PBS) and to secure its funding. Bosnia and Herzegovina "substantially" met the guidelines from the Roadmap in September 2002.[44]

At that time, former Foreign Policy Commissioner Chris Patten arrived in Sarajevo to inform the authorities that Bosnia and Herzegovina passed the first test. In November 2003, nearly a year after the conditions set out in the EU Road Map, Bosnia and Herzegovina was given a green light to begin work on the Feasibility Study, which should show whether Bosnia and Herzegovina is ready to begin negotiations on the conclusion of the SAA. When this agreement is signed, then Bosnia and Herzegovina will have the status of a potential member, or an associated candidate of the European Union, with the possibility of drawing additional financial assistance from certain funds.[45] The conclusion of the European Union

[44] Road Map, [http://www.dei.gov.ba/dokumenti/default.aspx?id=5681&langTag=bs-BA] Accessed 16.02.2019

[45] It is a public secret that at that time all the conditions in the Map were not fulfilled, but that the EU, thanks to Patten's personal engagement, wanted to give a small boost to democratic processes in BiH in the hope that it would accelerate the harmonization

report on the progress of Bosnia and Herzegovina in the SAA process from 2003 is still a current framework for the image of Bosnia and Herzegovina's position towards the European Union: *"The objective of B&H's integration into EU structures and eventual EU membership faces widespread support in B&H. However, in order to achieve this objective, the country must first demonstrate that it shares the core values of the EU as well as the capacity necessary to meet the obligations deriving from the Stabilization and Association Agreement (...) "*.[46] No one is any longer deny the political consensus on a common European path, even if it is a declarative commitment to fundamental European values.

The Directorate for European Integration of Bosnia and Herzegovina, which is crucial for negotiations with the European Union, needs people, means and equipment to become the coordinator of overall B&H efforts to join the EU. In such a constellation, the limited "briselization" of Bosnia and Herzegovina is possible, but its membership in the EU by 2025 is very questionable.

## 5. CONCLUSION

The countries of the region, both individually and jointly, have made significant efforts and made significant progress to change the stereotype of the backward, problematic and conflicting European suburbs. Cooperation between the countries of the region has been improved, both bilaterally and multilaterally. The geographic position of Bosnia and Herzegovina, common history, ethnic structure of the population, infrastructure, legal and economic ties, point to the versatile cooperation that needs to be intensified in the forthcoming period. This cooperation becomes a more constructive component that enables Bosnia and Herzegovina to become a full member of the European Union.

The progress of each country in the region towards European integration is significant from the perspective of Bosnia and Herzegovina as an indicator that progress towards the European Union is likely to depend on the pace of reform of each country. The best example of this is the neighboring and friendly country, the Republic of Croatia and its full membership in the European Union, which has created a positive atmosphere in Bosnia and Herzegovina in terms of confirming membership opportunities once all the necessary legal and economic conditions have been met. It has been 24 years since the signing of the Dayton Peace Agreement and we can now be pleased to say that Bosnia and Herzegovina, thanks to its

[46] Report of the European Commission to the Council of the European Union about the readiness of Bosnia and Herzegovina to negotiate the Stabilization and Association Agreement with the European Union, BiH Road to the European Union, [http: //www.dei.gov.ba/pdf/izvjestaj_komisije. pdf] Accessed 17.02.2019

European orientation and the stabilization and association process, comes out of the "post-war construction" period and moves with confidence to Brussels to her European future. The process is taking place very slowly, according to the "warm-cold" principle, but will surely come a time when Bosnia and Herzegovina will become a full member of the European Union.

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Topic 2

# New trends in EU law and migration challenges

# LEGAL POSITION OF FOREIGNERS IN CROATIAN HISTORY – PAST LESSONS FOR CURRENT IMMIGRATION PROBLEMS

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***ABSTRACT***

*The European Union has been exposed to very dynamic social changes for the last decade, and the issues of migration, asylum, and the protection of the legal position of foreigners have become some of the most vibrant areas within the EU political agenda, in particular within the activities of the European Parliament.*

*Relatively frequent migration policy changes within national legislation are the result of attempts to harmonize it with the recent EU acquis. In modern Croatian legislation, in accordance with the content of the applicable Aliens Act, there are visible attempts of legal balancing between the two dominant interests: the very extensive protection of social, political, economic, and other rights of immigrants and the security and protection of the national public policy. Nevertheless, understanding the legal position of foreigners in Croatian law demands consideration of various social and political factors and an extensive interpretation of the legal framework that has actively developed throughout history in our area.*

*Taking into account the growing importance of immigration policy for the territory of the Republic of Croatia, the aim of this article is to determine the legal position of foreigners in the domain of private and public law throughout different periods of Croatian legal history and, ultimately, by comparing the results with the contemporary situation, question their continuity and offer some lessons for current immigration problems.*

***Keywords:*** *Croatian legal history, foreigners, integration, legal position, migration policy, personal rights*

# 1. INTRODUCTION

The specific geostrategic position of Croatia within Europe appears to be an intersection of migration flows throughout history.[1] Although traditionally an emigration country, which, according to recent trends, seems to be a recurring pattern, there has been a change of perception such that the Croatian territory is no longer seen as exclusively emigrant.[2] The issue of legal immigration, of which the historical aspect is the focus of this study, has been given attention mostly in the context of the recent migration crisis (especially in terms of asylum and illegal immigrants), while, consequently, the studies of the legal status and actual position of regular immigrants have been left out.

While the system of migration control and external border protection is mostly regulated at the EU level, voluntary and regular migrations are largely left to the national jurisdiction. The problem is that through the construction of impermeable and tighter mechanisms for controlling illegal migration, the legal ones are also being increasingly constrained. The states decide independently which categories of immigrants they find beneficial and most often issue temporary residence permits with limited economic and social rights according to the labour market needs.[3] Thus, contemporary Croatian legislation approaches the matter of foreigners[4] by adopting the basic principles and standards of EU legislation.[5] A

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1 About the historical and socio-political context of migration in Croatia, see Bužinkić, E., et al., *Pregled pravnog i institucionalnog okvira za zaštitu stranaca u Hrvatskoj*, Centar za mirovne studije, Zagreb, 2013, pp. 57–58 [https://www.cms.hr/system/publication/pdf/39/Pregled_pravnog_i_institucionalnog_okvira_za_za_titu_stranaca_u_Hrvatskoj.pdf] Accessed 03.04.2019

2 According to migration statistics on the 1st January 2018 published by Eurostat, the number of Croatian emigrants still outnumbers the number of immigrants. However, compared to other EU countries, a considerable proportion (12,9%) of the resident population is foreign born, while 461 200, i.e., 11,2% of its total population are third country nationals. In 2017. Croatian citizenship was granted to 600 non-nationals outside the EU. Cf. *Migration and migrant population statistics*, [https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf] Accessed 08.04.2019. Cf. also: *Trend se mijenja, u Hrvatsku se doseljavaju stranci*, Večernji list, 11.2.2019, [https://www.vecernji.hr/premium/trend-se-mijenja-u-hrvatsku-se-doseljavaju-stranci-1300104]. Accessed 09.04.2019; *Za zapošljavanje stranaca u 2019. odobrena kvota od 65.100 dozvola*, Točka na I - Medij za biznis, 21.12.2018, [https://tockanai.hr/biznis/aktualno/zaposljavanje-stranaca-u-2019-19060/] Accessed 09.04.2019

3 Baričević, V., *Azil i imigracije: perspektiva rubnih zona unije i prava migranata*, Političke analize *Vol.* 2, No. 5, 2011, p. 31

4 Within this examination, the focus will be set only on the position of regular immigrants. Foreigners for the purpose of this study are therefore considered third country nationals, i.e., any person who is not a citizen of the EU within the context of Art. 20(1) of TFEU and who is not a person enjoying the EU right to free movement, as defined in Art. 2(5) of the Regulation (EU) 2016/399

5 The relevant documents are implemented primarily into the amendments of the *Aliens Act* (Official Gazette No 130/11, 74/13, 69/17, 46/18), which *inter alia* lay down the requirements for the entry, stay, and work of aliens in the Republic of Croatia as well as the *Croatian Citizenship Act* (Official

very comprehensive legal framework covering various segments of the legal status of foreigners can hardly be considered restrictive. However, as is the case in many other fields of Croatian legislation, when it comes to its application on a practical level, the real deficiencies of the system responsible for its implementation emerge. In order to make migratory movements beneficial to the economic and social development of the country and society, the *Migration Policy of the Republic of Croatia for the period 2013–2015* committed to ensuring the cooperation of all state offices and stakeholders in a timely and coordinated manner in order to effectively respond to potential problems of immigration.[6] Nonetheless, recent statistics and studies on the legal status and foreigners' rights on Croatian territory point to the shortcomings in the practical application of these regulations, especially in the field of social, political, and cultural rights.[7] Criticism is primarily directed against the perception of immigration as exclusively a security problem[8] and a tool for political point-scoring[9] as well as non-transparent bureaucracy.[10]

Despite the fact that the issues of the legal status of foreigners have received particular attention only in recent decades due to the dynamics of social movements at the level of the European Union, it has not been ignored in Croatian legal historiography. Taking into consideration some features of the current migration legislation in the field of private and public law through the analysis of the relevant legal sources dating from the Roman times throughout its tradition in the late Middle Ages until the formation of modern Croatia in 1990, the main objective of this contribution is to question the continuity of the legal status of foreigners and ultimately offer some lessons for current immigration problems.

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Gazette No 53/91, 70/91, 28/92, 113/93, 4/94, 130/11, 110/15) relevant for the acquisition of citizenship

6 Cf. *Migration Policy of the Republic of Croatia for the period 2013–2015* (Official Gazette No 27/2013)

7 *E.g.,* Bužinkić, *et al., op. cit.*, note 1, pp. 50–57; *Second European Union Minorities and Discrimination Survey*, [https://www.cms.hr/system/article_document/doc/487/fra-2017-eu-midis-ii-main-results_en.pdf] Accessed 08.04.2019

8 Migration is listed as one of the challenges within the framework of *The National Security Strategy of the Republic of Croatia*, which was adopted in 2017 (Official gazette No 73/2017). At the same time, an appropriate immigration policy in line with the needs of the labour market, the economic development of the country, and the increase of the integration potential of the society is considered one of its strategic objectives

9 Cf. *Zbog predrasuda stranci u Hrvatskoj teško nađu posao,* Nacional br. 1032, 18. 02. 2019, [https://www.nacional.hr/dossier-zbog-predrasuda-stranci-u-hrvatskoj-tesko-nadu-posao-2/] Accessed 09.04.2019

10 In terms of the most extensive challenges, Sajfert, who analysed the process of citizenship acquisition, pointed out the excessive duration of proceedings, noncompliance of the state officials with the prescribed administrative procedure, the margin of discretion that leads to discrimination against certain nationalities, the extensive paperwork, and the impossibility to appeal. Sajfert, J., *Naturalisation Procedures for Immigrants - Croatia*, Eudo citizenship observatory, 2013, pp. 2–7

## 2. THE ROMAN PERSPECTIVE - AN ANCIENT VIEW ON IMMIGRATION

Viewed from today's perspective of a united Europe and globalization trends, the achievements of the Roman Empire in the creation of a common identity based on Roman citizenship that went beyond local particularities appears significant. Roman citizenship not only guaranteed a special legal status and personal identity to its holders but played a unifying element in the establishment of the empire,[11] being able to "transform Gauls, Africans, Syrians into real human beings."[12] Given that *civitas* primarily implied a privileged social and legal status, it should not be equated with the concept of citizenship in its contemporary meaning. Without closer examination of the specific features immanent to different statuses or gender within Roman society, in general, the citizenship provided various rights within public and private law. In the domain of *ius publicum*, the citizen was able to vote (*ius suffragii*) and participate in the political community holding magistrate offices (*ius honorum*). It also included the right and duty of military service and exemption from arbitrary physical punishment. Within *ius privatum*, citizenship enabled engagement in commercial transactions (*ius commercium*), allowed the conclusion of a lawful marriage (*ius connubii*), and provided the right to initiate and pursue legal process (*legis actio*) and to acquire property (*ius Quiritium*). The holder also possessed the legal capacity to make a will as well as to be instituted as heir via testament (*testamenti factio activa* & *passiva*) along with powers and competences within the family (*patria potestas, manus, tutela*).[13]

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[11] In his celebration of Roman achievements, Aristides specifically highlights the citizenship as the way of sharing privileges as a unifying element and the essence for Roman hegemony. (*Aelius Aristides*, Roman oration 59–60: "But there is that which very decidedly deserves as much attention and admiration now as all the rest together. I mean your magnificent citizenship with its grand conception, because there is nothing like it in the records of all mankind. Dividing into two groups all those in your empire—and with this word I have indicated the entire civilized world—you have everywhere appointed to your citizenship, or even to kinship with you, the better part of the world's talent, courage, and leadership, while the rest you recognized as a league under your hegemony. Neither sea nor intervening continent are bars to citizenship, nor are Asia and Europe divided in their treatment here. In your empire all paths are open to all. No one worthy of rule or trust remains an alien, but a civil community of the World has been established as a Free Republic under one, the best, ruler and teacher of order; and all come together as into a common civic centre, in order to receive each man his due." *Trans. cit.* Oliver, J., H., *The Ruling Power: A Study of the Roman Empire in the Second Century after Christ through the Roman Oration of Aelius Aristides,* Transactions of the American Philosophical Society*, Vol.* 43, No. 4, 1953, p. 901)

[12] Moatti, C., *Translation, migration, and communication in the Roman Empire: three aspects of movement in history*, Classical Antiquity, *Vol.* 25, No. 1, 2006, p. 117

[13] *Cf. amplius* Sherwin-White, A., H., *The Roman Citizenship*, Part II, Ch. X, Oxford, Clarendon Press, 1939, pp. Taylor, T., S., *Social Status, Legal Status and Legal Privilege*, in: du Plessis, P., J. *et al.* (eds.), The Oxford Handbook of Roman Law and Society, 2016, p. 350

As was typical for ancient legal systems, the Romans approached foreigners through principle of personality, according to which strangers (*peregrines*) did not share the jurisdictional privileges of Roman *cives*. Unless otherwise granted by a treaty, peregrines were free persons without any rights in the spheres of public or private law. Obtained either generally through an agreement between Romans and their national community or personally, they could have been given the right to conclude a legally valid marriage or contracts. Although excluded from civil litigation, they obtained protection through the institute of *praetor peregrinus*. The most difficult position by far was held by *peregrini dediticii*, foreigners who initially opposed the Roman rule and refused to join the union peacefully but were later conquered and subordinated to the authority.

Mobility being one of the core aspects of the state, it increased considerably due to *pax Romana* at end of the Republic and the beginning of the Principate.[14] The whole Roman history is actually a tale of the gradual inclusion of foreigners in the circle of citizens, but this process has never been uniform. On the contrary, it reflected Roman economic and political interests and was based on granting privileges to those areas and foreigners that brought benefits.[15] Just as in today's society, immigrants generated mixed feelings and divided opinions. On one hand, there were prejudices depending on their origin and nationality,[16] while on the other hand, the reasons for their integration into Roman society were emphasized.[17]

14 The idea that borders are only constructions seems to exist already in the antiquity. A short *oratio* addressed by Pseudo-Aristides to an unknown emperor around the 3rd century, praises the *pax Romana* and what seems like the freedom of movement. (*Pseudo-Aristides*, *Eis Basilea* 37: "Cannot everyone go with complete freedom where he wishes? Are not all harbours everywhere in use? Are not the mountains as secure for travellers as the cities for residents? Has not fear gone everywhere? What straits are closed? Now, all humanity seems to have found true felicity!")

15 On the example of communities in Roman Histria, Milotić showed the implementation of legal duality and the twofold distribution of Roman citizenship by granting the coastal region the whole scope of privileges while leaving the population of remote inland territories in the position of *peregrini dediticii*. Milotić, I., *Legal Status of Peregrini and their Communities in Roman Histira*, in: Thür, G; Lučić, Z. (eds.), Imperium und Provinzen (Zentrale und Regionen), Pravni fakultet Univerziteta u Sarajevu, 2006, pp. 99–110

16 *E.g.* Ulpian's opinion about the origin of slaves expressed in the first book *On the Edict of the Curule Aediles* D. 21,1,31,21: "Persons who sell slaves should always state their nationality, at the time of the sale, for very frequently the place of the nativity of a slave either attracts or deters the purchaser, and hence it is to our interest to know in what country he was born; for it is presumed that some slaves are good because they are sprung from a nation which has not an evil reputation, and others are considered to be bad because they are derived from a nation which is rather disreputable than otherwise. If the origin of the slave was not mentioned, an action on this ground will be granted to the purchaser and to all those interested in the matter, by means of which the purchaser can compel a slave to be taken back."

17 Such policy was advocated by a couple of Roman statesmen; Gracchus, Caesar, Claudius, Vespasian, and Hadrian being several of the most prominent ones. Tacitus reports the arguments of Emperor Claudius presented in front of the Roman senate as to why Gauls should get access to public offices.

In order to manage the legal relations between citizens and foreigners as well as amongst foreigners themselves, Romans introduced a set of informal and flexible regulations *ius gentium*.[18] This innovative and complex approach towards foreigners exercised its influence particularly in the field of commercial transactions by reinforcing mutual trust, the absence of which would hinder their relationship. The old legal system based on formal *ius civile* and accessible only to Roman citizens had to be abandoned and merged with the new one to achieve progress and enable the integration of foreigners. The process was aided by the jurisdiction of *praetor peregrinus*, a function introduced in 242 B.C.

Individual foreigners could have been granted the legal status of *cives*, or a less favorable *ius Latii* (privileges which included *ius suffragii, ius commercii*, *ius connubii*, and the acquisition of citizenship through immigration to Rome). Individuals were able to acquire citizenship most often through services to the Roman state, military service being a key manufactory for the production of Roman citizens.[19] The citizenship could as well be granted to whole communities by assigning them a municipal status[20] or

Recalling the mistakes of Athens by not integrating foreigners into their society, he advocates the naturalization of foreigners in order to achieve economic gain. (Tacitus, *Annales* 11,24: "In my own ancestors, the eldest of whom, Clausus, a Sabine by extraction, was made simultaneously a citizen and the head of a patrician house, I find encouragement to employ the same policy in my administration, by transferring hither all true excellence, let it be found where it will. For I am not unaware that the Julii came to us from Alba, the Coruncanii from Camerium, the Porcii from Tusculum; that — not to scrutinize antiquity — members were drafted into the senate from Etruria, from Lucania, from the whole of Italy; and that finally Italy itself was extended to the Alps, in order that not individuals merely but countries and nationalities should form one body under the name of Romans. The day of stable peace at home and victory abroad came when the districts beyond the Po were admitted to citizenship, and, availing ourselves of the fact that our legions were settled throughout the globe, we added to them the stoutest of the provincials, and succoured a weary empire. Is it regretted that the Balbi crossed over from Spain and families equally distinguished from Narbonese Gaul? Their descendants remain; nor do they yield to ourselves in love for this native land of theirs. What else proved fatal to Lacedaemon and Athens, in spite of their power in arms, but their policy of holding the conquered aloof as alien-born? But the sagacity of our own founder Romulus was such that several times he fought and naturalized a people in the course of the same day! Strangers have been kings over us: the conferment of magistracies on the sons of freedmen is not the novelty which it is commonly and mistakenly thought, but a frequent practice of the old commonwealth … Now that customs, culture, and the ties of marriage have blended them with ourselves, let them bring among us their gold and their riches instead of retaining them beyond the pale!")

18 Gai. D. 1,1,9; Inst. 1,2,1

19 Cf. Sherwin-White, *op. cit*. note 13, pp. 311sqq; Balsdon, J., P., V., D., *Romans and aliens*, Duckworth, London, 1979 pp. 82–96

20 As an example of Roman municipality on the territory of modern Croatia, see Karlović, T.; Milotić, I.; Petrak, M. *Andautonia. An Example of Local Self-Government in Pannonia*, Lex localis 13, 2015, pp. 35–48. The Roman model of administration gave local populations the possibility of self-government, ensuring peace in the provinces while at the same time introducing Roman governmental structures which facilitated the Romanisation and integration of local communities in the Roman state. Balsdon, *ibid.* pp. 84

creating new colonies.[21] Except Istria, which was a part of province Italia, the majority of modern Croatian territory was a part of Illyricum, later on split into Pannonia and Dalmatia. Since the native tribes opposed the Roman rule in 6 AD in the Illyrian revolt, most of the inhabitants became *peregrini*.[22] Although the same approach is surely not applied identically in all parts of the territory, the widely accepted standpoint,[23] which Karlović elaborated on in the example of Andautonia, is that the Romanisation of provinces was conducted by granting the *municipia ius Latii* as an intermediary step for peregrine communities on their way to the acquisition of Roman citizenship through their services in local magistracies.[24] Through gradual allocation of civic rights and inclusion of most loyal foreigners into the military or regional government service rather than by invasive policy, Roman authorities managed to stimulate foreigners to accept their values and Romanisation.[25]

The differences that were gradually erased mostly throughout commercial relations between citizens and foreigners in Roman populations over the course of time received their formal confirmation through emperor Caracalla's *Constitutio Antoniniana* issued in year 212, granting Roman citizenship to all free *peregrini*.[26]

Although pragmatic and interest-oriented while assigning legal capacity, we can conclude that the Roman approach to foreigners was indeed a unique and multicultural one. It tolerated the coexistence of *cives* with national and local peculiarities of peregrine communities, introducing a dynamic set of rules via *ius gentium* for the purpose of the efficient resolution of mutual disputes.

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[21] Since *coloniae* were established by Romans, compared to *municipia*, they had privileged status, and their inhabitants were considered *cives*. Cf. Soloman, E., *Essai sur la condition juridique des étrangers dans les législations anciennes et le droit moderne*, Paris, 1844, p. XLIII

[22] For further studies on the development of Roman provinces, see: Mommsen, T. *The Provinces of the Roman Empire from Caesar to Diocletian*, *vol.* 1, Macmillan & co., London, 1909, pp. 195–251; András M., *Pannonia and Upper Moesia: A History of the Middle Danube Provinces of the Roman Empire*, Routledge & K. Paul, 1974

[23] One of the main advocates for the concept of transitional status was Saumangne. Cf. Saumagne, C., *Le droit latin et les cités romaines sous l'empire: essais critiques*, Sirey, 1965, pp. 71sqq, 79sqq. The idea that peregrine communes were not admitted to Roman citizenship directly was backed up by Sherwin-White, who pointed out that from the time of Caesar onwards, Roman privileges were commonly granted to native communities in the form of Latin rights as a "bridge-status" rather than full franchise. After an intermediate period as a *municipium Latini iuris*, communities eventually secured the status of a full Roman *municipium*. Cf. Sherwin-White, *op. cit.* note 13, pp. 337–344

[24] Karlović, T., *The Legal Status of Municipium Andautonia*, in: Thür, G; Lučić, Z. (eds.), Imperium und Provinzen (Zentrale und Regionen), Pravni fakultet Univerziteta u Sarajevu, 2006, pp. 59–61

[25] *Ibid*. p. 68

[26] The scope of this document is still being disputed today, but the generally accepted opinion is that it excluded *peregrini dediticii*. *Cf.* Sherwin-White, *op. cit.* note 13, p. 380 with instructions on further literature

## 3. THE POSITION OF FOREIGNERS IN THE MEDIEVAL STATUTES ON THE EXAMPLE OF DALMATIAN MUNICIPALITIES

A very concrete approach to the question of the legal position of foreigners in the ancient Roman Empire encourages us to assume that medieval legal sources, due to the dynamics of social movements in the Middle Ages, were probably even more concerned with this legal issue. Through the analysis of the late medieval legal sources (12–14$^{th}$ century), this chapter is dedicated to the reconstruction of the legal framework of foreigners' protection. A special emphasis will be put on the status issues, the questions of civil litigation, and the protection of foreigners' political rights, to the extent possible within the observed period, as well as some economic issues which, when analysed, prove that according to mediaeval sources, the legal position of foreigners varied depending on whether the municipality gained some significant benefit from the settlements of foreign individuals or not.

Even at first glance, Croatian mediaeval law is characterized by the inequality of legal sources related to certain legal issues.[27] Regarding the regulation of foreigners, some of its sources, mainly municipal town statutes, devoted more attention to it, while others referred to them only indirectly and casuistically depending on whether they were exposed to it in practice. Therefore, the analysis of individual issues related to the legal position of foreigners will be oriented exclusively to those statutory regulations which, in their content, foresee a special position for foreigners by respecting certain restrictions or, in some rare cases, by adding guarantees aimed at creating a favourable atmosphere for their settlement within the commune. Despite the fact that the medieval communes stimulated economic and cultural activity through their interaction or communication with foreigners, the normative role of the statutory provisions describing the position of foreigners was directed towards the achievement of the isolation of the city commune and thereby the protection of the position of the domestic population.

Describing the marginal position of foreigners in the social structure of Dalmatian communes during the Middle Ages, Raukar lists two categories of foreigners with

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[27] At the end of the 16$^{th}$ century, the name of Croatia included the medieval Slavonia area, where significant influence of Hungarian law was observed when regulating certain private law relations. On the other hand, the areas of Istria and Dalmatia were marked by the relevance of the statutory law, which was primarily aligned with the interests of the Republic of Venice, while the Republic of Dubrovnik, thanks to its autonomous status over a period of several centuries, managed to establish a recognizable legal system known in legal history as a statutory right of the medieval Dubrovnik municipality. Beuc, I., *Povijest država i prava na području SFRJ*, Narodne Novine, Zagreb, 1989, p. 19 and 208; Kasap, J, *Legal Regulation of the Borrowing Institute in Medieval Croatian Statutory Law*, Pravni vjesnik Pravnog fakulteta u Osijeku, *Vol.* 32, No. 1, 2016, pp. 77–78

whom the authorities of individual Dalmatian municipalities met within their work. The first group, to which attention will be given below, are *the forenses* that fit into the framework of the social and economic development of the commune and who, accordingly, had the opportunity to acquire the status of the commune citizens under certain conditions. The second group, which Raukar calls *the viatores,* consisted of travellers, pilgrims without the intention of permanent retention and thus the acquisition of civic status and related rights.[28]

### 3.1. The concept of a foreigner and their ability to acquire citizenship status in medieval Dalmatian communes

With very careful interpretation and comparison of certain urban legal codes, it can be concluded that the concept of a foreigner in the statutory provisions of Dalmatian cities is determined by several criteria that appear in the urban statutes with different frequencies. These are, first of all, the length of stay in the commune, the extent of obligations the foreigner contributed to the commune, and the ownership of real estate in the municipality that is taken into account as a purpose of the permanent retention of foreigners or their settlement in the commune. According to the ruling opinion in the domestic literature, a foreigner was considered anyone who was not related to the commune by birth and domicile.[29]

In the following, the analysis of some criteria will begin with the statutes of the southern Dalmatian city and island communes which, because of their geographic position or political and economic power, were often a refuge for strangers. Due to the systematic processing, the regulation of the topic from the title below will be divided into two legal circles, those of Dubrovnik and Split, the affiliation of which depends mostly on the geographical vicinity of the small island communes.

[28] According to the definition contained in the statutory law, a *forensis* is any person born outside the city and its district which is not a subject to the municipal jurisdiction. See L, II, c. 80 The Statute of Šibenik, in: Grubišić, S., (ed.), *Knjiga statuta, zakona i reformacija grada* Šibenika, Muzej grada Šibenika, Šibenik, 1982 and L, V, c. 30. The Statute of Zadar in: Kolanović, J.; Križman, M. (eds.), *Statuta Iadertina*, Zadarski statut sa svojim reformacijama odnosno novim uredbama donesenima do godine 1563, Zadar 1997. The term *forensis* is most often used in the statutes of the Dalmatian communes to designate the term foreigner, while the term *exstraneus* was only exceptionally used to denote the same term. Cf. Birin, A., *Pravni položaj stranaca u statutima dalmatinskih komuna*, Zbornik - Odsjeka za povijesne znanosti Zavoda za povijesne i društvene znanosti Hrvatske akademije znanosti i umjetnosti (1330–7134) *Vol.* 20, 2002, p. 67; Raukar, T., *Komunalna društva u Dalmaciji u XIV. Stoljeću*, Historijski zbornik, *Vol.* 33–34, Zagreb, 1980-1981, p. 192; Raukar, T., *Cives, habitatores, forenses u srednjovjekovnim dalmatinskim gradovima Historijski zbornik*, *Vol.* 29–30, Zagreb, 1976–1977, pp. 139–149

[29] See more in: Radić, Ž, Ratković, I., *Položaj stranca u splitskom statutarnom pravu*, Adrias: Zbornik radova Zavoda za znanstveni i umjetnički rad Hrvatske akademije znanosti i umjetnosti u Splitu No. 12, 2005, p. 196 and related literature in the note No. 26

Thus, in the following section, we will be dealing with the statutes of the islands of Korčula, Lastovo, and Mljet as well as Ston, while in the wider area of the Split municipality, we are referring to the legal regulation present in the statutes of the islands of Hvar and Brač and the town of Trogir.[30]

Although the Statute of the City of Dubrovnik contains a wealth of information on the position of foreigners, the criteria defining the status of foreigners are left out, and it can be concluded that a multitude of individual provisions regulating the relations of Dubrovnik with the inhabitants of neighbouring municipalities define a foreigner simply as a non-citizen of Dubrovnik.[31] The same is true of the definition of the position of a foreigner provided for in the provisions of the Korčula and Mljet Statutes.[32] The aforementioned statutes did not foresee a special procedure for foreigners to obtain the status of full citizenship. On the other hand, the circumstance of ownership of real estate within the commune has been pointed out on the island of Korčula.[33]

The Statute of Split regulates the legal status of foreigners extensively. The statutory provisions refer to multiple aspects of their legal position, and the regulation of a special procedure of acquiring the right of full citizenship demonstrates the openness of the city towards social immigration. Terminologically, the statute refers to two categories of foreigners depending on the length of their stay in the city. Thus, the *habitator* signified the transitional level between the foreigner (*forensis*) and the citizen (*civis*).[34] Citizenship was acquired by foreigners in a special procedure be-

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30 About divisions in legal areas see more in: Kasap, *op. cit.* note 27, p. 77–78

31 See the provisions of the Statute Vol III, Ch: LI- LVII, in: Šoljić, A. *et al.* (eds.), *Statut grada Dubrovnika, sastavljen 1272. godine*, Državni arhiv u Dubrovniku, Dubrovnik, 2002. Numerous data based on insights into the archives of the City Council of Dubrovnik, related to the social and demographic structure of the foreign population, can be seen in a very detailed article: Janeković Römer, Z., *Stranac u srednjovjekovnom Dubrovniku: između prihvaćenosti i odbačenosti*, Radovi Zavoda za hrvatsku povijest Filozofskoga fakulteta Sveučilišta u Zagrebu, *Vol.* 26 No. 1, 1993, pp. 27-38

32 The Korčula Statute refers to foreigners as to persons from other municipalities. Cf. Šeparović, Z. (ed.), *Korčulanski statut, Statut grada i otoka Korčule iz 1214. godine*, Književni krug, Split, 1987. Confirmation and annex to the statutory provisions of the city and the island of Korčula, Ch XLVI. On the same issue, the New Statute Booklet, Chapter LII, A foreigner is defined as *"homo extraneus de alia pruincia."* Reformation of the Statute of Korčula Commune in Ch. CLXII extends the status of citizens of the commune to all foreigners living in the commune area and who are in the position of real estate there. The statute of Mljet does not define foreigners, but since the Statute of Korčula regulated legal relations for Mljet for some time, it can be concluded the situation on this issue was the same. Marinović, A., Veselić, I. (ed.), Mljetski statut, Statut otoka Mljeta iz 1345. Godine, 1. Izdanje, Književni krug, Split-Dubrovnik, 2002

33 Šeparović, *op. cit.* note 32, The book of Reformations, Ch. 162

34 In that sense, according to the provisions of the Split Statute, the *habitator* had all the rights and duties as well as the citizen of the city, except being able to participate in political affairs. A foreigner acquired the status of a habitat after having lived in the city for more than six months. He had an obligation to

fore the Grand Chamber, where they swore to obey the communal government's orders as well as their personal and property contribution to the commune with a special condition of permanent residence in the city.[35] Unlike the Split Statute, the statute of Trogir omitted to regulate the standardization of the status of a citizen as well to include a special procedure for enabling this possibility for foreigners.[36] The Statutes of the island of Brač and Hvar do not contain provisions that would specifically regulate the process of acquiring citizenship, although by extensive interpretation of a provision of the Brač Statute, it is possible to conclude that the adoption of the citizenship depended on both the approval of the governor and the decision of the council members.[37] It is thus clear that the island communes, due to the limited resources and the basic needs of their population, tried to limit the settlement of foreigners. This is also supported by the fact that there was a general mistrust towards foreigners as expressed in the provisions of the statute.[38]

The statutes of the northern Dalmatian municipalities of Zadar and Šibenik were significantly more open to foreigners. Contrary to the aforementioned ones, these communes made it possible to obtain certain guarantees to facilitate the permanent settlement of foreigners in their area, encouraging their entire families, not just individuals. Thus, for example, the Zadar Statute exempts foreigners from paying municipal obligations on condition of permanent settlement in the city.[39] Both statutes provide for a special procedure that allowed foreigners to acquire the

participate in free public works and givings as other citizens of the commune. See: Cvitanić, A.(ed.), Statut grada Splita, Statuta civitatis Spalati, II. Dotjerano izdanje, Književni krug, Split, 1987., New Statute, Chapter VIII

35 Cvitanić, *op. cit.* note 34, Vol. VI, Ch. I and II

36 The Statute of Dubrovnik is not the only statute that does not contain the definition of a foreigner. Although some of the provisions of the Statute regulate the legal position of foreigners in Trogir, foreigners were persons who were not citizens of the commune and were, in legal terms, discouraged. Berket, M.; Cvitanić, A.; Gligo, V. (eds.), Statut grada Trogira, Statuta et refomationes cicitatis Traguirii, Književni krug, Split, 1988., See: Word Interpreter, *Forenses*, *extraneus*, p. 830

37 Cvitanić, A. (ed.), Brački statut, Drugo prošireno dopunjeno i dotjerano izdanje, Književni krug, Split, 2006, II. The book of reformations, XV

38 Foreigners were perceived as people of evil intentions and the poor performance that came with the intent of destruction and theft of property. Cvitanić, *op. cit,* note 37, The book of reformations Vol III, Ch. IX

39 The foreigner was released from the obligation for a period of five years, except for the acquisition of real estate in the city where the period of release lasted for 10 years; Kolanović, J.; Križman, M. (eds.), *Statuta Iadertina, Zadarski statut sa svojim reformacijama odnosno novim uredbama donesenima do godine 1563, Zadar 1997,* Title IX, Book V, ch. 34 and 35; The provision refers to the economic development of Zadar in relation to other Dalmatian communes, e.g. Split; Raukar, T., *Cives, habitatores, forenses u srednjovjekovnim dalmatinskim gradovima*, Historijski zbornik, *Vol.* 29–30, Zagreb, 1976–1977, p. 143. The same is provided for in the provisions of the Pag Statute, in which the exemption from payment of "any sort of pressure" is for a period of 10 years. Čepulo, D. (ed.), Statut Paške općine, *Statuta Communitatis Pagi*, Pag, Zagreb, 2011, *Vol* I, Ch. 15

status of citizens, which, apart from the vote of the majority, did not significantly differ from those mentioned in the provisions of the Split Statute.[40]

Ultimately, the analysis of the particular provisions of the Dalmatian statutes shows that all sources, to greater or lesser extent, regulated the problem of foreigners and their settlement in the municipality. While only a few of them foresaw guarantees to newcomers trying to provide them with a favourable climate for permanent residence, other communes, such as islands, due to the lack of resources and social and cultural isolation, sought to limit such a stay and permanent settling down. However, despite the content of the analysed statutory provisions, an attempt will be made to determine whether the mentioned limits were really carried out without exception or whether the communes provided exceptions of their restrictive policy in the case of beneficial economic interests.

### 3.2. The legal position of foreigners in the statutory provisions

The legal position of foreigners in the observed sources will be examined from different perspectives: primarily, in the public law domain in terms of the scope of political rights, if they can be recognized in the provisions of certain sources, as well as in the domain of private law with regard to the aspect of property and the procedural position in civil and criminal lawsuits. Before individual analysis of these issues, it is important to note that the fundamental regulator of the legal position of foreigners in Dalmatian communes is the principle of reciprocity.[41] Even before the statutory norms, the towns tried to resolve the relations with foreigners through this principle, which is evident in the bilateral agreements quoted by Birin.[42] The Dubrovnik Statute provides, therefore, for a special regulation of relations between Dubrovnik and the inhabitants of neighbouring municipalities according to the customs of the third book of the Statute.[43] The application of

[40] While in Split and Zadar, it was necessary to have a decision of the regular majority for citizenship; a two-thirds majority of council members was required in Šibenik. Kolanović *et al., op. cit,* note 39, The Statute of Zadar V, 35; Grubišić, *op. cit.* note 28, The Statute of Šibenik II, 80 and 81

[41] Šeparović, *op. cit.*, note 32, Ch 14 of the old edition and Ch 62 of the new edition of the Statute of Korčula. The principle of reciprocity is also referred to by the Statute of Split in fiscal matters (see: Cvitanić, op. *cit. note* 34, Cvitanić, *op. cit.*, note 34, The Statute of Split, III, 49–57, VI, 8; the book of reformations, 76), Cvitanić, *op. cit,.* note 37, The Statute of Brač, II, IX and the Statute of Hvar II, XXXXV, Berket *et. al, op. cit.* note 36, Berket, *et. al,* op. cit. note 36, The Statute of Trogir I, 21, Grubišić, *op. cit.* note 28, The Statute of Šibenik II, 8, Kolanović, *et. al., op. cit.,* note 39, The Statute of Zadar, II, 8

[42] The author cites a contract between Dubrovnik and Molfetta from 1148; between Pisa, Dubrovnik, and Split from 1169, and between Ancona and Trogir from 1236. Birin, *op. cit.,* note 28, p. 68

[43] The third book in chapters LI–LIII Regulates the relations of Dubrovnik with the inhabitants of the Hum Principality, Bosna, Raška, and Zeta, as well as the inhabitants of the towns of Upper Dalmatia and the other Slavs.

the principle of reciprocity in places where individual regulation is missing was the only possible criterion for regulating mutual relations in cases where common higher hierarchical power was non-existent.[44]

There are few statutory provisions referring to the position of foreigners in terms of their political rights. To a greater extent, political rights can only be determined by the interpretation of provisions on the conditions for the choice of holders of certain administrative functions in the Dalmatian communes. According to the research conducted in the legal literature almost without exception, the possibility of participation in municipal services was related to the citizenship of the municipality.[45] Some exceptions were foreseen but only for cases involving city officials most often engaged in activities required by the communes, such as physicians, and there were no citizens who, due to the lack of the competence of the service concerned, could accept it.[46]

All the aforementioned about the status of foreigners in the Dalmatian communes becomes more apparent if we look at the foreigners' ownership rights. A large number of provisions that have been standardized by the legal interaction of foreigners and citizens of the municipality included a limitation of the irrelevant relations between the citizens of the municipality. They are limited and exhaustive and cannot be fully presented in the context of this research, but some of them clearly point to the role of foreigners in the economic development of the medieval city and are therefore mentioned below. In particular, we are going to refer to the possibility of acquiring real estate or valuable movables with a special note that the above-mentioned issues were the objects of scientific research numerous times. Thus, we are going to try to present the most important conclusions drawn from a very rich analysis. Under this criterion, legal sources can be categorized into exceptional ones, those which *expressis verbis* did not foresee restrictions on

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[44] Cvitanić, A., *Iz dalmatinske pravne povijesti*, Književni krug, Split, 2002, p. 648

[45] Grubišić, *op. cit.*, note 28, The Statute of Šibenik II, 82; Cvitanić, *op. cit.*, note 34, The book of reformations II, vol. 21, ch 11
Most sources do not explicitly regulate the issue of participation in the performance of utility services, but the provisions on the manner in which city councillors or civil servants were chosen do not leave room for doubt. See for example: Čepulo, *op. cit.*, note 39, The Statute of the Municipality of Pag, I, 23, The Statute of Lastovo, Chapter 49. Special attention is required to regulate the statutes of certain municipalities that were under Venetian supremacy during the observed period. These municipalities foresaw the possibility that most communal functions are performed by Venetian representatives. But, they were not considered foreigners in terms of *forenses*. See: The Statute of Rab Municipality, V, II. Margetić, L.; Strčić, P., *Statut rapske komune iz 14. stoljeća = [Statut communis Arbae]*, *Adamić, Rab, Grad Rab*; Rijeka, 2004. The Statute of Hvar, I, 27. Cvitanić, A., (ed.), *Hvarski statut, Statuta Communitatis Lesinae,* Književni krug Split, 1991

[46] See more in: Birin, *op. cit.,* note 28, pp. 83–84

the ability to acquire assets to foreigners and those which explicitly prohibited or restricted such possibility, i.e., in extremely unfavourable conditions.

The Dubrovnik Statute does not refer to this issue, and it could be concluded that there were no restrictions on the acquisition of real estate. This is also supported by a very clear provision of the statute that entitles all foreigners whose property was sold or disposed of during their stay outside the city to file a complaint within two years of the conclusion of a legal transaction so as to return the property to its possession.[47] The statutes of islands that were under the jurisdiction of the Dubrovnik legal circuit referred to this issue differently. As the Lastovo Statute maintains the views of the Dubrovnik commune in terms of legal regulation since it was under its authority for a certain period of time, in order to comprehend these issues, we are going to refer to Provision 37 of the Statute, which explicitly forbids the acquisition of property to all but the citizens of the island.[48] The Korčula Statute, on the other hand, allows foreigners the possibility to acquire real estate.[49] However, according to the ruling opinion in the reference legal literature, this provision was subsequently amended, and foreigners were prohibited from owning the existing (with the right to sell) and acquiring new real estate on the island.[50]

The statutes that we have previously classified under the Split legal circle refer to this matter differently. The Split Statute does not forbid the acquisition of real estate, but in terms of foreigners, this possibility is significantly restricted by the compulsory approval of the Grand Council.[51] The Statutes of the islands of Brač and Hvar stipulate restrictions on the sale of island real estate to foreigners by the Grand Chamber's consent but also by the islanders' right of pre-emption.[52] Radić pointed out that the Trogir Statute recognized the ban on acquiring real estate by foreigners but only in its later edition.[53] It seems that the ban did not exist before,

47 Šoljić, *et al.*, *op. cit.*, note 31, Book 8, LXXII

48 The Statute of Lastovo, ch 37. Later, in the year 1486, the Dubrovnik Chamber supplemented this provision by defining null and void all legal affairs that had permanently and temporarily alienated real estate. See ch. 87 of the statute. Lastovski statut, (ed. Cvitanić, A.), Književni krug, Split, 1994. The same provision is also contained in the Mljet Statute, ch. 30. Marinović; Veselić, *op. cit.*, note 32

49 Šeparović, *op. cit.,* note 32, The book of reformations, ch CXCIV. Attention is drawn to the part of the provision which obliges all foreigners who own the real estate on the island to contribute to all communal charges

50 Šeparović, *op. cit.* note 32, The book of reformations, ch CII. For more details: Radić; Ratković,, *op. cit*, note 29, p. 216 with attention to the note 146

51 Cvitanić, *op. cit.,* note 34, The Statute of Split, I, 21

52 Cvitanić, *op. cit.*, note 37, The Statute of Brač, The book of reformations Vol. I, 79

53 Radić; Ratković, *op. cit.,* note 29, p. 215

and the later adopted provisions of the statute testify that it was often neglected in practice.[54]

The statutes of the northern municipalities explicitly ban the possibility of acquiring real estate to foreigners, even when the legal basis for the acquisition is based on inheritance or legacy.[55] The statute of Pag excludes the possibility of acquiring real estate property to foreigners irrespective of the acquisition basis.[56] This provision did not seem to apply to foreigners whose intention was to permanently settle on the island. It is similarly stated in the provision of the Zadar statute.[57] The preemption right of the citizens of Pag in the case of sale of real estate, but also the possibility of redeeming a property already sold to foreigners, is another provision that discriminates against foreigners in terms of real estate acquisition and limits the possibility of property gains in their favour.[58]

The position of foreigners in medieval law in virtually all of the quoted sources reflects the actual relationship of the commune to that category of individuals. It is difficult to find a common link in a number of sources as all refer to cases that have marked the jurisprudence of individual municipalities, but it can be argued that deviations from the ordinary court procedure in most cases did not favour the interests of foreigners.

Rules on the implementation of an urgent procedure in the case of legal disputes of foreigners, which are most clearly defined in the Split Statute, are outlined since, in addition to Dubrovnik, Split was the most important trade centre for exchange with other communes. But, we have to see how a special, i.e., urgent procedure without procedural formalities, as well as litigation on otherwise-non-working days, marks the special position of foreigners in almost all of the Dalmatian communes whose earlier statutes have been referred to.

The oath of the governor's deputy in the provisions of the Dubrovnik Statute also includes the obligation to hold litigation on Sunday in disputes of foreigners and islanders and peasants who lived outside the city and were under the jurisdiction of Dubrovnik.[59] As the island of Korčula belongs to the same legal circle, it is not surprising that the shortening of the procedure was foreseen in the provisions of the

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[54] Berket, *et. al, op. cit.,* note 36, The Statute of Trogir, IV, 45, The book of reformations *Vol.* I, 17 (1369); I, 62 (1390)

[55] Grubišić, *op. cit.*, note 28, The Statute of Šibenik, IV, 45

[56] Čepulo, *op. cit.,* note 39, The Statute of the Municipality of Pag, IV, 31

[57] Kolanović, *et al, op. cit.,* note 39, The Statute of Zadar, III, 17, and V, 34

[58] Čepulo, *op. cit.,* note 39, The Statute of the Municipality of Pag, III, 42

[59] Šoljić, *et al, op. cit.,* note 31, 8, I

Korčula Statute.[60] In medieval Split, litigation of foreigners was enabled in an urgent procedure, and on those days in which it was not allowed for the citizens of Split, i.e., "on holiday and non-holiday days [...] without any delay and procrastination".[61] It is similarly provided for in the content of the Zadar Statute, although the provision is more specific concerning the nature of the procedure. An urgent procedure is foreseen only in cases of dispute between foreigners and citizens of Zadar and foreigners if a dispute arises during travel in regard to movable property while respecting the provisions of the statute of such disputes.[62] In the context of the protection of property rights of foreigners, there is a noticeable provision of the Trogir Statute, which obliged citizens on the payment of claims, i.e., goods to foreigners without delay and payment of fines to the municipality if the deferral occurred.[63] A provision of similar content cannot be established in the content of other sources.

Undoubtedly, the above-mentioned provisions, apart from encouraging foreign trade, sought to enable their urgent departure from the city. Therefore, when it comes to their real purpose, it can be concluded that the same principle privileged the position of foreigners, but they were indeed protecting the economic interests of the municipality.

Even more decisively, the communes secured their public order against the negative influences of foreigners by criminal law provisions that deviated from the institutes or procedures prescribed to the citizens. There are a number of cases in which the position of the foreign population was evidently unfavourable, which is particularly highlighted in the following cases. Thus, communes have given their citizens special self-help rights when dealing with foreigners who committed any kind of offense, personal or property, or have entered the commune with criminal intent.[64] For citizens who acted in the aforementioned manner, there were fore-

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60 In the event of a dispute with foreigners, the islanders were obliged to respond immediately or as soon as possible at least two days after filing a lawsuit if the foreigner stayed for a long time on the island. Šeparović, *op. cit.* note 32, ch. 32 of the old edition, and ch. 35 of the new editions. It is obvious that a shortened procedure was possible in commercial but also in other obligatory business. See more about the peculiarities of the shortened procedure in some Dalmatian communes in: Radić; Ratković, *op. cit.*, note 29, p. 211, note 126

61 Birin, *op. cit.*, note 28, p. 69; Cvitanić, *op. cit.*, note 34, I, 5 and III, 5

62 Kolanović, *et al.*, *op. cit.,* note 39, The Statute of Zadar, Reformations, 78

63 Berket, *et al., op. cit.*, note 36, The Statute of Trogir, II, 48. Birin states that similar regulation is also represented other statutes, although in some cases it is standardized as a down payment, i.e. bail indicating validity of a concluded legal business. Kolanović, *et al.*, *op. cit.,* note 39, The Statute of Zadar, III, 25-26; Cvitanić, *op. cit.* note 34, III, 96; Šoljić, *et al.*, *op. cit.*, note 31, 8,17; Šeparović, *op. cit.*, note 32, ch 38 of the old edition, ch. 35 of the new edition, Birin, *op. cit.*, note 28, pp. 70-71

64 This issue is referred to in details in The provisions of the Split Statute, IV, 32 (Cvitanić, *op. cit.,* note 34) and of the Reformations, ch. 99 and the provisions of the Trogir Statute, II, 10 (Berket, *et al., op. cit.*, note 36) The provisions differ depending on the modalities of the offense and the way of proving

seen the exclusions of unlawfulness for the consequences caused. Furthermore, the possibility of deviating from the usual method of punishment for foreigners and arbitrariness when measuring the amount of compensation in case of injuries is another factor contributing to the claim on the marginalized position of foreigners in the Dalmatian communes.[65] The most southern communes were most reactive to foreigners, while the statutory deviations in the statutes of northern municipalities in the case of offenses caused by foreigners were conditioned by special evidentiary procedure.[66] However, the cause of differences in the provision of certain sources must also be sought in the period from which the statutes of the northern municipalities are given. Obviously, with the passing of time, the negative attitudes toward foreigners were mitigated by the interests the municipality had regarding their stay in the city. It was no wonder, therefore, that there was a greater tolerance when determining their legal position.

## 4. LEGAL STATUS OF FOREIGNERS IN CROATIA AND SLAVONIA FROM THE MIDDLE AGES TO 1848

In the feudal period in the Kingdom of Croatia and Slavonia, there was a distinction between the domestic people (state members) and foreigners, and so was the case in the rest of the Hungarian-Croatian Kingdom.[67] Thus, Venetians, French and Austrians were considered foreigners, as were Hungarians regarding the use of autonomous Croatian-Slavic rights. Namely, this distinction was due to the special position of the Kingdom of Croatia and Slavonia within the countries of the Hungarian Crown and the Croatian-Hungarian Kingdom.[68]

the injury, but in both cases the intent is the same. The Statutes of the Northern Communes also refer to this issue. For more information see: Kolanović, *et. al.*, *op. cit.,* note 39, Zadar Statute, V, ch. 11, and Grubišić, *op. cit.* note 28, Šibenik Statute VI, 96. A very detailed explanation of certain provisions can be seen in: Radić; Ratković, *op. cit.,* note 29, pp. 221-222

65 About arbitrariness when setting the sentence see in more details the Provisions of Split Statute (Cvitanić, *op. cit.,* note 34, IV, 43) and Trogir Statute (Berket, *et. al.*, *op. cit.* note 36, II, 7, II, 49)

66 Šoljić, *et al.*, *op. cit.*, note 31, IV, 33 which implies the nose cut of the maid who received a foreigner in the house. Or the provision of the Lastovo Statute in ch. 110 which limited the residence of foreigners to the island area for a maximum period of 10 days. Radić; Ratković, *op. cit.* note 29, p. 222. When it comes to the statutes of the northern municipalities, The Statute of Rab for the commission of crimes (theft) against foreigners foresees an equally rigorous procedure as in other cases and the application of the principle of reciprocity which is excluded in criminal proceedings against foreigners in the southernmost communes. The Statute of Rab, IV, 44 and 47 The Pag Statute do not even contain provisions on the different punishment of aliens. Margetić, *et al.*, *op. cit.*, note 45, The Statute of Rab, IV, 44 and 47. The Staute of Pag does not contain provisions on the different punishment of foreigners

67 Kosnica, I., *Državljanstvo i Opći građanski zakonik u Kraljevini Hrvatskoj i Slavoniji od 1853. do 1879.*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 63, No. 5-6, 2013, p. 1145

68 Kosnica, I., *Gubitak državljanstva u Hrvatskoj i Slavoniji od Bachovog apsolutizma do raspada Monarhije*, Pravni vjesnik, *Vol.* 29, No. 3-4, 2013, p. 62

In the Croatian-Hungarian Kingdom, the citizenship was one and unique, and so all the members of the Kingdom of Hungary and of the Kingdom of Croatia and Slavonia were considered citizens of one such state (*indigenae*). On the other hand, foreigners (*alienigenae, peregrini*)[69] stood in front of the Hungarian-Croat nationals. Therefore, foreigners were all those who were not citizens of the Hungarian-Croatian Kingdom but who were newcomers (*advenae)* in this area for a long time or were only passing through (*transeuntes*). If they resided abroad and had possessions in the area of the Hungarian-Croatian Kingdom or came to perform certain business activities, then they were called (*forenses*).[70]

The Hungarian-Croatian laws at that time did not recognize foreigners as citizens of the Kingdom despite having illegally owned real estate in the area, performed public services, enjoyed church privileges (donations), or dealt with crafts and trades. Hence, even a longer period of regular stay in the territory of the Kingdom of Hungary could not replace the acquisition of citizenship.[71] Accordingly, all citizens of the Kingdom of Hungary who stayed in this area were considered to be citizens in the broad sense of the word. Thus, Greeks, Armenians, and Serbs were granted the right to trade freely since they were considered to be permanent citizens (*incolae*), i.e., citizens and not *advenae*.

Considering all the above, it can be stated that, under the law, foreigners could not obtain the noble title of the Kingdom of Hungary, perform public services, or have the right to act on state affairs; furthermore, they could not receive church donations (jobs), own real estate, or freely deal with crafts or trades. The aforementioned rights were only the rights or privileges of the citizens.[72]

In spite of the above-mentioned prohibitions regarding the acquisition of certain national privileges, there were certain exceptions. Namely, the foreigners had the right to perform mining and military service even though the advantage was given to citizens in this matter. Similarly, in terms of trade, the principle of reciprocity was, in relation to other countries, respecting the concluded international treaties and allowing foreigners to participate in public fairs.[73]

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[69] Lanović, M., *Privatno pravo Tripartita za nastavne potrebe Pravničkog fakulteta*, Tipografija d.d., Zagreb, 1929, p. 141

[70] *Ibid*. p. 142

[71] *Ibid.* p. 144

[72] *Ibid*. More on acquisition of citizenship by dividing citizens and citizens' rights see in: Dabinović, A., *Statutarno pravo grada Zagreba,* Mjesečnik: glasilo hrvatskoga pravničkoga družtva, No. 1–2, Zagreb, 1943, pp. 1–14

[73] Lanović*, op. cit.* note 69, p. 144

However, regarding the acquisition of real estate by foreigners, the legal provisions were much stricter. Thus, every citizen could simply buy an estate from a foreigner, while in respect of the realization of the pledged right, it was sufficient for him to lay down the amount paid without taking into consideration any other deals among negotiating parties. In addition, citizens also had the pre-emption right concerning the city real estate. Consequently, in order for foreigners to be completely excluded from property rights, it was stipulated that foreigners could not buy the debts (bonds) of Hungarian-Croatian citizens.[74]

## 5. LEGAL STATUS OF FOREIGNERS IN CROATIA AND SLAVONIA FROM 1848 TO 1918

At the end of the 18th century, after the American and French Revolutions, a radical change in the position of foreigners came about on the basis of the idea of the equality of all people, improving the legal status of the citizens in the countries where they did not have citizenship.[75] The revolution in 1848 created the preconditions for introducing modern citizenship. Thus, with the introduction of the Octroyed Constitution of March 4, 1849, an Austrian citizenship for the entire monarchy was established in Croatia and Slavonia.[76] However, as this Constitution was not of a long term and there was a certain legal void, the authorities decided to extend the *Austrian General Civil Code* (hereinafter GCC), which entered into force on 1 May 1853[77] to the countries of the Hungarian Crown, which also included Croatia and Slavonia. The GCC should have been equally applied to all citizens as a 'general' rule, and full enjoyment of civil rights was allowed only to nationals.[78] However, this provision was limited by the content of the provision in Art. 33 of the GCC, according to which foreigners were in an equal positions with citizens regarding civil rights and obligations, in a parental position with nationals but conditioned by reciprocity. Consequently, it was stipulated that if the state of a foreigner would restrict the rights of foreigners vis-à-vis their own nationals, then the same would apply in these areas. For example, Turkish citizens were not able to acquire property on the real estate in this area because the foreigners were excluded from that right in Turkey. Accordingly, a foreigner could acquire real

[74] *Ibid.* p. 145

[75] Krbek, I., *Pravo javne uprave FNRJ (Osnovna pitanja i prava građana)*, Birozavod, Zagreb, 1960, p. 237

[76] Kosnica, I., *Utvrđivanje državljanstva u Hrvatskoj i Slavoniji 1849.-1880.,* Zbornik radova Pravnog fakulteta u Splitu, *Vol.* 51, No. 3, 2014, p. 699

[77] Vuković M., *Opći građanski zakonik s novelama i ostalim naknadnim propisima*, Školska knjiga, Zagreb, 1955, p. V

[78] See article 28 of the General Civil Code. Derenčin, M., *Tumač k obćemu austrijskomu gradjanskomu zakoniku*, knjiga I., Nakladom Sveučilišne knjižare Albrechta i Fiedlera, Zagreb, 1880, p. 190

estate property in this area, be entitled to inheritance, sue a citizen or a foreigner at a 'domestic' court, enjoy the same rights as citizens in bankruptcy proceedings, and freely deal with crafts and trade.[79]

Legal and business abilities of foreigners were generally judged on the basis of the law of the country a foreigner belonged to or was a citizen of, taking into account two criteria — residence and birth.[80] There were also exceptions of the above-mentioned rules in the following cases: the provisions of the GCC relating to the prohibition of slavery, polygamy, the so-called institution of civil deaths, limitations of legal capacity with regard to religion, etc. Thus, in these cases that we have not mentioned as exceptions, the legal and business capacity of foreigners was judged according to the laws of the state they were a member of. [81]

Concerning the conclusion of the contract, the GCC provides two situations depending on whether a foreigner made a contract in this country or abroad (either with a foreigner or a citizen). Thus, in the first case, Art. 35 of the GCC stipulates that if a foreigner signs a contract in this country, and binds himself to the agreement, the validity of the contract will be judged either under this law or the law of the country he is a citizen of. Hence, it all depends on which of these laws this agreement is valid upon.[82] On the other hand, if a foreigner entered into a double-sided binding agreement with a national in this country, the provisions of this code would apply with regard to the interpretation of the rights and obligations of the parties. Likewise, the provisions of this code would apply even if a foreigner enters into a double-sided contract with another party in this country unless the parties, at the conclusion of the contract, expressed the will to apply another law (the parties could choose between the laws of the place where they settled the contract and the place where the contract must be completed).[83] In the second case, that is, if a foreigner concluded an agreement abroad, irrespective of whether the agreement was concluded with another foreigner or a national citizen, the provisions of the law of the place where the contract was concluded would be applied unless the parties agreed to apply the law of another place.[84]

Apart from the GCC, the legal position of foreigners was regulated by the Law on the Establishment of Municipalities in the Kingdom of Croatia and Slavonia of 1881 and 1895, which stipulated that foreigners were entitled to demand that the

[79] See Art. 33 of the GCC. *Ibid*. p. 207
[80] See Art. 34 of the GCC. *Ibid*. p. 210
[81] *Ibid*. pp. 212-214
[82] Art. 35 GCC. *Ibid*. pp. 214–215
[83] Art. 36 GCC. *Ibid.* p. 215
[84] Art. 37 of the GCC. *Ibid*. p. 217

city area protect them and their property that was located in the city area and to allow them to use city bureaus. They were also obliged to bear municipal expenses fairly.[85]

## 6. LEGAL POSITION OF FOREIGNERS FROM 1918 TO 1990

After the founding of the Kingdom of Serbs, Croats and Slovenes (hereafter KSCS) in 1918, the issue of regulating the legal status of foreigners was mainly based on numerous laws and regulations, many of which came from the middle of the 19th century, and the peace treaties and intergovernmental treaties concluded by the Kingdom with neighbouring countries. Namely, at the beginning of existence, the Kingdom of Serbs, Croats and Slovenes represented a legal mosaic composed of six different legal areas: the Croatian-Slavonian, the Slovene-Dalmatian, the former Hungarian territory (Prekmurje, Međimurje, Baranya, Bačka and Banat), the Bosnian-Herzegovinian, and the Serbian and Montenegrin.[86] Thus, each legal area partially retained own rules regarding foreigners. For example, in the area of the former Kingdom of Serbia, the provisions of the *Civil Code of the Kingdom of Serbia* (hereinafter CCKS) were very important. The CCKS stipulates that in respect of personal rights and freedoms of such property, foreigners enjoy equal legal protection as Serbian citizens.[87] Accordingly, it was determined that the parties enjoy personal rights and rights over property except when the enjoyment of these rights was not related to seeking Serbian citizenship.[88] In general, the rule of factual reciprocity was applied since, in all cases where a foreign state treated Serbs as their own nationals, the laws that were applicable in this area would also apply in the same way to foreigners as well as their own citizens. In case of doubt,

85 According to the Basics of the Law on the Organization of Free and Royal Cities and Legitimate Trades in Croatia and Slavonia since 1861, in addition to equal obligations as citizens, the only rights foreigners had were the right to personal security and the protection of property and the right to use city institutes. The legal status of foreigners was also envisaged by the Government's Draft Law on the Establishment of Town Halls in the Kingdom of Croatia and Slavonia of 1879, according to which the foreigners had all the same obligations as the citizens of the municipality but without having the same rights except for that of unhindered residence but under the condition of unprovoked rule and possession of the means of nutrition and the condition of legitimizing with the citizenship permit. The Government's basis of the Law on the Establishment of Town Halls in the Kingdom of Croatia and Slavonia, according to: Čepulo, D., *Položaj i ustroj hrvatskih gradova prema Zakonu o uređenju gradskih općina iz 1881. godine*, Hrvatska javna uprava: časopis za teoriju i praksu javne uprave, *Vol.* 2, No. 1, 2000, p. 98

86 Pavlović, M., *Problem izjednačenja zakona u Kraljevini Srba, Hrvata i Slovenaca / Jugoslaviji*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 68, No. 3-4, 2018, p. 494

87 Art. 15 CCKS (1844). Ristić, A., M., *Pravni položaj stranaca*, doctoral thesis, Beogradski univerzitet - Pravni fakultet, Beograd, 1934, p. 77

88 Art. 45 CCKS (1844). *Ibid.*

a foreigner had to prove it.[89] The enjoyment of "civil rights", as set forth in Art. 44 of CCKS, could refer not only to the rights covered by this law but also to the political rights, and in that case, this provision should be in the Constitution and not in this law.[90]

Despite the fact that foreigners were equal with domestic citizens in respect of the enjoyment of certain private rights, there were certain restrictions. Namely, upon the establishment of the Kingdom of the Serbs, Croats, and Slovenes (hereinafter SCS), a new provision was introduced regarding the acquisition of real property rights by a natural person. Thus, foreigners were made difficult to acquire immovable property in an area near the state border and the coastline at a distance of 50 km from the border.[91] In addition to reciprocity, regarding the acquisition of real estate in the area, it was necessary to obtain the approval of the army, navy and interior minister.[92]

However, there is a group of rights enjoyed exclusively by citizens of a certain state, and those are political rights. Namely, there was an established rule, which exists even today, that foreigners did not have active and passive voting rights, that is, that they had no choice of legislature or bodies of local government units. Nevertheless, two states represented an exception, namely, the Soviet Union and the Kingdom of SCS/Yugoslavia.[93] According to the *Act on the Election of People's Representatives to the Constitutional Assembly* of 3 September 1920, the voting right was also given to the Slavs who had permanent residence anywhere in the Kingdom of the SCS (so the number of fugitives from the Russian Empire was also given a voting right).[94] Accordingly, foreigners were neither allowed to be members of political organizations nor to form associations.[95]

[89] Art. 47 CCKS (1844). This principle was also applied to inheriting foreigners in this area. *Ibid*.

[90] Article 44 CCKS (1844): "A Serbian citizen is entitled to the full enjoyment of civil rights. Citizenship of Serbia is earned either by birth or inheritance; which means that all Serbian citizens are either born or naturalized Serbs and they all enjoy civil rights. In case of born Serbs, citizenship is passed from parents to their children by nature. In the case of naturalized Serbs, citizenship is earned if a foreigner spent seven years in the state service, craftsmanship or agriculture, or in any other secondary occupation providing that all that time he lived in accordance with the laws, without doing any crime. Should a foreigner spend less than seven years of residing in the country in question, a citizenship was granted only by the special permit of the Governor with the consensus of the Council." *Ibid.* p. 79

[91] *Ibid*. p. 89

[92] Art. 48 of the Law on the budget's twelfth for July, August and September 1923. *Ibid.*

[93] Ristić, *op. cit.* note 86, p 80

[94] *Ibid*.; Balkovec, B., *Izborno zakonodavstvo prve jugoslavenske države (1918. – 1941.),* Časopis za suvremenu povijest, *Vol.* 48, No. 1, 2016, p. 200

[95] Art. 1, 17, 21 and 24 of the Law on associations, gatherings and arrangements, Official Gazette of the Kingdom of Yugoslavia No. 225/1931

The second group of political rights which foreigners were excluded of represented the whole sequence of public functions of political character, the first of which was the state service. Thus, the basic rule was that a foreigner was not allowed to perform the function of a state clerk; he was not allowed to be a judge or to hold any function in judicial affairs.[96] Also, foreigners were not allowed to be lawyers or public notaries.[97]

The first *Constitution of the Federal People's Republic of Yugoslavia* (hereinafter FPRY) was passed in January 1946 and after the Communist conquest of power 1945.[98] This Constitution in Chapter V introduces articles defining "the rights and duties of citizens", but the same apply only to nationals. Namely, the above-mentioned articles on citizens usually refer to citizens while expressly referring to foreign nationals only in Art. 31 (right of asylum).[99] Thus, via this provision, it was established that foreign nationals were persecuted for the purposes of promoting democratic principles, national liberation, the rights of the working people, and the freedom of scientific and cultural work.[100] Despite this and the fact that it could be concluded from some of the provisions of the Constitution (for example, in Art. 28, para. 2 and 5, the term 'citizen' is replaced with 'nobody') that they also apply to foreigners, they, as a rule, could not invoke the constitutional provisions.[101] This did not mean that the parties were completely disenfranchised but that their public and private law positions were regulated and protected by special laws. Thus, under the *Constitution of the FPRY*, foreigners were entitled to those rights that were similar to the basic rights of citizens[102] but they were not their constitutional rights. Consequently, the principle of the equality of citizens did not apply to foreigners; that is to say that they were to be treated equally with citizens.

Restrictions on the rights of foreigners who then existed and influenced their legal status were needed because of the political circumstances at that time. Thus,

[96] Art. 2 of the Law on Judges of Regular Courts of the Kingdom of Serbs, Croats and Slovenes, Official Gazette of the Kingdom of Serbs, Croats and Slovenes No. 295/1928

[97] Art. 2 of the Law on Lawyers of the Kingdom of Serbs, Croats and Slovenes, Official Gazette of the Kingdom of Yugoslavia No. 21/ 1929

[98] The Constitution of the FPRY, Official Gazette of FPRY No. 10/1946. See in: Sirotković H., Margetić, L., *Povijest država i naroda SFR Jugoslavije*, Školska knjiga, Zagreb, 1988, pp. 378–379

[99] Krbek, *op. cit.,* note 75, p. 238

[100] Mihaljević, J., *Ustavna uređenja temeljnih prava u Hrvatskoj 1946.–1974.*, Časopis za suvremenu povijest, *Vol.* 43, No. 1, Zagreb, 2011, p. 41

[101] Krbek, *op. cit.,* note 75, p. 238

[102] E.g. According to Art. 25 of the Constitution of the FPRY, citizens were guaranteed freedom of conscience and freedom of religion; Art. 39, 40 and 41 further define the rights of citizens, their right to appeal and petition and compensation for damages

according to the Law on the Nationalization of Private Economic Enterprises of 28 April 1948, all properties owned by foreign nationals, foreign institutions, or foreign private or public persons were nationalized and became state property.[103] Foreign nationals had the same inheritance rights as nationals but only under the condition of reciprocity.[104] There were also certain restrictions on employment in the bodies of state and public administration. Namely, according to Article 31 of the Law on Public Officials of 25 December 1957[105], a Foreign Citizen could have been appointed for a civil servant only on the basis of the approval of the Federal or Republic Executive Council. A foreigner needed approval for the management of crafts or private crafts from the Council of the Economy with the approval of the Republican State Secretariat for Internal Affairs and Reciprocity.[106]

Foreigners generally had the freedom of movement in the territory of Yugoslavia and the right to change their place of residence as Yugoslav citizens. Thus, they could temporarily or permanently reside if they were granted a permit by the competent authority. If a foreigner was granted a permit for temporary or permanent residence, he had to be registered, and the records were kept by an administrative body of the district national committee responsible for internal affairs.[107] In addition, foreigners also had the right to social assistance and compensation for extraordinary damage. They also enjoyed special rights with regard to education and employment.

According to the *Act on the Movement and Residence of Foreigners* of 1980, a foreigner is considered to be any person who is not a citizen of The Socialist Federal Republic of Yugoslavia (hereinafter SFRY) or who, according to the provisions of the *SFRY Citizenship Act* of 1976, is not an SFRY citizen.[108] According to the *SFRY Constitution* of 1974, it was determined that foreigners in Yugoslavia enjoyed the freedoms and rights of man and that they had other rights and duties as laid down by the law and international treaties.[109] Consequently, Borković states

[103] Bartoš, M; Nikolajevič, D. B., *Pravni položaj stranaca: savremena shvatanja međunarodne prakse i prakse u FNRJ*, Naučna knjiga, Beograd, 1951, p. 103–105

[104] Art. 5 of the Law on Inheritance 1955, Official Gazette of SFRY No. 20/55

[105] Art. 31 of the Law on Public Officials, Official Gazette of FPRY No. 53/57

[106] See: Regulation on crafts and businesses, Official Gazette of FPRY No. 5/54; General Law on Craftsmanship Official Gazette of FPRY No. 49/1949; The Basic Law on Private Trades, Official Gazette of FPRY No. 39/1948, 40/1948

[107] Ordinance of the Federal State Secretary for Internal Affairs, Official Gazette of FPRY No. 9/59; The Law on the Bodies of Internal Affairs, Official Gazette of FPRY No. 30/1956

[108] The Law on Movement and Residence of Foreigners, Official Gazette of SFRY, No. 56/80, art. 1.); The Law on the Citizenship of SFRY, Official Gazette of SFRY No. 58/76

[109] The Constitution of SFRY, Official Gazette of SFRY No. 9/1974

that special efforts were made in Yugoslavia to ensure that foreigners were secured a decent human position.[110]

The issue of regulating the legal status of foreigners in SFR Yugoslavia was resolved by numerous laws concerning the legal situation of foreigners. Thus, foreigners who entered the SFRY on the basis of valid travel documents could move, reside, settle, set up their own associations, serve their personal name, acquire, and hold arms.[111] Foreigners could exercise these rights only under the conditions prescribed by the *Law on the movement and stay of foreigners* of 1980 unless otherwise stipulated by an international treaty. In addition to the above-mentioned rights, foreigners could also exercise other rights established by other laws under reciprocal conditions.[112]

From the above, it may be concluded that the historical development of the legal position of foreigners evolved more and more towards the status of the citizen. From the Middle Ages, especially from the end of the 18th century to modern times, foreigners were almost equal with the citizens regarding so-called 'personal liberties and rights', but in principle, they were excluded of political rights, i.e., opportunities to participate in political life.

## 7. CONCLUSION

Considering the present-day problems Croatia is facing while trying to integrate regular immigrants into its social environment and legal framework, the aim of this contribution is to put the subject in its proper legal-historical context. The cross-section of the status of foreigners throughout Croatian history has shown that immigration has always been experienced as a challenge and a benefit at the same time. Although regular immigrants were usually observed from the prism

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[110] Borković, I., *Upravno pravo*, Informator, Zagreb, 1991, p. 118

[111] Tomašević, P., *Upravno pravo (posebni dio) – unutrašnji poslovi*, Republički sekretarijat za unutrašnje poslove SR Hrvatske, Odjel za izdavačku djelatnost i dokumentaciju, Zagreb, 1989, p. 220

[112] For example, according to the Art. 82 of *Law on Basic Ownership Relations* (Official Gazette of SFRY No. 6/80), it was stipulated that, subject to reciprocity, foreigners may be the holders of property rights on land and buildings acquired by inheritance on the territory of the SFRY, as well as SFRY citizens, unless otherwise specified by an international treaty. Also, according to the Art. 1 and 2 *Law on Health Care Protection of Foreigners in Yugoslavia* (Official Gazette of SFRY No. 2/1974, 5/1978) foreigners had the right to health care to be provided in the scope, in the manner and under the conditions under which health care is provided to SFRY citizens. Furthermore, a foreigner could establish a working relationship in SFRY under the conditions laid down in Art. 1 of the *Law on Conditions for Establishing a Foreign Citizenship* (Official Gazette SFRY No. 11/78, 64/89) and by the *Law on Foreign Investments* (Official Gazette of SFRY No. 77/88) invest resources in order to carry out economic and social activities in the SFRY

of economic benefits, their social position and integration in the society proved troublesome.

The historical lessons teach us furthermore that successful integration is a two-way process that requires active contribution on both sides. On one hand, it implies the obligation of the recipient country to ensure a legal, social and economic framework which will enable the integration of foreigners, but on the other hand, it presupposes the commitment and adaptation of foreigners to legal standards and values of the recipient community. By tolerating the cultural, ethnic and religious peculiarities of different communities through their inclusion in the regional services as well as through gradual allocation of rights rather that invasive policy, the Romans demonstrated a way to integrate foreigners and stimulate them to accept values of domestic culture.

The current migration crisis exposed the poor implementation of the Croatian, often declarative, official migration policies, shifting their course towards security questions. Only recently, due to shortages in the labour market (especially in the field of tourism and construction) and the need for demographic renewal, immigration is slowly being identified as a tool to solve those deficiencies. The lessons from the historical overview make it quite clear that such an approach was always encouraged if it had a positive impact on the domestic community. Despite the medieval particularism, as a common feature, it can be observed that the prejudice and the negative attitudes towards foreigners were mitigated by the interests of the local municipalities. *De facto* throughout history, foreigners who were considered to perform beneficial and shortage occupations were invited to take up residence and settle down with their families in exchange for various privileges. They were granted legal protection before courts and other public bodies.

It proved, however, to be much easier to adjust the existing legal provisions, no matter how strict they were, than to enable the successful integration of foreigners because the economic, social and cultural components of migration flows have often been neglected. This implies that instead of applying *ad hoc* measures, the state should act proactively in order to create a tolerant environment. Since the migration policy in Croatia is reduced to the formal compliance to the EU requirements, the insights from the history should teach us to use the immigration potential of society more wisely instead of aligning it to the political interests to focus it on the benefits of the community and the foreigners itself.

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# JUDICIAL CONTROL OF ADMINISTRATIVE ACTS AND MEASURES REGARDING UNLAWFUL RESIDENCE OF FOREIGNERS IN CROATIA IN THE EUROPEAN CONTEXT

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***ABSTRACT***

*Accession of the Republic of Croatia to the EU has prompted numerous legal reforms and amendments. One of them was a major administrative court reform the main result of which was the new Administrative Disputes Act adopted in 2010 and coming into force 2012. One of the issues it regulates is the judicial control in general, and together with Foreigners Act from 2011 defines control of administrative acts and measures regarding unlawful residence of foreigners in Croatia, which is the subject of the analysis in this paper. The paper is divided in three main parts. Basic features of migrations and its consequences on European and domestic regulation are explained in the first part of the paper. Second part of the paper is focused on the procedural aspect of migrations, namely on the unlawful residence of foreigners from the perspective of the administrative courts. The final part of the paper draws certain conclusions based on the preceding analysis. The main focus of the paper is an analysis of the specificities of administrative courts' control, such as the shortness of deadlines, oral hearings as an exception, particularities of the engagement of the parties before the court, etc. Paper elaborates in detail the normative arrangement of unlawful residence in Croatia and differences between Foreigners Act and Administrative Disputes Act through analysis of the relevant domestic and European regulative framework and case law. With this, the paper hopes to contribute in solving at least some of the numerous legal problems associated with the current migrant and refugee crisis from the perspective of the European and Croatian administrative law.*

***Keywords***: *immigration, unlawful residence, detention, judicial review, Council of Europe, European Union, Croatia*

## 1. INTRODUCTION

Accession of the Republic of Croatia to the European Union (hereinafter: EU) has prompted numerous legislative reforms and amendments. One of them is a major administrative courts' reform[1] that resulted in the adoption of the new Administrative Disputes Act (hereinafter: ADA) which was accepted in the parliament in 2010, and was applied since 2012.[2] After joining the EU,[3] the Republic of Croatia has become a kind of south-eastern frontier for the rest of EU,[4] which has become particularly important with the rise of migration over the last few years, due to which growth it is often referred to as a so-called migrant or refugee crisis.[5] Due to a specific role of the Republic of Croatia in these processes,[6] which is undoubtedly for the most part a result of its territorial position, the Croatian legislator has

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1 More on administrative courts' reform in Croatia see in: Medvedović, D., *Novi sustav upravnog sudovanja*, in: Đerđa, D.; Šikić, M., Komentar Zakona o upravnim sporovima, Novi informator, Zagreb, 2012, pp. 17-75; Đerđa, D. Šikić; M, Komentar Zakona o upravnim sporovima, Novi informator, Zagreb, 2012; Šikić, M., *Pravo na suđenje u razumnom roku u upravnosudskim postupcima – novi problemi i izazovi*, in: Uzelac, A.; Garašić, J.; Maganić, A. (eds.), Zbornik radova u čast 70. rođendana prof. dr. sc. Mihajla Dike - Djelotvorna pravna zaštita u pravičnom postupku, Izazovi pravosudnih transformacija na jugu Europe – *Liberamicorum* Mihajlo Dika. Sveučilište u Zagrebu, Pravni fakultet, 2013, p. 990; Rajko, Alen, *Novi Zakon o upravnim sporovima: odluke Upravnog suda RH u prvostupanjskome upravnom sporu*, Hrvatska pravna revija, *vol.* 10, No. 10, 2010, p. 84

2 Administrative Disputes Act, Official Gazette (hereinafter: OG), No. 20/10, 143/12, 152/14, 94/16, 29/17. (hereinafter: ADA)

3 Croatia had specific position on migrant routes even before joining the EU, and according to Ivanda, the rise of migration through Croatia, will influence on the rise of illegal migration as well (Ivanda, S., *Suvremene ilegalne migracije u Republici Hrvatskoj*, Policija i sigurnost, *vol.* 11, No. 1-3, 2002, p. 85. On the same topic see also: Ivanda, S.; Šuperina, M., *Migracije, granična policija, ilegalni prelasci i krijumičarenje ljudi preko državne granice*, Pravni vjesnik, *vol.* 16, No. 3-4, 2000, p. 280

4 According to Gregurović and Mlinarić, Croatia was interested to migrants mostly as a transit country (Gregurović, S.; Mlinarić, D., *The Challenges of Migration Policies in Croatia: Migration History, Trends and Prospects*, AEMI Journal, *vol* 10, special issue on Migration History Matters, 2012, p. 106

5 Bulli, G.; Soare, S. C. *Immigration and the Refugee Crisis in a New Immigration Country: The Case of Italy*, Croatian and Comparative Public Administration, *vol.* 18, No. 1, 2018, p. 127; Speer, B., *External and Internal Effects of How Austria Has Handled the Refugee Crisis*, Croatian and Comparative Public Administration,*vol.* 18, No. 2, 2018, p. 248; European Commission, *Progress Report on the Implementation of the European Agenda on Migration,* COM (2018, No. 2, pp. 247-268); European Commission, *Progress Report on the Implementation of the European Agenda on Migration,* COM(2018) 301 final, 18 May 2018,301 final, 18 May 2018, p. 5, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180516_progress-report-european-agenda-migration_en.pdf] Accessed 04.03.2019. The Report provides data on the main migration routes in Europe (Eastern Mediterranean, Western Balkans, Central Mediterranean and Western Mediterranean/Atlantic route) and EU Support to Migration Management. Together with Albania, FYROM, Serbia and Bosnia and Herzegovina, Croatia is in the Report mentioned as a country on the Western Balkans route

6 All borderline EU countries are facing similar challenges on migration issues. For Romanian example see in: Doncea, A., *Illegal migration - a current European issue*, European Journal of Public Order and National Security, *vol.* 2, No. 4, 2015, pp. 21 – 26. Docnea has mentioned so-called „Black Sea route",

given priority to the internal security of the state by amending the basic regulation in this area-Foreigners Act (hereinafter: FA)[7] and strengthening of police powers[8] with the aim of deporting foreigners with unlawful residence as soon as possible.[9]

On the one hand, the procedures related to unlawful[10] residence should definitely be effective but, on the other hand, the principle of proportionality and the preservation of fundamental human rights and freedoms have to be observed. Thereby in this paper consideration is given to the degree of achievement of certain principles envisaged by the General Administrative Procedure Act (hereinafter: GAPA),[11] such as the principle of effectiveness, proportionality and protection of the rights of the parties. Further, the paper elaborates in detail the normative arrangement of unlawful residence in Croatia and differences between FA and ADA through an analysis of relevant domestic and European regulative framework and case law. Since the fundamental right to the movement of persons is very limited in these proceedings, attention will be given to this right guaranteed in numerous provisions of the Council of Europe and in documents of the EU.

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alongside main migrant routs in the Commission Report. See Docnea, *op. cit.*, p. 23. For Italy see in: Bull; Soare, *op. cit.* note 5, pp. 130 – 137

7 Foreigners Act, OG, No. 130/11, 74/13, 69/17, 46/18 (hereinafter: FA)

8 Hellenthal has mentioned several measures existing during 90-ies for combating illegal entrance on national and EU level and their reflection to federal protection of borders in Germany (Hellenthal, M., *Granične kontrole kao dio nacionalnog i europskog sustava za kontrolu kriminala i migracije = Grenz kontrollen als Teilnationalen und europaeischen Systems zur Kriminalitaets-und Wanderugkontrolle*, translation from German: Dragica Dragičević, Izbor **članaka** iz stranih **časopisa**, *vol.* 35, No. 1, 1995, pp. 31-34

9 Heads of police of the country's most effected by migration have agreed on common standards for improving cooperation in migration flow management in meeting held in Zagreb, for example unified registration form, etc. See in: Joint Statement of heads of police Services, [https://www.mup.hr/UserDocsImages/topvijesti/2016/veljaca/migranti_sastanak/joint_statement.pdf] Accessed 04.03.2019

10 ECtHR primarily uses term „unlawful residence", but CJEU uses terms such as illegal migration, illegal crossing, etc. For the purposes of the paper, authors use both terms, respecting the context

11 General Administrative Procedure Act, OG, No. 47/09

## 2. EUROPEAN STANDARDS IN PROCEDURES OF UNLAWFUL RESIDENCE

### 2.1. Council of Europe standards

Human right treaties such as the Universal Declaration on Human Rights[12] and European Convention on Human Rights[13] provide basic legal framework for the protection of all human beings, including migrants regardless of their nationality.[14] For the purposes of this paper which is focused on the Croatian law in the European context, we will analyse certain provisions of the ECHR which set minimum standards for High Contracting Parties, namely right to liberty and security regulated by Art. 5 and freedom of movement provided in Art. 2 and 4 of Protocol 4 of the ECHR.[15] Both rights can be restricted under specific circumstances, but minimum standards in dealing with those cases should be respected, such as speedy and effective procedures, all explained and analysed in the ECtHR case law.

National procedures include both administrative measures, since irregular migration is constituted as administrative offence and not criminal offence,[16]and court proceedings reviewing legality of administrative actions concerning migrants. Administrative measures are regulated in domestic provisions of various foreigners or

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12 Universal Declaration on Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations (http://www.un.org/en/universal-declaration-human-rights/). Text of the Declaration available at [http://www.un-documents.net/a3r217a.htm] Accessed 19.02.2019

13 European Convention on Human Rights is an international treaty created by the Council of Europe in 1950. ECHR came into force in 1953 and since then it was amended by its protocols widening rights guaranteed in original text

14 Lambert, H., *The position of aliens in relation to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2007, p. 9;
*Report of the Special Rapporteur on the human rights of migrants*, A/HRC/38/41, 4 May 2018, [https://reliefweb.int/sites/reliefweb.int/files/resources/G1812517.pdf] Accessed 08.02.2019, pp. 5-6
Exceptions on admissibility criteria regarding foreigners include the right to enter and stay in the country and to vote and to be elected (Crepéau, F., *Statement by the UN Special Rapporteur on the Human Rights of migrants*, PGA Plenary Session – Criminalization of Migrants, New York, 2013, p. 1, [https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/SRMigrants/Speech/StatementPGAPlenaryCriminalization.doc&action=default&DefaultItemOpen=1] Accessed 08.02.2019)
For the admissibility criteria in general before ECtHR see in *Practical Guide on Admissibility Criteria*, Council of Europe, last updated 31 December 2018. Accessed 19 February 2019

15 "Art. 5 § 1 of the Convention concerns the deprivation of liberty, Art. 2 of Protocol No. 4 governs mere restrictions on the liberty of movement. However, the difference between both concepts is not one of nature or substance but one of degree or intensity"(*Berdzenshvili and Others v. Russia* (2017) § 108)

16 Crepéau, *op. cit.* note14

immigration acts[17] and by-laws.[18] Court proceedings, on the other hand, can be regulated in Administrative Disputes Act on general level with details provided in other acts regarding foreigners.[19]

ECHR guarantees everyone who is deprived of his liberty by arrest or detention to undertake proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is unlawful.[20] ECtHR finds violation of standards guaranteed in ECHR mostly by declaring domestic procedures as being not sufficiently effective nor speedy as is needed in sensitive cases like immigration.[21] For example in *Alimov v. Turkey* the ECtHR found violation of Article 5 § 4 because Turkish legal system at the relevant time did not provide persons in the applicant's position with a remedy whereby they could obtain judicial review of the lawfulness of their detention.[22] In *M. and Others v. Bulgaria*, two different governmental bodies had issued two separate orders for the detention of the applicant,[23] and he lodged an appeal before administrative courts in each case.[24] In the procedure concerning the first order, court did not reach decision in speedy procedure since proceedings lasted for more than two years.[25] In the second order procedure, Sofia City Court refused the first applicant's request for a stay of enforcement of the detention order.[26] ECtHR found serious violations of the right to take proceedings speedily by a court.[27]

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17 For example, the entry and residence of immigrants are governed by following laws in Russia: Federal Law no. 115-FZ of 25 July 2002 on the Legal Status of Foreign Nationals in the Russian Federation and Federal Law no. 109-FZ of 18 July 2006 on the Registration in the Russian Federation of Migrants who are Foreign Nationals or Stateless Persons (*Case of Berdzenishvili* **and others v. Russia** (2017), § 32), and The Aliens and Immigration Law and the Refugee Law (*Case of M. A. v. Cyprus* (2013),§§ 61 et *sqq.*)

18 Ordinance on Treatment of Citizens of the Third Countries, OG, No. 68/2018

19 See Croatian regulation, ADA and FA

20 Art. 5 §4 of the ECHR

21 Sitaropoulos, N., *Judicial Review of Migrant Detention in Europe: In Search of Effectiveness and Speediness* (*OxHRH Blog*, 27 January 2014) [http://humanrights.dev3.oneltd.eu/?p=4126], [http://ohrh.law.ox.ac.uk/judicial-review-of-migrant-detention-in-europe-in-search-of-effectiveness-and-speediness] Accessed 08.02.2019

22 *Alimov v. Turkey* (2016), §50. See also *Abdolkhan and Karimnia v. Turkey* (2009), §§139. – 142, *Z. N. S. v. Turkey* (2010), §§58 – 63, *Tehrani and Others v. Turkey* (2010), §§ 74 – 80, *Batyrkhairov v. Turkey* (2018), §§66 – 69, *Amerkhanov v. Turkey* (2018), §§ 71 – 74

23 The first order was issued on 6 December 2005, and the second order on 12 October 2006 (See *M. and Others v. Bulgaria* (2011) §§11-17)

24 Applicant lodged an appeal against the first order on 20 October 2006 (§23), and against the second order on 26 October 2006 (§35)

25 Judgement was reached on 2 April 2009 (*M. and Others v. Bulgaria,* § 38)

26 *Ibid.*,§§35-38

27 *Ibid.*,§§82 – 83

On the other hand, by the provisions of the ECHR, the High Contracting Parties are allowed to "control the liberty of aliens in an immigration context",[28] and they can "remove aliens as part of their national sovereignty".[29] If these processes are not conducted lawfully, human rights can be infringed by the police officers while exercising their duty in connection of irregular migration. Methods of conducting the legitimation of foreigner, and their detention should be strictly defined by the law. Under the ECHR, detention,[30] as a first measure in the unlawful residence treatment, must be "carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued".[31] Detention is not punishment and must not be punitive in character.[32]

The ECtHR gives a wide margin of discretion to the states in relation of art 5 (1) f.[33] Nonetheless, judicial review of the legality of the detention must be guaranteed "as a safeguard against the arbitrariness of the measure, including the domestic law upon which it is based".[34] In the analysed cases judicial control was not as effective and as speedy as needed. Guidelines provided by the ECtHR in *Suso Musa v. Malta* pilot-judgement[35] where ECtHR in §§ 119 – 123 highlighted the necessity of general measures at the national level which will establish judicial mechanism providing for speedy and fair judicial review of migrant detention. In *M.A. v Cyprus* the ECtHR explained essential conditions for lawful detention in §§102 –

[28] *Khlaifia and Others v. Italy* (2016), §89 and *Guide on Article 5 of the European Convention on Human Rights*, p. 26, last updated 31. 12. 2018, [https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf] Accessed 19.02.2019

[29] Lambert, *op. cit.* note 14, p. 17

[30] For principles of the detention of aliens see Lambert, *ibid.*, p. 27

[31] *Saadi v. UK* (2008), § 74, and *Guide on Article 5 of the European Convention on Human Rights*, p. 27, last updated 31 December 2018, [https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf] Accessed 19.02.2019

[32] Principles on the immigration detention are also summarized in the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* factsheet form March 2017, CPT/Inf (2017)3, p. 1, [https://rm.coe.int/16806fbf12] Accessed 01.03.2019

[33] See for example *Chahal v. UK* (1996), §123

[34] Lambert, *op.cit.* note 14, p. 32

[35] More on Pilot-Judgement Procedure before ECtHR see in: *The Pilot-Judgment Procedure Information Note* issued by the Registrar, [https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf] Accessed 08.02.2019

105 by referring to Amnesty International reports.[36] Both previously mentioned judgements are of great importance for national judicial proceedings. Right to the effective remedies[37] is in close connection to an effective and speedy judicial review.[38] Strict standards on duration of detention and its determination are set in§ 162 of *M. A. v. Cyprus* and in some other cases such as *Sarbanv. Moldova,*[39] *Kadem v. Malta,*[40] *Rehbock v. Slovenia,*[41] etc. According to an opinion expressed in literature, if there exists a bi-level of judicial review,[42] both levels should meet above mentioned standards.[43]

Article 2 of the Protocol 4 guarantees freedom of movement to everyone who is lawfully on the territory of the State. Although in the Article 4 of the same Protocol condition of lawful or unlawful residence is not mentioned directly, ECtHR stipulates clearly that a collective expulsion[44] of aliens is prohibited in cases of their unlawful residence, “whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on

36 *Punishement without a crime – Detention of Migrants and Asylium Seekers in Cyprus*, Amnesty International, 2012, [https://www.amnesty.org/download/Documents/20000/eur170012012en.pdf] Accessed 05.03.2019 and Annual Report for 2011 (see *M. A. v. Cyprus* (2013)§105)

37 According to Kitsakis, supervision of the legality of detention after the person has been released from detention, falls within the scope of the right to the effective remedy in Article 13 of the ECHR (Kitsakis, Y., *Protecting Migrants under the European Convention on Human Rights and the European Social Charter*, Council of Europe, 2013, p. 45)

38 See *M. A. v. Cyprus* (2013), §160

39 *Sarban v. Moldova* (2006),§§ 118 - 124

40 „The competent court should examine not only compliance with the procedural requirements set out in domestic law, but also the legitimacy of the purpose pursued by the arrest and the ensuing detention and should have the power to order the termination of the deprivation of liberty if it proves unlawful (*Kadem v. Malta* (2003), §41)

41 *Rehbock v. Slovenia* (2000), §§82 – 88

42 On the first level, Croatia has four administrative courts, and on second level High Administrative Court of the Republic of Croatia (Art. 14 (3) of the Courts Act, OG, No. 28/13, 33/15, 82/15, 82/1 6, 67/18 and Art. 12 (1) of the ADA, OG, No. 20/10, 143/12, 152/14, 94/16, 29/17 )

43 *Djalti v. Bulgaria* (2013), §64; Sitaropoulos, *op. cit.*note 21; *Guide on Article 5 of the European Convention on Human Rights*, p. 40

44 For explanation of the term “collective expulsion” see *Berdzenishvili and Others v. Russia* (2017) §79, *Khlaifia and Others v. Italy* (2016) §§237-238, *Georgia v. Russia (I)* (2014), §160

their own initiative, or whether they are stateless or possess another nationality"[45]. ECtHR[46] found violation of the Article 4 of the Protocol in six cases.[47]

The case law related to the mentioned provisions of the ECHR is of importance because Croatia could easily find itself as the respondent state in the procedures before the ECtHR. Great number of migrants were passing through Croatian territory recently, where upon Croatian state bodies were exercising their power to detain citizens, and in those proceedings fundamental rights and freedoms could easily be violated. If aliens were on the territory unlawfully, they were detained, brought before state bodies and courts. Last two decisions in 2018[48] regarding aliens were reached in October and December of 2018 by the Constitutional Court of the Republic of Croatia. Although mentioned procedures are in Croa-

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45 *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, Council of Europe, p. 6, last updated 31 December 2018. [https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf] Accessed 20.02.2019

46 In its argumentation, the ECtHR case law both international and European documents and reports on foreigner status in the third countries, for example in *Khlaifia and Others v. Italy* (2016): *Directive 2008/115/EC*(§§41 – 45), *Draft articles on the expulsion of aliens* (2014) adopted by The International Law Commission (ILC) (§§46 – 47), *Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores* (2011) by the Council of Europe's Parliamentary Assembly (PACE) (§49), *Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*(2011) by Amnesty International (§50); in *M. A. v. Cyprus* (2013): *Guidelines of the Committee of Ministers of the Council of Europe* (2009) (§94), *Recommendation (CommDH(2001)19)* of the Commissioner for Human Rights (§95), European Commission against Racism and Intolerance (ECRI) *reports on Cyprus* (2005 and 2011) (§96 – 97), Directive 2005/85/EC (§99), *Report concerning the detention of migrants and asylum-seekers in Cyprus* (2012) by Amnesty International (§§100 – 104), Annual Amnesty International Report (2011) (§105). ECRI Reports on Croatia are available at: [https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/croatia] Accessed 20.02.2019; in *Hirsi Jamaa and Others v. Italy* (2012): *Geneva Convention relating to the Status of Refugees* (1951) (§§ 22 – 23), *United Nations Convention on the Law of the Sea ("the Montego Bay Convention")* (1982) (§24), *International Convention on Maritime Search and Rescue ("the SAR Convention")* (1979 amended in 2004) (§ 25), *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime ("the Palermo Protocol")* (2000) (§26), *Resolution 1821 of the Parliamentary Assembly of the Council of Europe* (2011), *Charter of Fundamental Rights of the European Union* (2000) (§28), *Schengen Agreement* (1985) (§29), *Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)* ***(§30),*** *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*(§31), etc.

47 Čonka *v. Belgium* (2002), *Georgia v. Russia (I)* (2014), *Shioshvili and Others v. Russia* (2017), *Berdzenishvili and Others v. Russia* (2017), *Hirsi Jamaa and Others v. Italy* (2012) *Sharifi and Others v. Italy and Greece* (2015) *(Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, Council of Europe, p. 7)

48 Decision *U-III-3124/2018* from 17 October 2018 and *U-IIIBi/1385/2018* from 18 December 2018 of the Constitutional Court of the Republic of Croatia

tian legislature defined as urgent,[49] all administrative and judicial remedies have to be exhausted prior the procedure before ECtHR. It is not to be expected that the ECtHR has had an opportunity between then and now to reach a decision, even if plaintiff had submitted application to the ECtHR, which is not known for a fact.[50]

## 2.2. European Union standards

Over the past few years, EU was confronted with large influx of migrants mostly due to the war and economic reasons. As a sort of a border towards the rest of the Europe, Croatia has had a specific situation with a large number of migrants crossing through the country every day in legal or illegal manner. EU case law and regulations give us certain definitions of the terms which are important for national legal systems such as illegal stay,[51] illegal crossing, illegal transit, unlawful residence, first point entry,[52] etc.[53] Migrants, as vulnerable group of people,[54] can easily be discriminated and their rights at this point can easily be infringed.[55]

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[49] Administrative Court should decide in five days on detention of foreigner (Art.135 (4) of the FA, OG, No. 130/11, 74/13, 69/17, 46/18)

[50] The exhaustion of the domestic remedies in Croatian law implies conducting of the administrative procedure, administrative dispute (both levels) and the procedure before Constitutional Court based on the constitutional complaint

[51] In case C-646/16, in §12 Court highlights that according to the Return Directive "illegal stay" means the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State" and in §63 that „concept of 'illegal stay', which is not to be confused with that of 'illegal entry'" and 'irregular crossing' of the border of a Member State cannot be construed in the same way as that of an 'illegal stay'". See also judgements on preliminary ruling in following cases regarding illegal entry: C-240/17, C-225/16, C-181/16, C-82/16C-18/16, C-601/15C-218/15, C-133/15, C-47/15, C-544/13, C-249/13, C/166/13, C-225/12, etc.

[52] Frantziou, E., Staiger, U, Chaytor, S., *Refugee Protection, Migration and Human Rights in Europe*, UCL policy briefing – May 2014, p. 2, [https://www.ucl.ac.uk/public-policy/sites/public-policy/files/migrated-files/Refugee_protection_FINAL.pdf] Accessed 07.03.2019

[53] Project „Clandestino" funded by the EU (2007-2009), (for more see inhttps://ec.europa.eu/knowledge4policy/dataset/ds00039_en, accessed on 7 March 2019), adopted terms "undocumented" and "irregular migration" and "undocumented immigrant". See in: Morehouse, C.; Blomfiled, M., *Irregular Migration in Europe*, migration Policy Institute, 2011

[54] Office of the High Commissioner of Human Rights provide us with reasons for vulnerability of migrants, such as their inherent characteristics, for example children, women at risk, people with disabilities, older persons, conditions people are leaving behind in their countries of origin, the circumstances in which they are compelled to move, or because of the virtue of the conditions in which they are received. [https://www.ohchr.org/en/Issues/Migration/Pages/MigrantsinLargeMovements.aspx] Accessed 07.03.2019

[55] For more detail review of vulnerabilities in immigration cases see in: IOM Submission to the Working Group on Arbitrary Detention, *International Standards on Immigration Detention and non-custodial*

The legal basis for migration includes both primary[56] and secondary legislation[57] of the EU. The Charter of Fundamental Rights of the European Union, as a key document providing the catalogue of rights, in Article 45(2) guarantees freedom of movement and residence in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State. With respect of the aim of the paper, we will focus on illegal migration, namely detention of the third-country nationals and extension of the detention, and judicial control of the decisions of the detention.

In the relevant EU case law, the most cited is Directive 2008/115/EC[58] of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter Return Directive).[59] Return Directive set out rules on detention of the third - country nationals in Articles 15 – 18. The Member States are obliged to put in place effective remedies against those decisions, meaning that they are obliged to provide a speedy judicial review of the lawfulness of the detention. It also provides that the third-country nationals have to be released immediately if the detention is not lawful.[60] Those provisions integrate human rights principles,[61] espe-

*measures*, 2011, pp. 5-6

56 See Art. 3(2) of the Treaty on European Union (TEU); Art. 21 of the Treaty on the Functioning of the European Union (TFEU); Titles IV and V of TFEU

57 Geddes and Achtnich analyze certain directives on immigration issues, namely The Racial Equality Directive (2000/43/EC), Family Reunification (Council Directive 2003/86/EC of 22 September 2003), Employment Equality Directive (2000/78/EC) and Long-Term Residence Directive (Council Directive 2003/109/EC of 25 November 2003). Geddes A.; Achtnich M., *Research-Policy Dialogues in the European Union*. In: Scholten P., Entzinger H., Penninx R., Verbeek S. (eds) Integrating Immigrants in Europe. IMISCOE Research Series. Springer, Cham, 2015, [https://link.springer.com/chapter/10.1007/978-3-319-16256-0_16] Accessed 07.03.2019

58 European Parliament and Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98

59 Republic of Croatia has implemented Return Directive (see general provisions of FA)

60 Judgment in Case C-383/13 PPU, Press Release, § 1

61 Returns Directive mentions three principles which need to be respected or of which due account needs to be taken, namely *non-refoulement* (articles 4(b), 5 and 9(1)(a)), family unity (articles 5(b) and 14(1)(a)) and the best interests of the child (articles 5, 10(1) and 17(5)). See also in: Baldaccini, A. *TheEu Directive on Return: Principles And Protests*, Refugee Survey Quarterly, *Vol.* 28, No. 4 UNHCR [2010], p. 126. On non-refoulment principle see in: Lalić Novak, G., *The Principle of Non-Refoulement and Access to Asylum System: Two Sides of the Same Coin*, Migracijske Iietničke teme, *vol.* 31, No. 3, 2015, pp. 365-385; Rodin, S., *Načelo non-refoulement u hrvatskom pravu*. Informator: instruktivno-informativni list za ekonomska i pravna pitanja, No. 6048, 2012, pp. 1-3

cially principle of proportionality.[62] [63]According to this Directive, detention should be ordered by administrative or judicial authorities.[64]

Conditions on detention are set in Article 16 of the Return Directive.[65] Leading rulings on judicial control of the grounds of detention and extension of the detention are *G and R*[66] and *Mahdi.*[67]

In *G and R* the issue was an infringement of the applicants' right to be heard before the administrative bodies in Netherlands who ordered the detention under a removal procedure. They lodged judicial actions before first instance court challenging the decisions to extend their respective detention. Appeals were lodged to Council of State and that court made a request for preliminary ruling to the Court of Justice. The Court of Justice concluded that "the national court must assess whether such an infringement has actually deprived the party relying thereon of the possibility of better arguing its defence to the extent that the outcome of the administrative procedure that led to the decision maintaining the detention could have been different".

Mr. Mahdi was a Sudanese national without a valid identity document and was arrested in Bulgaria. Bulgarian authorities ordered his detention and they brought the case before Administrative Court seeking the extension of the detention on the grounds of the risk of Mr. Mahdi absconding and a lack of cooperation. Bulgarian Court has referred a number of questions before the Court of Justice. Summarisation of the Court of Justice ruling is:"any extension of detention must be in writing, with reasons being given in fact and in law, and be subject to a review of legality by a court".[68] In conclusion of this chapter we may say that the weight of the decision making and observing that human rights are respected is on national administrative bodies and on the national courts.

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62 Thielemann states that The Returns Directive „made immigration detention subject to the principle of proportionality" (Thielemann, E-R., *How Effective are National and Eu Policies in the Area of Forced Migration?*, Refugee Survey Quarterly, *vol* 31, No. 4, 2012, p. 31)

63 Costello, C., *Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 298

64 Art. 15(2) of the Return Directive

65 On the detention under the Return Directive see in: Baldaccini, A., *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive*, European Journal for Migration and Law, vol. 11, 2009, pp. 15-16 and Basilien-Gainche, M-L., *Immigration Detention under the Return Directive: The CJEU Shadowed Lights*, European Journal of Migration and Law, *vol.* 17, 2015, pp. 104–126

66 Judgment in Case C-383/13 PPU G and R v Staatssecretaris van VeiligheidenJustitie, PRESS RELEASE No 100/13

67 Judgment in Case C-146/14 PPU Bashir Mohamed Ali Mahdi, PRESS RELEASE No 80/14

68 *Ibid.*

## 3. SPECIAL ADMINISTRATIVE PROCEDURES REGARDING UNLAWFUL RESIDENCE IN CROATIA

First of all, it is to be emphasized that in accordance with the Art. 32 (1) of the Constitution of the RC every individual, lawfully present on the Croatian territory, has the right of freedom of movement and a free choice of one´s own place of residence.[69] The right of movement, entering and departing the country can be exceptionally limited by law in cases where this action is necessary due to protection of legal order, health, rights and freedoms of others.[70]

The implementation of special administrative procedure regarding the decision-reaching process about the placement in reception centres (hereinafter: RC)[71] of the Ministry of the Interior (hereinafter: MI)[72] through competent police PD/PS[73] due to unlawful residence in the RC is normed by the provisions Art. 135 of the FA. The legal framework connected to unlawful residence is stipulated in Ordinance on Treatment of Citizens of the Third Countries and Ordinance on Stay in the Reception Centre for Foreigners from 2018. With regard to unlawful residence, the return decision[74] is issued as well as the decision about placement in the RC.[75] The restriction of the freedom of movement[76] by placing a foreigner in a RC (optional only for the shortest period of time necessary for forceful departure) is needed for ensuring forceful departure and return of the Citizens of the Third Countries (hereinafter: CTC) which could not have been ensured by applying less severe[77] measures. Crucial in determining of the mentioned situation is the individual assessment in accordance with the proportionality principle.[78] It is also to be pointed out that in the decision-making process in this special administrative

69 See also Art. 33 of the Constitution of the Republic of Croatia, OG, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (hereinafter: Constitution of the RC)

70 About principle of proportionality see also Art. 16 (1) of the Constitution of the RC

71 Reception Centre for Foreigners Ježevo, Transit Reception Centre for Foreigners Trilj and Transit Reception Centre for Foreigners Tovarnik. Art. 1 (2) of the Ordinance on stay in the Reception Centre for Foreigners, OG, No. 101/18. See Art. 91 (5.4.5) Code on Inner Organisation of the Ministry of the Interior, OG, No. 70/12, 140/13, 50/14, 32/15, 11/17, 129/17, 5/18, 109/18, 24/19 (hereinafter: Code)

72 See Art. 76 (5.4.) (Border administration) and 84 (5.4.3.) (Services for unlawful migrations) of the Code

73 Police Department or Police station

74 Art. 109 and 112 of the FA

75 Art. 135 of the FA

76 Art. 130 of the FA

77 Art. 132 of the FA. On applying less severe measures the MI reaches a decision through competent PD/PS. (for a period of time until forceful departure depending on which of the (4) are appropriate for the circumstances of the given case)

78 See Art. 6 of the GAPA

area specific circumstances must be taken into consideration along with the procedural standards. In addition, special emphasis is to be put on rightfully applying the principle of efficiency and proportionality, along with right to legal remedy.[79] The placement decision (or prolongation of the placement for a maximum of 12 months)[80] in RC is reached by the MI through competent PD/PS. It is not allowed to place an appeal against the reached decision, but it is, however, possible to start an administrative dispute. Upon the reaching of the decisions, the case file is delivered to the AC (by mail or fax), that is then obligated to reach a decision in the period of five days by which the placement decision is dismissed or confirmed.[81] CTC is notified about all the actions taken during the decision-making process. There has to be an explanation of the circumstances in each individual case, which indicate the justification of placement in the centre (up to 6 months) due to the presence of risk of avoiding the obligation of leaving EEA or RC. When compared to starting and managing administrative disputes, the presence of certain exceptions and specificities is noticeable. The administrative dispute is, therefore, not started by filing a law suit in a period of 30 days,[82] PD/PS delivers the case file to the AC, there is a proscribed deadline by which the AC needs to make a decision about dismissing or confirming the decision reached by the MI, the oral hearing is organised exceptionally (for minors). The case described is thus a quasi-administrative dispute,[83] in which the AC decides about other legally proscribed cases.[84]

Special emphasis is put on the specificity of the administrative disputes in which under aged children of foreigners are involved. In accordance with the 2018 FA amendments, it is proscribed that the court needs to organise an oral hearing if the CTC is a minor.[85] The provisions regarding the obligatory oral hearing[86] in cases in which the AC enforces periodic control of the lawfulness of the decisions

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79 See Art. 5-14 of the GAPA

80 Art. 134 and Art. 135 (6, 8) of the FA

81 See title 4. of this paper

82 The deadlines for filing a lawsuit are set out in the Art. 24 of the ADA

83 See Decision of the *U-III-1502/2007* from 9 July 2008 of the Constitutional Court of the Republic of Croatia

84 Art. 12 (2, p. 5) of the ADA

85 Art. 135 para 7 of the FA. See Decision of the Administrative Court in Osijek UsI-1331/18-5 from 24 October 2018, UsI-1390/18-4 from 16 November 2018, UsI-158/2019-4 from 4 February 2019

86 See Art. 7 of the ADA. The obligation of organising a public oral debate is one of the basic principles of the administrative dispute and it presented one of the key components in the judicial administration reform as well as in the process of forming new organisation of administrative judiciary in accordance with the administrative court's authorities regarding the decision-making processes. The exceptions to this rule are proscribed in Art. 36 of the ADA

about the placement in the RC for foreigners[87] have been erased. With respect to provisions of both, the principle of family unity, as well as the principle of efficiency, according to which the AC proceedings will be swift, without unnecessary delay and costs, the court has joined some cases for the purposes of conducting a unified procedure and reaching a common decision.[88] The current legal regulation presents improvement, especially with regard to enforcing alternative measures for restricting the freedom of movement, proscribing the application of measures for ensuring the return and redefining the circumstances which may indicate the risk of avoiding the obligation of leaving EEA that is RC. Particular imperfections have been dealt with along with the process of harmonisation with the EU Directive from 2016,[89] terminological harmonisation was necessary due to certain legislative definitions, whereas nomotechnical improvements were made with the aim of allowing undoubtful enforcement of the FA.

## 4. ANALYSES OF THE ADMINISTRATIVE-COURTS CASE LAW

Emphasis is put on the analyses of the judicial practice of the Administrative Courts in Zagreb and Osijek in administrative matters regarding restrictions on freedom of movement, and detention in reception centres-Reception Centre for Foreigners in Ježevo (hereinafter: RCJ) (Zagrebačka County) and Transit Reception Centre for Foreigners in Tovarnik (hereinafter: TRCT) (Vukovarsko-srijemska County). [90] From available statistical data of judicial practice of the Administrative Court in Osijek (hereinafter: AC OS) and in relation to court cases in which administrative disputes regarding restrictions on freedom of movement were imposed, a total of 128 court cases were received. In 10 cases from 2018 the plaintiffs filed a lawsuit for assessment of the lawfulness of a decision of the MI in which restrictions on freedom of movement were imposed by detention in RC. In these disputes, 9 cases ended in a way that the law suit was dismissed,[91] while 1 case ended by reaching

87 „…in 2017 the EU Commission reached a revised Return Directive which proscribes the manner in which periodic control is conducted, which, therefore, needed adjusting with the FA provisions…“ See Final Proposal of the Foreigners Act, Klasa: 022-03/18-01/53, Ur. broj: 65-18-02, P.Z.E. No. 328, Zagreb, 5 April 2018, pp. 25

88 See Decision of the Administrative Court in Osijek, UsI-158/19-4 from 4 February 2019

89 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, [https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32016L0801] Accessed 23.03.2019

90 About seats and area of competence of the Administrative Court in Osijek (hereinafter: AC OS) and Administrative Court in Zagreb see Art. 8 para 1 and para 4 Law on Areas and Seats of Courts, OG, No. 67/18. See Art. 135 (9) of the FA

91 Art. 57 para 1 of the ADA. See also Judgment of the Administrative Court in Osijek, UsI-626/18-25 from 25 May 2018, UsI-623/18-16 from 25 May 2018 in which the court has dismissed the law

a judgment in which the law suit was accepted. Appeals were made against the decisions reached by the AC OS (in all 10 cases). All the appeals were dismissed by the High Administrative Court in Zagreb.[92] Furthermore, in cases in which the AC OS was the body determining the law suits regarding the legitimacy of the decision reached by the MI about the placements, there were totally 10 cases in 2017, 59 cases in 2018 and 49 cases in 2019. 6 cases ended with the suspension of the reached decision, 9 cases were resolved by dismissing the decision reached by the MI and in 103 cases the decisions were declared lawful. It was not allowed to place an appeal against the reached decisions. Another point to emphasize, are the cases in which minors were involved.[93] In all such cases AC OS has reached the decisions[94] which were in accordance with the decision reached by the MI regarding the placement of foreigners in the centre for the purposes of ensuring forceful departure and return based on Art. 135 (4) FA. When analysing the accessible data due to judicial control of lawfulness of movement restrictions by placement in RC, it is to be concluded that AC have mostly confirmed the decision of the

suit for nullification of the decision reached by the MI regarding the placement in TRCT. The case included a number of minors for whom there existed justified reasons for restricting the freedom of movement due to establishing and checking the identity and citizenship. The specificity of these cases is also visible in difficulty to find the interpreter for Parsi or Pashto (the languages they understood)

92 See some of them Judgment of the High Administrative Court of the Republic of Croatia Usž-3203/18-3 from 21 August 2018, Usž-3452/18-2 from 30 August 2018, Usž-3547/18-2 from 28 November 2018, Usž-3700/18-2 from 28 November 2018. In judgement Usž-3203/18-3 from 21 August 2018 dismissed the law suit as unfounded and confirmed the decision reached by the AC OS, since it established the presence of justified reasons for restricting the freedom of movement and placement in the centre due to the lack of the plaintiff´s identity. The necessity for establishing one´s identity is a special reason for which it is allowed to restrict someone´s freedom (none of the 12 persons found together in a group was in possession of any type of evidence regarding the identity or kinship, they claimed to be the members of the same family, but have presented different last names, there has been a large number of minors). Moreover, in judgement Usž-3452/18-2 from 30 August 2018 points out that the plaintiff along with the group of people unlawfully entered the RC territory from the Republic of Serbia (hereinafter: Rs) and was therefore reasonably founded that he sought international protection in RS or other EU member country, which presents the reason for restriction of freedom of movement (unknown identity). The HAC, moreover, states that the plaintiff wrongfully claims he was unable to declare himself/herself in the administrative procedure due to the fact there was no interpreter for Parsi thereby questioning the honouring of the basic human rights guaranteed by the Constitution of the RH (unequal position). In the analysed cases plaintiffs argue that it was not possible to determine the basis of individual assessment for not applying less severe measures in order to impose movement restrictions

93 Decision of the Administrative Court in Osijek, UsI-25/18-4 from 12 January 2018, UsI-123/18-4 from 19 February 2018, UsI-168/18-4 from 27 February 2018, UsI-1266/18-2 from 4 October 2018, UsI-1427/18-2 from 26 November 2018, UsI-174/2019-3 from 8 February 2019

94 According to Art. 135 para 4 of the FA, it is proscribed that AC reaches the decision upon which the prior reached decision is either dismissed or confirmed. The judicial practice of the AC OS shows that the judgements were made in form of decisions

MI. This is so due to the fact that in individual decisions, circumstances[95] were justifiably determined, which indicated the presence of risk of avoiding the departure of EEA or RC in accordance with Art. 133 (2) of the FA.[96] Moreover, these were unlawful entries and stays of foreigners within the territory of the RC, which AC made undoubtedly clear by insight in records about taking depositions from foreigners which were enclosed in the case file. Additionally, they explain that the forceful departure of foreigners could not have been ensured by applying less strict measures (Art. 131 (1) and 132 (1) of the FA).[97] Having considered the fact that the foreigner´s freedom of movement, which is one of the basic human rights, is hereby restricted by placement in RC, ACs have declared this not being opposed to achieving its lawfully proscribed purpose and is in proportion with the necessity for movement restriction. There have been, however, some cases in which the decisions of MI have been dismissed.[98] Some of the reasons for reaching those decisions are that it is not enough for a foreigner not to have an identification document or it is not clear whether the individual assessment has been performed since no reasons for the maximum length of the forceful placement period have been provided or the case file has not been delivered. Another possibility is that the decision does not explain how the conclusive fact (unclear exact identity of a foreigner) has been determined or there might even be a contradiction between the decision and its clarification etc. This is all indicative of the seriousness of the responsibility assigned to the competent administrative and judicial authorities. The fact is more than obvious when comparing the necessity for ensuring minimal legislative guarantees when reaching decisions by conducting lawful and transparent procedures to ensure effective legal protection of individuals´ rights and interests. These are both extremely complicated legal and highly sensitive life situations in which under aged children[99] are often involved as well, which makes the AC role in these cases even more important and demanding.

## 5. CONCLUSION

Human rights and freedoms are subject of numerous documents at European level. Basic framework on irregular migration is set in ECHR in Article 5 which

[95] The most frequent reasons are (considering the unlawful residence) the lack of travel documents or identification, residence address or financial means

[96] Decision of the Administrative Court in Zagreb, UsI-3702/18-2 from 18 October 2018

[97] See Decision of the Administrative Court in Osijek, UsI-168/18-4 from 27 February 2018

[98] Decision of the Administrative Court in Zagreb, UsI-3797/18-2 from 30 October 2018, Decision of the Administrative Court in Osijek, UsI-169/18-4 from 27 February 2018, Decision of the Administrative Court in Osijek, UsI-30/19-2 from 11 January 2019, Decision of the Administrative Court in Osijek, UsI-185/19-2 from 12 February 2019

[99] See Ar. 5 (a) of the Return Directive

guarantees right to liberty and security regardless of status, nationality or citizenship. ECtHR case law sets clear standards on the restriction of the mentioned right for national administrative bodies and courts on national level, such as guidelines on lawful detention of migrants. Review procedures before national courts should be speedy and effective when deciding on lawfulness of the decision on detention and on the decision for prolongation of the detention. Nonetheless, wide discretion is left for High Contracting Parties in the aspect of the protection of the national security.

The Charter on Fundamental Freedoms of the EU in Article 45 (2) provides basic framework for the residence of the third-country nationals in the EU. Returns Directive sets rules on the detention and on the procedures regarding returning irregular migrants. Immigrants should be treated with dignity and respect. CJEU has very important role in the achievement of mentioned standards through its rulings in cases of illegal migration, especially in preliminary procedures where national courts refers questions to CJEU on the interpretation of the EU law. European countries should respect Council of Europe and EU standards in order to avoid or at least minimize the violation of rights of vulnerable groups in the migration process.

The current legal regulation (FA) presents improvement, especially with regard to enforcing alternative measures for restricting the freedom of movement, proscribing the application of measures for ensuring the return and redefining the circumstances which may indicate the risk of avoiding the obligation of leaving EEA that is RC. When analysing the accessible data due to judicial control of lawfulness of movement restrictions by placement in RC, it is to be concluded that AC have mostly confirmed the decision of the MI.

Our opinion is that the standards of urgency of proceedings and decision making (speedy judicial review) by administrative (MI) and judicial (AC) authorities are being obeyed. Moreover, the procedural safeguards in the cases regarding the decision making about unlawful stay are being fulfilled since the foreigners have the right to effective remedy, necessary linguistic assistance (an interpreter), giving statements, receiving representation, (free) legal aid. Conclusively, we emphasize that based on the review of the administrative-judicial decision it is to be concluded that the standards guaranteed by Art. 15-18 of the Return Directive (Detention for the Purpose of Removal) are being ensured.

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# ILLEGAL MIGRATION THROUGH THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE CONSEQUENCES FOR THE REPUBLIC OF CROATIA

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***ABSTRACT***

*The European humanitarian and migration crisis created by the mass influx of migrants into the European Union that began in 2015 opened up many issues and areas that have not been systematically discussed. The area of irregular entry is certainly one of the most important, precisely because of the legal gaps in the application of the Dublin III Regulation. Recently, the question of irregular entry came before the Court of Justice of the European Union (CJEU) in two cases brought by Slovenia and Austria, whose outcomes have significant consequences for the Republic of Croatia. In the Court's opinion, admission of third-country nationals in the Member State, with the intention of transferring to another Member State to seek international protection, is considered irregular entry, even in emergencies such as the mass influx of migrants to the state border. Member States receiving a third-country national on their territory shall ensure that all conditions for legitimate entry are met. Without legal preconditions for entry, legitimate residence on the territory of the country of first entry or legitimate transit to another Member State is not possible. The passage of third-country nationals from the Republic of Croatia for humanitarian reasons has resulted in irregular migration because requirements for entry into the state territory were not met. Within these judgments, the CJEU has discussed issues relating to the presumption of lawful entry into the territory of the European Union and the issue of the treatment of a Member State in which a third-country national has first entered. The importance of the CJEU decision is in the fact that it clarifies that the mechanism established by the Dublin III Regulation must inevitably apply, even in exceptional circumstances.*

*The established form of action will certainly be of great importance in the further treatment of Member States because the inflow of migrants to the external borders of the European Union is still expected. This paper will analyse the legal framework regulating the issue of irregular entry and the protection of external borders of the European Union and the main arguments of the CJEU, as well as the opinion of the Advocate General, which was opposing the opinion of the CJEU. The impact of such a Court decision will be critically analysed in this paper as well.*

***Keywords**: migration crisis, irregular entry, visa, transit, international protection, third-country nationals*

## 1. INTRODUCTION

Migration has been a common and everyday occurrence all throughout history and remains so until the present. All the countries in the world, including Member States of the European Union (hereinafter 'the EU'), should be prepared to address it. The migration and refugee crisis which, as a result of the Arab Spring, shook the EU in 2015, reflected all the shortcomings of the Common European Asylum System (hereinafter 'the CEAS') and the migration policy of the EU. One of the problems which proved to be crucial from the very beginning is the issue of irregular entry. For the purpose of this paper, it is important to note the differentiation between refugees and migrants. This is relevant not only to provide a clearer understanding of the subject, but also given the fact that migrants and refugees do not enjoy the same rights, do not qualify for the same level of international protection and are subject to different procedures and regulations. This paper focuses on the period from September 2015 to March 2016 (hereinafter 'the crisis period'), when the refugee crisis reached its culmination point, showing the most important problems and shortcomings of the CEAS.[1] This paper discusses two research questions which have been raised during the migration and refugee crisis period in the EU. The first question concerns the admission of third-country nationals who do not meet the entry requirements into the territory of a border Member State for the purpose of transit to another EU Member State. Is the admission of third-country nationals, in exceptional circumstances such as the mass influx of migrants and refugees, for the purpose of transit to another Member State, considered irregular or regular entry? The second question relates to the admission of third-country nationals who do not meet the entry requirements into the territory of a Member State on humanitarian grounds. Specifically, is the entry of third-country nationals into the territory of a border Member State authorised on humanitarian grounds considered regular entry? The Court's judgments in cases *A.S. v. Slovenia*[2] and *Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*[3] are significant for answering these research questions. The opinion of the Advocate General contradicted the Court's decision, making the discussion even more relevant. By its judgments the Court managed, once again, to protect the integrity of the EU and attempted to strengthen the Dublin system and the common European policy on asylum. However, the effects and the significance of the judgments will have a considerable impact on the future. The judgments also

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[1] See further: Lalić, G., *Razvoj zajedničkog europskog sustava azila,* Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave, *vol.* 7 No. 4, 2007

[2] Case c-490/16 *A. S. vs. Republic of Slovenia* (2017) ECL I 585

[3] Case C-646/16 *Khadija Jafari and Zainab Jafari vs. Bundesamt für Fremdenwesen und Asyl* (2017) ECL I 586

raise the question of whether the Court put the protection of human rights in an inferior position to policies implemented by the EU. The effect of the judgments in the cases concerned is relevant to the Republic of Croatia (hereinafter 'Croatia') as well since the country was a subject matter of the proceedings[4]. With a view to answering the research questions raised, the paper will analyse the obligations of the Member States as regards to international and European asylum law, the main arguments of the Court as well as the opinion of the Advocate General, which was opposing the opinion of the Court. For the purpose of this paper, an interview will be conducted with the heads of the Ministry of the Interior responsible for irregular migration and the border crossing point between Serbia and Croatia, at which the families in the cases concerned first entered EU territory in the crisis period.

## 2. EU MEMBER STATES' OBLIGATIONS TOWARDS REFUGEES UNDER INTERNATIONAL AND EUROPEAN ASYLUM LAW

The entire EU migration law involves the interaction of national laws, European law and international law.[5] International and European law complement each other: the EU law brings general rights which are provided for on international level. When it comes to international human rights law, there are no generic rights related to the entry of third-country nationals [6], whereas EU legislation ensures far more individual rights. In relation to refugees, the Member States' mandatory compliance with the Geneva Convention[7] and human rights means prohibiting the infringement of international obligations when applying European law in the field of border control and visa issuance. Entry and border control must be pursued in compliance with human and refugee rights.[8] As Hathaway[9] finds, refugee rights are matters of international law to the extent that they derive from one of the accepted trio of international law sources, in this case the Geneva Convention, and they do not exist as an alternative to, or in competition with, general human

4 Croatia was not a party to the proceedings, but a subject matter thereof since the third-country nationals concerned first entered EU territory in Croatia

5 See further: Goldner Lang, I.: *The European Union and Migration: An Interplay of National, Regional, and International Law*, American journal of international law, 111, 2017, p. 509-513

6 See: Weissbrodt, D., *The Human Rights of Non-citizens*, (OUP 2008); and Mantouvalou, R.,*The Labour and Social Rights of Migrants in International Law*, in: Rubio-Marin (ed.), Human Rights, 2014, p. 177-211

7 Convention Relating to the Status of Refugees, 25 July 1951.as amended by the 1967 Protocol Relating to the Status of Refugees, 31 January 1967. (Geneva Convention)

8 Hailbronner/Thym, *Legal Framework for Entry and Border Control*, in Hailbronner, K.; Thym D., (eds.), EU Immigration and Asylum Law, A Commentary, 2nd edition, C.H.Beck/Hart/Nomos, 2016, p. 48-49

9 Hathaway, C., J., *The evolution of the refugee rights regime*, Cambridge University Press, 2005, p. 75-153

rights. When we talk about the refugee crisis on EU territory during the crisis period, we talk about refugee rights. Although, as Schuster[10] finds, very often refugees are being converted into irregular migrants in political and public discourse, and the current EU regime shields EU Member States from their international legal obligations. From Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms[11] (hereinafter 'Convention on Human Rights') follows that non-refoulment stems from the absolute prohibition of torture.[12] The Geneva Convention defines the term 'refugee'[13] and prohibits punishment due to unlawful entry in the country where protection is claimed. The implications of stringent border controls, provided for in the Schengen Borders Code, can be particularly severe for persons seeking international protection. There are reasonable prospects that, in most cases, persons fleeing persecution, a serious threat to their life or physical or mental health or war will not be admissible to the Schengen area. In numerous cases, they will also not possess a valid travel document or other necessary documents. Irrespective of the non-compliance with entry requirements, every person must have the right to entry in order to seek international protection and their stay must be allowed during the examination of their application.[14] The EU is not a signatory to the Geneva Convention, but the Member States are, each of them individually and only with regard to their own territory. The CEAS[15] is based on the Dublin system composed of the Dublin III Regulation and the Regulation on the establishment of Eurodac for the comparison of fingerprints[16]. The Dublin system is based on the principles of solidarity and fair sharing of responsibilities among Member States[17], laid down in the

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[10] Schuster, L., *Turning refugees into 'illegal migrants': Afghan asylum seekers in Europe*, Ethnic and Racial Studies, *vol.* 34, - Issue 8: Irregular Migrants: Policy, Politics, Motives and Everyday Lives, 2011, p. 1392-1407

[11] Adopted in Rome on 4 November 1950, Narodne novine (Official Gazette) – International treaties, No. 18/97, 6/99 – consolidated text, 8/99 – corr., 14/02, as amended by Protocol 14 to the Convention (2010) Narodne novine – International treaties, No. 1/06

[12] See Soering vs. United Kingdom (1989) ECHR 14

[13] Geneva Convention, Article 1(a)

[14] Egbuna-Joss, E., *op. cit.* note , p. 60-62

[15] See more in: Lalić, G., *Razvoj zajedničkog europskog sustava azila*, Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave, *vol.* 7 No. 4, 2007

[16] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (2013) SL L180

[17] Goldner Lang, I., *op. cit.* note 5, p. 512

Treaty of the Functioning of the European Union[18] (hereinafter 'TFEU'), which ensure the efficiency of the system. It is precisely the lack of solidarity among the Member States that led to the biggest problems the Dublin system faced in the crisis period. Goldner Lang points out that there is a problematic relationship between the Dublin state-of-first-entry rule and the application of the principle of solidarity, which results in fair responsibility-sharing between the Member States. She also points to the problem stemming from the principle of solidarity in terms of shifting the burden instead of sharing it.[19] Article 3 of the Directive on common standards and procedures in Member States for returning irregularly staying third-country nationals [20], defines irregular stay, whereas Article 5 of the Schengen Borders Code lays down the conditions for entry. Exceptions from conditions for entry shall be granted, *inter alia*, on humanitarian grounds or because of international obligations.[21] This means that a Member State can apply a more favourable legal interpretation for the refugees, however, only with regard to its own territory, without affecting other Member States. If a Member State does not apply the Geneva Convention to third-country nationals who meet the requirements for refugee status directly, it has to apply the European protection mechanism. It also has to make sure that the conditions for a lawful entry are fully met, which follows from the judgments in cases *A.S. v. Slovenia* and *Jafari v. Bundesamt fur Fremdenwesen und Asyl.*

## 3. IRREGULAR ENTRY THROUGH THE PRACTICE OF THE COURT OF JUSTICE

Even though there are wide international and European legal frameworks regulating irregular migration, their interweaving and application in the refugee crisis period led to numerous discussions and opened up legal matters which have not been discussed before. The paper will proceed with a presentation of the most prominent issues relating to irregular entry in the case-law of the Court. These

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[18] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (2007) OJ C 202, Art. 80 (TFEU)

[19] Goldner Lang, I., *Ima li solidarnosti u azilu i migracijama u Europskoj uniji? Prvih deset godina razvoja sustava azila u Hrvatskoj*, in: Župarić-Iljić, D., (ed.), Zagreb: Institut za migracije i narodnosti: Centar za mirovne studije: Kuća ljudskih prava, 2013, p. 33-45.

[20] Directive 2008/115 (EC) of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (2008) OJ L 348 (The Return Directive)

[21] Schengen Borders Code, *op. cit.*, note 2, Article 6(5)(c)

issues proved to be crucial during the crisis period due to inconsistencies in their interpretation and the application of legal provisions. The aforementioned questions referred to the Court by the Supreme Court of the Republic of Slovenia and the Supreme Court of the Republic of Austria are very similar and concern the interpretation of the provisions of the Dublin III Regulation and the Schengen Borders Code. Both cases are related to the issue of irregular entry in the crisis period. In both cases, the Court's opinion was opposing the one of the Advocate General Eleanor Sharpston[22] (hereinafter 'Advocate General'), opening up opportunities for examining the Court's view.

### 3.1. CASE C-490/16 *A.S. v. SLOVENIA* – FACTUAL SITUATION

Mr A.S., a Syrian national, travelled from Syria to Turkey and across a number of countries to finally arrive in Croatia. He was transferred by the Croatian authorities across Croatian territory to the Slovenian border. On 20 February 2016 Mr A.S. entered Slovenia, where he was registered. On the following day, after an attempt to cross the Austrian border, he was sent back to the Slovenian authorities. After that event, Mr A.S. lodged an application for international protection in Slovenia. On that same day, Slovenia asked Croatia to take back 66 people of whom Mr A.S. was one. Croatia confirmed its acceptance that it was the Member State responsible under the Dublin III Regulation. After the Slovenian Ministry of the Interior informed Mr A.S. that his application for international protection would be examined by Croatia, as the Member State responsible, he challenged that decision before the Administrative Court. He stated that the Croatian State authorities' conduct must be interpreted as meaning that he entered Croatia lawfully. His request was rejected and Mr A.S. appealed against the first instance decision to the referring court seeking clarification from the Court on how the terms of irregular or unlawful entry are to be applied in this context.[23] In this particular case, the Court had to decide if an applicant for international protection may, in an appeal against a decision to transfer him, plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of a Member State's border. It also had to rule if the periods laid down in Article 13(1) and Article 29(2) of the Dublin III Regulation continue to run after an appeal has been lodged against the transfer decision concerned, including when the court hearing that appeal has decided to seek a preliminary ruling from the Court. In addition, the Court had to answer the following question: In the light of the fact that the

22 Opinion of Advocate General in cases C-490/16 and C-646/16 *A.S. v. Republic of Slovenia and Jafari v. Bundesamt für Fremdenwesen und Asyl.,*8 June 2017

23 The request for a preliminary ruling concerned the interpretation of Art. 13(1), Art. 27(1) and Art. 29(2) of the Dublin III Regulation

entry of third-country nationals is tolerated by the authorities of the first Member State only for the purpose of transit to another Member State, must it be assumed that the entry is unlawful?

### 3.2. CASE C-646/16 *JAFARI v. BUNDESAMT FÜR FREMDENWESEN UND ASYL* –FACTUAL SITUATION

Ms Khadija Jafari and Ms Zainab Jafari and their children are Afghan nationals, who entered EU territory in Greece, where they stayed for three days before leaving EU territory and re-entering in Croatia, which allowed them to travel through its territory. Upon entering the Austrian border, the Jafari families lodged an application for international protection. The Austrian authorities considered that Croatia is to be responsible for examining that application given the systemic flaws in the asylum procedure in Greece. The Jafari sisters contested this conclusion. They took the view that their entry was authorised on humanitarian grounds under the Schengen Borders Code and thus lawful, considering Austria to be the Member State responsible for examining their application. In its request for a preliminary ruling, the Upper Administrative Court in Vienna sought guidance for addressing the aforementioned legal issues.[24] In this particular case, the Court had to answer the following questions: whether the Dublin III Regulation should be interpreted by reference to other EU acts; did the cooperation and facilities provided by the EU transit States amount to visas; how the phrase 'irregularly crossed the border' should be interpreted and whether third-country nationals who were allowed to enter the Schengen area during the humanitarian crisis fall within the exceptions to the normal rules in the Schengen Borders Code. Given the similarities between the proceedings, the Court decided to hold a joint hearing for these two cases.

### 3.3. ADVOCATE GENERAL'S OPINION IN CASES *A.S. v. SLOVENIA AND JAFARI v. BUNDESAMT FÜR FREMDENWESEN UND ASYL*

At the very beginning of her opinion, the Advocate General states that the Court is asked to provide a legal solution to fit the unprecedented factual circumstances of the refugee crisis. She takes the view that the Dublin III Regulation should be interpreted by reference to the wording, context and objectives of that Regulation alone, rather than in conjunction with other EU acts, like the Schengen Borders Code and the Return Directive. Apart from that, she considers that certain Member States allowed the persons concerned to cross the external border of the EU and subsequently to travel through to other Member States in order to lodge an

[24] The request for a preliminary ruling concerned the interpretation of Arts 2, 12 and 13 of the Dublin III Regulation and Art. 5 of the Schengen Borders Code

application for international protection, which does not equate to the issuance of a 'visa', since the rules governing the issuing of visas were not met in these cases. Furthermore, she considers that the words 'irregular crossing' in the Dublin III Regulation do not cover a situation where, as a result of a massive inflow of third-country nationals, Member States allow third-country nationals to cross the external border of the EU and subsequently travel through other EU Member States to lodge an application for international protection in a particular Member State. She concludes that, if the entry conditions[25] are not met, the crossing of an external border by a third-country national must, in the formal sense, be considered 'irregular'. However, the entry of the person concerned is *de facto* allowed, the legal basis for the authorisation being the derogation[26] under the Schengen Borders Code. Given the fact that Mr A.S. and the Jafari families first entered EU territory in Greece and then temporarily left it to eventually reenter in Croatia, the Advocate General finds that Croatia is the country of second entry and not bound by the Dublin III Regulation, irrespective of the fact that the persons concerned could not reenter Greece due to a previous decision of the Court.[27] She reiterates the unprecedented inflow of persons into the Western Balkans and the fact that no bespoke criterion was inserted into the Dublin III Regulation to cover that situation. She agrees with the Italian government's argument that according to Article 78(1) of the TFEU, it is correct to consider Articles 31 and 33 of the Geneva Convention the starting point for interpreting Article 13(1) of the Dublin III Regulation. Therefore, the states allowing transit through their territory acted in accordance with their obligations under the Geneva Convention given the fact that the crisis period involved refugees. This fact is important and must not be neglected. She also states that the right to asylum laid down in Article 18 of the Charter of Fundamental Rights of the EU[28] and the prohibition of torture or inhuman or degrading treatment, which the third-country nationals would have been subject to if they had stayed in the unresolved situation at the national borders, should be taken into consideration. If the national asylum system of a particular Member State is overloaded, it is impossible to guarantee effective access to the procedures granting international protection, thereby compromising the objective of rapid processing of applications for international protection laid down in the Directive on common procedures for granting and withdrawing international protection.[29] That being said, the Advocate General concludes that

[25] Schengen Borders Code, *op. cit.*, Article 5(1)

[26] *Ibid.* Article 5(4)(c)

[27] See: *infra*, note No. 37, 38 and 39, p 8

[28] Charter of Fundamental Rights of the European Union (2007) OJ C 303

[29] 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) OJ L 180

Slovenia is the Member State responsible for examining Mr A.S.'s application for international protection and that Austria is the Member State responsible for examining the Jafari families' applications.

### 3.4. THE JUDGMENT OF THE COURT AND THE UNDERLYING LEGAL FRAMEWORK

The Court takes the view that an applicant for international protection is entitled, in an appeal against a decision to transfer him, to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State.[30] Referring to the judgment in case *Ghazelbash*[31], the Court decides that an applicant for international protection may, in an appeal against a decision to transfer him, plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of a Member State's border. It also states that the lodging of an appeal against a transfer decision has no effect on the running of the period laid down in the Dublin III Regulation. Furthermore, it considers that the entry of a third-country national, even if tolerated and facilitated by the authorities of a Member State, must be regarded as irregular. Regarding derogation from the Schengen Borders Code on humanitarian grounds, the Court reiterates that such authorisation is only valid for the territory of the Member State in question and not for the territories of other Member States.[32] In addition, if it were accepted that the entry of a third-country national authorised by a Member State on humanitarian grounds does not constitute an irregular crossing of the border, that would imply that the Member State in question is not responsible for examining the application for international protection lodged by that person in another Member State. Such a conclusion would, however, be incompatible with the general structure and objectives of the Dublin III Regulation, which allocates the responsibility for examining an application for international protection lodged by a third-country national to the Member State which that national first entered or stayed in when entering EU territory. Thus, a Member State which has decided on humanitarian grounds to authorise the entry on its territory of a third-country national who does not have a visa and is not entitled to a waiver of a visa cannot be absolved of that responsibility. Against this background, the Court considers that the term 'irregular crossing of a border' also covers the situation in which a Member State admits into its terri-

[30] In view of recital 19 and Article 27(1) of the Dublin III Regulation

[31] Case C-63/15 *Mehrdad Ghazelbash v. Staatssecretaris van Veiligheid en Justitie* (2016) ECL I-409

[32] The preamble to the Geneva Convention, *op. cit.,* note 2., clearly states that all the obligations undertaken regard only signatory States, indicating that the asylum law may entail extremely burdensome obligations for certain countries and that a satisfying solution depends on international solidarity

tory third-country nationals on humanitarian grounds, by way of derogation from the entry conditions generally imposed on third-country nationals. Furthermore, referring to the mechanisms laid down in the Dublin III Regulation, to Directive 2001/55[33] and Article 78(3) of the TFEU, the Court finds that the fact that the border crossing occurred during the arrival of an exceptionally large number of third-country nationals seeking international protection is not a decisive factor. It also takes the view that the authorities of a first Member State tolerating the entry of those nationals who did not satisfy the entry conditions in principle required into their territory, due to exceptional circumstances of the crisis period, cannot be treated as a 'visa' situation.[34] Consequently, the Court states that admitting third-country nationals into the territory of a Member State cannot be equated to the issuance of a visa, even in exceptional circumstances of a mass inflow of displaced persons into the EU.

## 4. LEGAL IMPACT OF THE JUDGMENTS – CONSEQUENCES FOR THE REPUBLIC OF CROATIA

The questions referred to the Court are in fact closely related to the functioning of the Dublin system in mass migration as well as to the issue of refugee rights. Therefore, the Court finds that the provisions of the Dublin III Regulation, as well as the conditions for entry laid down in the Schengen Borders Code, must inevitably apply, even in exceptional and crisis situations. Refugees are not migrants. As Hathaway and Foster[35] find, recognition of the refugee status does not make a person a refugee but only declares him to be one, which means that he does not become a refugee because of recognition, but is recognised because he is a refugee. With these judgments the Court, once again, ignored the criticism of the doctrine. The Advocate General's opinion clearly states that the Dublin III Regulation does not include any mechanisms for controlling and managing mass migration and that the situation in the crisis period was exceptional, concluding that the non-functioning of the system was expected. On one hand, the Court decided on the temporary suspension of the Dublin system in Greece and Italy due to their difficult situations, whereas on the other, in these judgments it calls for the indispensable application of the Dublin system even in exceptional situations such as the mass inflow of migrants to the state border of a Member State.[36] According to

[33] Council Directive 2001/55 (EC) on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (2001) OJ L 212

[34] Within the meaning of Article 2(m) of the Dublin III Regulation, *op. cit.*, note 1

[35] Hathaway, C. J.; Foster, M., *The Law of Refugee Status,* Cambridge University Press, 2014, p. 1-16

[36] See also: Goldirova, R., *Greece under Fire over Refugee Treatment*, EU Observes, 2008

Bačić[37], the system of responsibility-sharing under the Dublin III Regulation resulted in uneven burdens being imposed on EU Member States, with a particularly heavy burden being imposed on states on the southern and eastern borders due to the principle of responsibility allocated to the country of first entry into EU territory. Bačić also finds that the transfer of jurisdiction in asylum policies from national states to the EU has led to an uneven distribution of responsibilities and consequently to the non-functioning of the Dublin system as a whole and the questionable application of the Geneva Convention in general.[38] Following the call by the German Chancellor directed at citizens of countries affected by wars, Croatia found itself in a very difficult situation. According to the official data reported by the Ministry of the Interior of the Republic of Croatia, 658 068 migrants entered Croatia during the crisis period, out of which 558 724 in 2015, usually at the borders of Eastern Croatia. Nearly all of them left Croatia on their way to Western Europe, while only 39 refugees applied for asylum. During the crisis period, the number of third-country nationals entering the country sometimes reached nearly 10,000 people a day.[39] The 'laisser passer' policy applied by Croatia was the only possible solution at that moment given the fact that the country was, due to its economic situation and level of preparedness[40], unable to receive such large numbers of third-country nationals and provide them with humane living conditions.[41] In her opinion, the Advocate General outlined the same argument as the one laid down by Article 31 of the Geneva Convention, which prohibits imposing penalties to refugees on account of their irregular entry. It is interesting to note that the Court refused to accept this connotation stating that the entry requirements laid down by the Schengen Borders code must inevitably apply and that, even in the case of fulfilling international obligations under the Geneva Convention, this obligation regards only the territory of the Member States of admission and not the territories of other Member States. This argument is valid given the fact that the Member States are signatories to the Geneva Con-

37 Bačić Selanec, N., *Dublinska uredba i problem pograničnih država članica Europske unije, Prvih deset godina razvoja sustava azila u Hrvatskoj*, in: Župarić-Iljić, D., (ed.). Zagreb: IMIN; Centar za mirovne studije; Kuća ljudskih prava, 2013, p. 2

38 See further: Bačić Selanec, N., *Asylum Policy in Europe – the competences of the European Union and inefficiency of the Dublin system*, Croatian Yearbook of European Law and Policy, *vol.* 8, No. 8, 2012, p. 41-76

39 Data obtained through an interview with the Head of the Department for Irregular Migration of the Vukovar-Srijem County (the Croatian state border where families from the judgments crossed the border during the crisis period) conducted for the purpose of this paper, 11 February 2019

40 In the last 10 years, on average 30 % of people in Croatia were at risk of falling into poverty or social exclusion, National Bureau of Statistics, Indicators of poverty and social exclusion, [https://www.dzs.hr/] Accessed 13 February 2019

41 Interview with the Head of the Department for Irregular Migration of the Vukovar-Srijem County, *op. cit.*

vention, but the EU should not have ignored their international obligations under the Geneva Convention. According to Goodwin-Gill and Lambert,[42] a transnational dialogue among courts can be an important instrument for the interpretation of the Geneva Convention even beyond the EU. Therefore, the Court has a central role in refugee protection in the EU and recognition of their refugee status and preventing the transformation of refugees into irregular migrants. According to Trauner[43], the implementation of the existing EU asylum rules may overburden southern Member States while the perpetuated ignorance of these rules risks overburdening the northern Member States, which proves the inefficiency of this system in crisis situations. In a number of cases, the ECHR and the Court found that the Dublin system does not function and that it has certain legal inconsistencies, which triggered the reform of the system. This started with the Proposal for amending the Dublin III Regulation[44], which introduced the so-called corrective allocation mechanism aimed at strengthening the principle of solidarity and fair responsibility-sharing. It becomes clear that, without a regulated system of solidarity among the Member States, there is no international solidarity, which makes this issue even wider. This judgment has failed to address all the difficulties encountered by the EU in the crisis period as well as the legal gaps of European legislation, indirectly confirming that the EU, instead of protecting the rights of refugees to access a territory, puts the protection of the territory first. Disregarding the context in which these situations occurred, considering that the Dublin system is an adequate mechanism in emergency situations, such as the mass influx of migrants, and ignoring the international obligations of Member States will have a significant impact on the further development of the asylum system and fair responsibility-sharing among the Member States. In its judgments, the Court stressed that the term 'irregular entry' also covers a situation in which a Member State admits third-country nationals into its territory on humanitarian grounds and by way of derogation from entry conditions generally imposed on third-country nationals. According to Bačić and Goldner Lang, the lack of solidarity between the Member States called the whole Dublin system, as well as the full respect of human rights, into question. Even though the preamble to the Dublin III Regulation outlines the aim of striking a balance between the Member States in a spirit

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[42] See further: Goodwin-Gill, G. S.; Lambert, H. (eds.), *The Limits of Transnational Law. Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, CUP, 2010

[43] Trauner, F., *Asylum policy: the EU´s crises´ and the looming policy regime failure*, Journal of European Integration, *vol.* 38, Issue 3: EU Policies in Times of Crisis, 2016, p. 311-325, also: Hatton, T. J., *European Asylum Policy*. National Institute Economic Review, number 194, October 2005, pp, 106-119

[44] 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 international protection lodged in one of the Member States by a third-country national or a stateless person (recast)COM/2016/0270 final/2 - 2016/0133

of solidarity, it actually disregards the possibility of mass migratory pressure put on certain border Member States. This was precisely the situation Croatia found itself in during the crisis period, which was due to its geographical location. The effect of mass migration on border Member States has been highlighted with regard to Greece, where the Court noted that the country was unable to cope with the situation given the mass influx of refugees and migrants.[45] As Mitsilegas finds,[46] increased migratory pressure on a particular Member State results in focusing on the management of migration flows, rather than on the rights of the asylum seeker. Ultimately, this could give rise to viewing asylum seekers in negative light. The analysis of the provisions of the Proposal for amending the Dublin III Regulation shows an attempt to address the issue of solidarity between the Member States by introducing the so-called corrective allocation mechanism, which would be activated automatically as soon as a Member State is faced with a disproportionate burden. However, such an allocation mechanism only provides a current one-year basis of calculation, which would imply a provisional allocation of asylum applications, with a potential need to resettle the asylum seekers the following year. As Van Wolleghem finds[47], this lack of flexibility likely maintains the burden on countries of entry, albeit for a limited amount of time. The author of this paper considers that the Court, in delivering its judgment, should have taken into account the fact that the situations concerned took place during an extremely large influx of migrants and refugees and that it should have determined Slovenia and Austria as the Member States responsible for examining the asylum applications lodged. If the border Member States were to be determined as responsible for considering all asylum applications during mass migration, they would face a real risk of not being able to handle such situations. This, in turn, would put the Member States in a situation in which they would not be able to comply with their obligations under the EU law and international law. The author also finds that a criterion for handling mass migration should be incorporated into the Proposal for amending the Dublin III Regulation in order to prepare the border Member States to implement such actions in a timely manner and harmonise their actions in these situations.

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[45] See Joined Cases C-411/10 and C-493/10, N. S. and M. E., judgment of 21 December 2011, paragraph 90

[46] Mitsilegas, V., *Solidarity and Trust in the Common European Asylum System*, Comparative Migration Studies, *vol.* 2, No. 2, Amsterdam University Press, 2014

[47] See further: Georges Van Wolleghem, P., *If Dublin IV were in place during the refugee crisis...A simulation of the effect of mandatory relocation*, Paper ISMU, Fondazione, Milano, 2018

## 5. CONCLUSION

After analysing the legal framework, the judgments and the opinion of the Advocate General in cases *A.S. v. Slovenia* and *Jafari v. Bundesamt für Fremdenwesen und Asyl*, it becomes clear that the EU requires compliance with its *acquis* and the provisions thereof even in exceptional circumstances such as the mass inflow of migrants to the borders of a Member State. Therefore, allowing refugees to travel through Croatian territory without meeting the entry conditions laid down by the Schengen Borders Code and under Article 31 of the Geneva Convention shall be valid only for the entry into Croatian territory. Any further transfer of third-country nationals to other Member States of the EU, even with the authorisation and facilitation of the Croatian authorities, must be considered irregular and such authorisation cannot be equal to visa issuance. Accordingly, the Court decided that Croatia is responsible for examining applications for international protection in cases *A.S. v. Slovenia* and *Jafari v. Bundesamt für Fremdenwesen und Asyl*. The opinion of the Advocate General was completely different from the ruling of the Court. In her opinion, the Advocate General outlines a number of arguments explaining why Croatia is not the Member State responsible for examining applications for international protection in the aforementioned cases, but the Court did not take those arguments into consideration and delivered a completely different judgment. Such judgments have significant moral and ethical implications for Croatia. Following these judgments, Croatia is indirectly held liable for facilitating irregular migration. These judgments are a result of the non-functioning of the Dublin system, imposing a burden on Croatia, a collateral victim of the system's inconsistencies. By building wire fences on their state borders, EU Member States such as Hungary and Slovenia left it entirely up to Croatia, a less economically developed country, to handle the mass inflow of refugees. The Dublin system is not a mechanism for controlling mass migration. Its provisions insist on an individual approach, while the crisis period and the problems that emerged during the crisis find themselves in a legal vacuum created by the system. The application of the Geneva Convention justifies the entry of third-country nationals into the territory of a signatory State if those persons are categorized as refugees. Why is the Court insisting on the application of the procedural rules of the EU asylum system even in situations of a mass influx of refugees arriving at the external borders of the EU and thus ignoring international obligations of the Member States? Will the Dublin system survive and manage to cope with what is today a migration crisis? Will the consequences of these judgments contribute to this and will the border Member States manage to handle the heavy burden imposed on them due to their geographical location? Obviously, more time is needed to answer all of these questions.

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# THE RIGHT TO WATER AND THE RIGHT TO USE HYDROPOWER: THE CASE OF SERBIA AND LESSONS LEARNED FROM THE EU

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***ABSTRACT***

*Water is a resource with the capacity to generate power in many forms whether be it access to drinking water or use as hydropower or steam power to produce electricity. Renewable recourses open issues where environmental protection meets different requirements: to protect the quality and national potential of water, but to develop the use of emission-free hydropower; to strengthen constitutional and legal guaranties to access to water but to provide adequate type of rights to use hydropower. The right to use water for hydropower must be weighed with its impact on the quality and quantity of water courses. In comparative law we may find different approaches that should guarantee the right to water. The concept that the right to water might be protected only if water is recognized as a legal person (exercised in recent cases the Amazon River, Ganges and Yamuna rivers, Whanganui river) will be challenged with EU approach where measurement on different interests of environmental protection is the base for water protection. The article outline elements that provide minimum guarantees for including the both rights in decision-making process singled out in practice of jurisprudence of the Court of Justice of the European Union. The article points out the most important case under the Serbian Administrative Court on small hydropower licensing in 2018. The aim of the article is to examine if the conclusions from EU may be find in Serbian law and to suggest legal changes that could lead to full transposition of environmental acquis.*

***Keywords:*** *Human Right to Water. – Small hydropower plant. – European Commission v. Republic of Austria, C–346/14. – C-664/15 Protect Natur-. – Rights of the Amazon River. – Whanganui River Claims Settlement. –Ganges and Yamuna Rivers as a Legal Person. – Serbian General Administrative Procedure Act*

## 1. INTRODUCTION

The right to water evolved from the right to health, established in 1946 with the founding of the World Health Organization, and further mentioned in the Universal Declaration of Human Rights of 1948 and the International Convention on Economic, Social and Cultural Rights of 1966. An explicit protection of the right to water was introduced as late as in 1979, in the Convention on the Elimination of All Forms of Discrimination against Women and in Article 24 of the

Convention on the Rights of the Child of 1989. Prohibition of the denial of food and water to prisoners of war is mentioned in the Protocols to the Geneva Conventions of 1977, relating to the implementation of international humanitarian law in armed conflicts.[1] The Protocol on Water and Health to the 1999 Convention on the Protection and Use of Transboundary Watercourses and International Lakes obliges Parties to provide access to drinking water and sanitation.[2] The idea that "it is vital to recognize first the basic rights of all human beings to have access to clean water" was supported by the UN Resolution where "the right to food and clean water are fundamental human rights".[3] In 2010, the human right to water is recognized as essential to the realization of all human rights.[4]

There are several ways of treating the right to water: as a human right, as a constitutionally guaranteed right out of basic human rights and as a law whose speciality is guaranteed through the protection of public interest in accordance with legal traditions of a certain country.[5] The question then arises whether within the existing framework of legal protection there is a possibility of identifying an interest in protecting the quality and quantity of water that would have a dominating influence in determining the public interest. The development of environmental law indicates that the need to protect the environment requires a more frequent involvement of various public interests, each of them aiming to protect the environment. One of examples causing diametric positions and controversy in recent years is the construction of small hydropower plants that both stimulates the development of use of energy from renewable sources and causes encroachment on the environment much less than when other sources for obtaining power generation are used. Ideally, the impact on the quality and quantity of water should be minimal. However, in practice, the right to water and the right to small hydropower plants often fail to create a balance aiming at protection and preservation of the environment, but present competing public interests instead.

The first dilemma arises at an attempt to define a small hydropower plant, knowing that the international law does not recognise a unified position on the capac-

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1 McCaffrey, S.C., *A human right to water: Domestic and international implications*, Geo. Int'l Envtl. L. Rev., *Vol.* 5, p. 1; Gleick, P.H., *The human right to water,* Water policy, *Vol. 1,* No. 5,1998, pp. 487-503

2 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, Art. 6(1) [https://www.unece.org/env/water/] 31.03.2019

3 Compare: International Conference on Water and Sustainable Development, 1992, Principle 4 and UN General Assembly Resolution A/Res/54/175 *The Right to Development,* 1992, Art. 12

4 Resolution adopted by the General Assembley on 28 July 2010, no. 64/292, *The human right to water and sanitation,* [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292] 06.04.2019

5 Daly, E., *Environmental Constitutionalism in Defense of Nature*, Wake Forest L. Rev., *Vol.* 53, 2018, p. 667

ity of small hydropower plants. Thus, in China, this term covers the hydropower plants with capacity up to 25 MWh, in India up to 10 MWh, and in Sweden to up to 1.5 MWh. According to the EU standard, a small hydropower plants are those of capacity lower than 10 MWh.[6] In order to implement the Renewable Electricity Directive and to contribute to the EU energy targets for 2020-2030, hydropower plants have to conform to the requirements of the Water Framework Directive, the Floods Directive, the Birds and Habitats Directives and Environmental Assessments Directives.[7]

Following the introduction, the second part of the paper aims to determine whether there is a dominant model found among the EU Member States regarding the constitutional protection of the right to water and to provide an answer regarding the model used in Serbian law. The third part analyses the comparative models of protection, which raises a dilemma of whether legal protection should be based on the model of water as a legal person, which is found in the recent cases in Colombia, India and New Zealand, or the basis should be the legal framework which estimates various interests of environmental protection, such as balancing the interest of energy production from renewable sources and the interest of protecting and maintaining water quality and quantity. Further, in the fourth part, by analysing the CJEU practice we determine whether the public interest is equal to the interest of environmental protection. We also analyse the CJEU practice in order to discover criteria which determine the basis of the public interest, and how to weigh up the overriding interest in the situation when two different interests of environmental protection are engaged. The fifth part of the paper points to the existing practice of issuing permits for construction of small hydropower plants in Serbia and analyses a recent case in which the Supreme Court of Cassation overturned the decision on construction of a small hydropower plant. The concluding observations compare analysed models.

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6 From arround 23.000 hydropower installations registered in EU, 91% are small and generate 13% of the total electricity production from hydropower. European Commission, *Guidance on the requirements for hydro power in relation to Natura 2000*, European Commission, 2018, p. 19

7 Among the Member States we encounter those who consider obtaining energy from renewable sources related to the climate change and the use of water and wind power as dominant. Thus, for example, in late 2018 Spain presented a draft Climate Change and Energy Transition law defining progressive closure plan for coal-fired power plants without new licenses for fossil fuel. The ending of use of coal by 2025 will lead to fullfilment of a goal of 100% renewable power sources for electricity by 2050. *Spain plans switch to 100% renewable electricity by 2050*, [https://www.theguardian.com/environment/2018/nov/13/spain-plans-switch-100-renewable-electricity-2050] Accessed 13.11.2018

## 2. THE RIGHT TO WATER AS A CONSTITUTIONALLY GUARANTEED RIGHT IN THE EU MEMBER STATES AND IN SERBIA

The right to water must be considered through both natural and social dimension. The natural dimension of water indicates that it is a right that puts water into a special category *per se*, while the social dimension indicates the need to approach the protection of the right to water taking into account all the values of water in a certain society.[8] Among the EU states we find several different approaches to the protection of the right to water. The first approach is found in those countries that treat the right to access to water as a basic human right (Belgium, Finland, France, Spain, Sweden, United Kingdom).[9]

The second approach is found in the Member States that do not regulate the right to water as a basic human right, but allow the possibility of special protection of the right to drinking water in an administrative procedure and dispute.[10] An example is found in Germany, where the protection of access to water is not connected to the protection of individual rights but, starting from the traditional terms of the German legal tradition, it is related to the protection of the principle of public interest (*Daseinsvorsorge*) and the welfare state (*Sozialstaatsprinzip*).[11] Such approach opens the possibility that the right to water is granted protection that is broader than the protection of a basic human right.[12] In the first case, the legal protection includes planning, management, mechanisms for monitoring the control of drinking water, guarantees that water will be of a certain quality. In addition, by protecting water as a public interest the interests of an individual are also protected.

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8 Lillo, A., *Is Water Simply a Flow: Exploring an Alternative Mindset for Recognizing Water as a Legal Person*, Vt. J. Envtl. L., *Vol.* 19, 2018, p. 164

9 Zobavnik, I., *Pitna voda*, Državni zbor, 2015, p. 24.

10 Constitution of Germany does not mention the term “environment”. Article 20a, which deals with this issue, is titled “Protection of the natural foundations of life and animals”. An “environmental duty” for individuals does not exist in the German constitutional system. Environmental protection in the Constitution of Germany is defined in such a manner that it does not grant an actionable right to the citizens. *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 20a. Rodi, M., *Public environmental law in Germany*, Comparative Environmental Law in Europe. An Introduction to Public Environmental Law in EU Member States, The Hague: Kluwer, 2002, pp. 199-245

11 Bullinger, M., *Französischer service public und deutsche Daseinsvorsorge*, Juristenzeitung, 2003, pp.597-604. See: Clausen, S.; Kramer, D.R., *Bericht über die 32. Fachtagung der Gesellschaft für Umweltrecht*, Natur und Recht, *Vol.* 31, No. 2, 2009, pp. 104-107

12 Gordon, G.J., *Environmental Personhood*, Colum. J. Envtl. L., *Vol.* 43, 2018, p.49; Bluemel, E.B., *The implications of formulating a human right to water*, Ecology LQ, *Vol.* 31, 2004, p. 957

The third approach is found in those Member States that constitutionally guarantee the right to access to water *per se*, not as a separate human right (Slovenia and Slovakia). The right to drinking water is guaranteed by the Constitution of Slovak Republic, but not as a basic human right. Slovak Constitution stipulates that groundwater and waterways are owned by the state, which, on behalf of citizens and future generations, is obliged to protect, take care and improve the quality of natural resources, including water. This Constitution prohibits any act of export of water from the country, including the possibility of export through water supply network. In November 2016, Slovenia became the first EU Member State that guarantees in its Constitution the right to access to drinking water. According to Art. 70a of Slovenian Constitution, everyone has the right to drinking water, and the water is a public resource managed by the state. The Constitution further states that the sources of drinking water can not be the subject of trade as they ensure a permanent supply of drinking water to public.[13] Apart from Slovenia, among the EU Member States, the right to drinking water is also protected constitutionally in Slovakia. The Constitution of the Slovak Republic does not regulate the right to drinking water as a basic human right, but stipulates that the flows of underground water, mineral spring waters and waterways are owned by the state, and the state has an obligation on behalf of its citizens and future generations to protect the natural resources and to ban the export of water from the country.[14] Amending the Constitution in 2015, Art. 4 is complemented with paragraph 2, which introduces a ban of drinking water export, regardless of its means of transport (by use of vehicles or through water supply network).

The 1974 Constitution of SFRY contained a broader definition of the right to a healthy environment that included several areas of environmental protection: "... sitizens have the right and duty to provide conditions for the preservation and development of natural and man-made environmental values, as well as to prevent harmful effects that by pollution of air, soil, water, watercourses and the sea, noise or otherwise threaten these values or endanger human life and health".[15] Constitutions of the countries in the region also contain the right to a healthy environment. Thus, for example, the Croatian Constitution, in the introductory provisions, before providing guarantees of basic human rights, ranks the environmental protection in line with "the most important values of the constitutional order and the basis for interpreting the Constitution".[16] It guarantees a general protection to

[13] The Constitution of Slovenia, *Uradni list RS*, no. 75/16 dated 30 November 2016, Art. 70a. Čebulj, J., *(So)delovanje strank v splošnem in posebnih upravnih postopkih*, Sodelovanje javnosti in stranskih udeležencev v okoljevarstvenih postopkih, 6-7, 2017, p. 989

[14] Constitution of Slovak Republic, *Ústavného zákona č.*, no. 161/2014 Z. z., Art. 4

[15] Constitution of the SFRY, Službeni list SFRJ, br. 30/1974, Art. 87

[16] Constitution of the Republic of Croatia, *Narodne novine,* no. 56/90, 8/98, 113/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, Art. 3

environment but also the special protection of the sea, sea coast, islands, water, air and other natural resources, land, forests, flora and fauna, as well as other segments of nature of environmental significance.[17]

The use and disposal of water do not enjoy special legal protection in the Constitution of Serbia. In the Water Act, water is defined as a natural resource owned by the Republic of Serbia, and it prescribes limitations, allowing the right of use of public good and the right of lease of water land.[18] The water bodies and wells that serve as regional, not local, drinking water supply are considered goods of general interest.[19] The right to a special use of water, in accordance with the mentioned Law, may be acquired with a water permit or, if it comes to a special use under concession, in accordance with the contract governing the concession.[20] The question then arises whether current law provides the possibility that, under certain circumstances, further use of drinking water, entrusted with the water permit or concession contract, is limited or excluded. If the water is not used rationally and economically, or if the use of water results in a water shortage, the relevant ministry and the competent authority of the autonomous province can limit the right to the special use of water, but only temporarily.[21] According to the Law on Public Property, "water, water streams and their resources, mineral resources, groundwater resources, geothermal and other geological resources and reserves of mineral resources" are defined as the natural resources owned by the Republic of Serbia, where concessions or right of use may be granted.[22]

## 3. WATER AS A LEGAL PERSON IN COMPARATIVE LAW

One of the means to achieve a better protection of water quality can be found in comparative law. In November 2016, the Constitutional Court of Columbia reached a decision to declare that the Atrato River basin, exposed to mining that significantly jeopardized nature and local community, has a right to 'protection,

[17] Constitution of the Republic of Croatia, Art. 70 and Art. 52

[18] Water Act, Official Gazette of RS, no. 30/10, 93/12, 101/16, Art. 5

[19] Water Act, Art. 76

[20] Water Act, Art. 68, para. 2

[21] Water Act, Art. 69

[22] Law on Public Property, Official Gazette of RS, no. 72/11, 88/13, 105/14, 104/16-dr. Law 108/16 and Art. 9. Article 8 of that law failed to indicate the specific nature of the regime of water lands. In Art. 8 it is stated that the legal regime of construction land, agricultural land, forests and forest land in public ownership shall be regulated by a special law. Draft Law on Amendments to the Law on Public Ownership of these legal regimes adds the one refering to water land

conservation, maintenance and restoration'.[23] The same formulation was argued by the Supreme Court of India, declaring Ganges and Yamuna rivers and their ecosystems as a legal person and ordered the government to establish a management board to represent their interests.[24] The New Zealand Parliamentary Council set into account the Whanganui River Claims Settlement Bill as a legal framework, which recognizes Whanganui River as 'a legal person with all the rights, powers, duties and liabilities of a legal person'.[25] In order to 'act and speak on behalf of the Whanganui River and protect its health and well-being' a special procedure for guardians election is provided.[26] Following that, in its decision the Supreme Court of Colombia recognized the Amazon River ecosystem 'as an entity, *subject of rights*, and beneficiary of the protection, conservation, maintenance and restoration'.[27] The case was initiated on the occasion of a lawsuit filed by 25 people aged 7 to 25, against the Government of Colombia, ministries and authorities of local government, stating that these bodies violate their right to a healthy environment, life and health by failing to control deforestation in the Amazon region, contributing to environmental degradation and climate change. The Supreme Court of Colombia ordered the respondent authorities to include 'plaintiffs, affected communities, and the interested population in general' in the preparation of policies aimed at fighting deforestation and adverse impact of climate change.[28] The question opens as to how such protection can be achieved, ie. which legal mechanisms would allow the nature to be considered an entity in possession of legally enforceable rights.[29] In the decision of the Supreme Court of Colombia, the solution was the establishment of 'Intergenerational Pact for the Life of the Colombian Amazon', in whose work plaintiffs, affected communities and scientific groups play an active

23 *República de Colombia, Corte Constitucional,* T-622 de 2016, Referencia: T-5.016.242, p. 153, par. 10.2, [https://redjusticiaambientalcolombia.files.wordpress.com/2017/05/sentencia-t-622-de-2016-rio-atrato.pdf] Accessed 24.03.2019

24 O'Donnell, E.L., *At the intersection of the sacred and the legal: rights for nature in Uttarakhand, India*, Journal of Environmental Law, *Vol.* 30, No. 1, 2017, pp.135-144; Kauffman, C.; Martin, P., *When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India*, in: International Studies Association Annual Conference, 2017

25 The New Zealand Parliamentary Counsel Office, 2016, Art. 14 (1). Rodgers, C., *A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, Environmental Law Review, *Vol.* 19, No. 4, 2017, pp. 266-279

26 The New Zealand Parliamentary Counsel Office, 2016, Art. 19. Studley, J.; Bleisch, W.V., *Juristic personhood for sacred natural sites: A potential means for protecting nature*, PARKS, *Vol.* 24, 2018, p. 81

27 *República de Colombia, Corte Suprema de Justicia, Sala de Casación Civil, Luis Armando Tolosa Villabona,* STC4360-2018, Redicación no. 11001-22-03-000-2018-00319-01, p. 45, par. 14, [http://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf] Accessed 06.04.2019

28 *Ibid.*, para. 48

29 Boyd, D.R., *The rights of nature: a legal revolution that could save the world*, ECW Press, 2017

role in order to represent the interest of the Amazon River ecosystem that is the subject of rights.[30]

## 4. THE CRITERIA FOR WEIGHING UP AN OVERRIDING INTEREST IN CASES DEALING WITH THE INTEREST OF PROTECTING AND PRESERVING WATER QUALITY AND THE INTEREST OF OBTAINING ENERGY FROM RENEWABLE SOURCES IN CJEU PRACTICE

The approach that natural objects should be given the legal personhood is not a new one. It was used in early 70's, when professor Stone argued that judges could be more sensitive to degradation and disappearance of water, air, soil and other values of nature if one could speak on behalf of nature.[31] Analysed examples argument that one of the approaches to protect nature is to establish natural resources as a legal minor and to establish certain representative bodies (including environmental groups, affected communities, interested population, scientists) with strong responsibilities to be guardians. The scholars opting for that approach believe that legal framework should provide tools of collective responsibility.[32] Recognized as a subject of law, water or some other natural object is not considered as private good or common resource, but as a person under the law. The most important issue related to the concept that 'other-than-human' persons can be recognized as legal subjects is who will be recognized as competent and/or interested to speak on behalf of it.

Bearing in mind the obstacles of the first approach, EU focused its water law and protection policy to the issue of criteria that should be used in the proportionality test where an interest of water is balanced with other interests of environmental

30 Bryner, N., *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, 20 April 2018, [https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem] Accessed 08.04.2019

31 Stone, C.D., *Should Trees Have Standing--Toward Legal Rights for Natural Objects*, S. CAl. l. rev., *Vol.* 45, 1972, p. 450; Stone, C.D., *Should Trees Have Standing Revisited: How Far Will Law and Morals Reach--A Pluralist Perspective*, S. Cal. L. Rev., *Vol.* 59, 1985, p. 1; Grear, A., *Should trees have standing? 40 years on*, Edward Elgar, 2012; Mendelson III, J., *Should Animals Have Standing: A Review of Standing under the Animal Welfare Act*, BC Envtl. Aff. L. Rev., *Vol.* 24, 1996, p.795; Varner, G.E., *Do species have standing?,* Environmental Ethics, *Vol.* 9, No. 1, 1987, pp. 57-72; Goldberg, D.M.; Badua, T.*, Do People Have Standing-Indigenous Peoples, Global Warming, and Human Rights*, Barry L. Rev., *Vol.* 11, 2008, p.59; Cullinan, C., *Do humans have standing to deny trees rights*, Barry L. Rev., *Vol.* 11, 2008, p. 11

32 Iorns Magallanes, C.J., *From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers*, in: Martin, B.; Te Aho, L.; Humphries-Kil, M. (eds.) ResponsAbility: Law and Governance for Living Well with the Earth, Routledge, London & New York, 2018, pp.216-239; Maloney, M., *Environmental law: Changing the legal status of nature: Recent developments and future possibilities*, LSJ: Law Society of NSW Journal, *Vol.* 49, 2018, p. 78

protection,[33] in majority of cases with the use of renewable energy sources. The precondition for balanced measurement is to find the legal framework that would allow public concerned and interested public to take part in that process.

In order to find the criteria that must be taken into account in order to properly assess the various interests that aim at protecting the environment, we shall analyse the practice of CJEU.

The more precise criteria are found in the CJEU practice, in the case regarding the complaint of the European Commission to CJEU arguing that development of a small hydropower project violated the obligations of Austria arising from Directive 2000/60/EC on establishing a framework for EU action in the field of water policy.[34] The case follows the factual sequence of events that started with a decision of the governor of Styria in Austria to authorise the construction of hydropower plant on the river Schwartz Sulm. One of the side effects of hydropower plant's activity was the deterioration of quality of surface river water, from the state assessed as "very good", to the state asessed as "good", prompting the Commission to send a letter of reminder to Austria, since a high quality surface water has to be considered the public interest. The response stated that the decision to deviate from the prohibition of deterioration of surface water quality was justified by the existence of public interest to use renewable energy sources such as hydropower, which is in this case considered to be an overriding interest. After several cycles of questions and replies, the Commission filed a lawsuit to CJEU. The CJEU noted that constructing a hydropower plant may be an overriding interest, but it established a basis for balancing the expected benefits of the renewable energy projects and the resulting deterioration of the environment. It is noted that national authorities are entitled to find whether the project would give rise to the benefits for the sustainable environment, whether the operator took all necessary measures to mitigate an adverse impact of that project on the environment, whether there is a possibility to achieve the objectives pursued by that project by another project which would have been a "significantly better environmental option", taking into account the technical feasibility or disproportionate costs.[35] Further, they refer to the methodology that decision-makers should follow in weighing up the overriding interest between protection of water quality and producing energy in small hydropower plants. Arguing that the interests were duly balanced, the CJEU stated that the governor of Styria had not abstractly refered to the overriding public interest of production of energy from renewable sources, but used

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[33] Bakker, K., *The "commons" versus the "commodity": Alter-globalization, anti-privatization and the human right to water in the global south*, Antipode, *Vol.* 39, No. 3, 2007, pp. 430-455

[34] *European Commission v. Republic of Austria*, C−346/14, [2016] ECLI:EU:C:2016:322

[35] *Ibid.*, pars. 69 and 74

as the basis a scientific analysis of the adverse impact on the state of surface water, the fact that the river has a high environmental quality, as well as the project benefits relating to the production of energy from small hydropower plants. The methodology should be such as to observe the overall environmental impact of the project, as well as the direct and indirect impact on the objectives of Directive 2000/60.[36]

The implementation inspection of these criteria can be carried out by independent bodies, such as the Green Ombudsman, as well as the interested public, as parties to the proceedings. The law of the EU Member States does not prescribe environmental impact assessment (EIA) for small hydroelectric power plants, which raises the question of whether the interested public has the right to take part in the process of deciding on a small hydroelectric power plant when it is not subject to EIA, and whether it is entitled to appeal or file an administrative action due to violation of prohibition on deterioration of the status of all bodies of surface water, in the sense of Article 4 (1) of Water Framework Directive.[37] In the case *Protect Natur-*[38] CJEU stated positions that can be applied to Member States whose rules of administrative procedure and administrative dispute associate the right to file a complaint or lawsuit to a strict impairment of rights doctrine. In the case in question, the company *Aichelberglifte Karlstein GmbH* requested permission to use river water for the purpose of making artificial snow for a ski resort in accordance with the Austrian Water Act.[39] According to this law, the environmental organization *Protect Natur-*, *Arten-*, *und Landschaftsschutz* did not have the right to challenge such a permit due to a significant negative impact on water quality, bearing

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36 *Ibid.*, para. 77 and 80

37 In the case of Serbia, the question is whether the interested public may be a party to the proceedings, outside the EIA, if, for example, a parcel of land on which a small hydropower plant is to be build, deviates from the planning document. This is the case especially bearing in mind that at the end of 2018 the Law on planning and construction was amended with Art. 2 para. 26 considering the derivation pipeline as a line infrastructural facility. A new Art. 2 para. 26b) was introduced, which determines the *underground parts of the infrastructure* as a special type of underground infrastructure facilities, whose construction on agricultural and forest land, as well as on construction land used for agricultural purposes, does not violate land use on the surface of the existing application and issuance of location conditions for construction of these objects can not be conditioned with the existence, or with a sufficient level of development of planning documents for the area that includes the parcels on which construction is planned; Article 2 para. 44 was also introduced, which defines that the electricity facilities are those used for the production, transformation, distribution and transmission of electricity. This is important because the new Art. 69 introduces the possibility that for purpose of construction or placement of objects from the Article 2, points 26), 26b) and 44) of this law, of electronic communications facilities or networks and devices, a building parcel can be formed which deviates from the surface or the positions envisaged in the planning document for that zone

38 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd,* C‑664/15, [2017] ECLI:EU:C:2017:987

39 Wasserrechtsgesetz 1959 – WRG. 1959. StF: BGBl. Nr. 215/1959 (WV)

in mind that EIA is not mandatory for the described project and that environmental non-governmental organizations according to Water Act have a right to appeal and file a complaint only if an impairment of rights was established in that case. It means that environmental organizations do not have standing outside the EIA. But, the most important argument provided by the Administrative court was that *Protect Natur-* lost its party status, as it failed to bring the action in administrative procedure on time.[40] Linking the obligation to protect the quality of water as a common interest, CJEU concluded that recognized environmental organizations must be able to challenge a decision that might violate WFD (Art. 4). Provisions of WFD oblige Member States to support the active participation of interested parties meaning environmental organizations that may provide important arguments of common interest in such procedures. Those arguments led to significant changes of Austrian EIA, which was amended in October 2018. A new rule states that an environmental organization may have a standing and challenge a decision in an environmental procedure if it has more than 100 members. An even more important change is that an appeal submitted by such an organization will not have *a priori* suspensive effect, contrary to general rule applying to appeals in Austrian administrative procedures and administrative disputes.[41] This effect may be recognized by the administrative authority that that might decide on suspensive if a 'disproportionate environmental risk' is to be expected.

What this shows is that the EU has a unique approach toward the protection of water that is based on EIA and weighing up different interests of environmental protection. The right that guarantees the legality of procedure is participation, that would provide public concerned and interested public with a right to participate, but also to a right to a collective redress that will be explained in the next part.

## 5. THE APPLICATION OF THE MODEL OF BALANCING THE INTEREST IN ENERGY PRODUCTION FROM RENEWABLE SOURCES AND THE INTEREST OF PROTECTING AND MAINTAINING THE QUALITY AND QUANTITY OF WATER IN PRACTICE OF SERBIA

In Serbian law, EIA is not required when it comes to construction of small hydropower plants. Thus, for example, according to the matrix developed in the Energy

[40] Comparing the circumstances with Kafka's *Before the Law*, Advocate General Sharpston stressed that loosing standing in this case would mean that Protect Natur- should be punished 'for not having done what the national law appears to preclude it from doing', Opinion of Advocate General Sharston delivered on 12 October 2017 on Case C-664/15, para. 120

[41] Access to Justice in Austria: One step forward, two steps back, [https://www.clientearth.org/access-to-justice-in-austria-one-step-forward-two-steps-back/] 05.04.2019

Law, for the hydropower facilities with capacity up to 1 MW it is not necessary to carry out an EIA. For these objects it is not even necessary to initiate the procedure for issuing energy permits. If a small hydropower plant is planned to produce energy of capacity of over 2 MW, EIA may be required, but is not obligatory, giving the competent administrative authority the discretion to decide on implementation of EIA.[42] It is mandatory for hydroenergy projects with a capacity exceeding 50 MW. The energy permit is an act issued by the competent administrative authority at the request of an authorized entity for the construction of facilities for electricity production capacity of 1 MW and higher.[43] If the request was filed for the construction of power plants which use water power to generate electricity to power up to 1 MW, the competent authority is not obliged to issue a decision, but only a consent.[44]

By ratifying the Treaty on establishing the Energy Community, Serbia assumed the obligations under Directive 2009/28/EC, which, inter alia, deals with the promotion of electricity produced from renewable energy sources.[45] In this way a system of subsidies on electricity production from renewable energy sources was established to increase the use of renewable energy sources. Introducing incentive fixed purchase price ('feed-in' tariffs), with the period of guaranteed electricity takeover of 12 years, has led to significant interest in the development of small hydropower facilities (<10 MW), increased the number of locations where there is interest to construct small hydropower plants, and there is a growing number of buildings. The Strategy on Water Management of Serbia reads that "the emergence of a large number of investors interested in investing in small hydropower plants in recent years, and in the transition period where appropriate standards were only just established, a considerable pressure was put on some aspects of environmental protection, and there were also cases of endangering other water users (...) the former work of hydropower facilities primarily fulfilled the needs and requirements of the electric power system of Serbia, not taking into account sufficiently the water regime in waterways..."[46]

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42 Decree on establishing the list of objects for which impact assessment is mandatory and the list of projects that may require environmental impact assessment, List II, "Official Gazette of RS", No. 114/08

43 Law on Energy, "Official Gazette of RS", No. 145/14, 95/2018, Art. 30

44 Drenovak-Ivanovic, M., *On current issues regarding energy permit and assessment of impact of hydropower premises in the environmental law in Serbia*, Split Faculty of Law Journal, *Vol.* 51, 2014

45 Law on ratification of the Treaty on establishing the Energy Community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, the Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and the United Nations Interim Mission in Kosovo in accordance with the Resolution 1244 of the United Nations Security Council, "Official Gazette of RS", No. 62/06

46 Water Management Strategy, "Official Gazette of RS", No. 3/17 (n) 55

There is an illustrative example in the case in which the approval was granted for the EIA study for the construction project for small hydropower plants in the river valley under a special regime of protection at the Stara Planina Nature Park.[47] This is the largest fish hatchery in the area and a physically protected biotope with a large number of rare and protected species of birds (including the dipper as a strictly protected species), mammals, reptiles, amphibians (including strictly protected species of creyfish *Austropotamobius torrentium*) and fish (including protected species of trout *Salmo trutta* and barbell *Barbus Balcanicus*).[48] Nevertheless, none of these species was mentioned in the EIA study, while the possible project impact, nor the Report on the Professional Surveillance of the Institute for Nature Protection of Serbia, which confirms the presence of these protected and strictly protected species, were not taken into consideration.[49] As a measure of nature protection, this Report proposed "a permanent ban of all activities that could lead to violation of existing habitat conditions: river restructuring, water capture, etc."[50] On this occasion, the Law on Nature Protection (Article 9), which establishes the obligation for the nature protection conditions issued by the Institute for Nature Conservation to form an integral part of the EIA study, was also neglected. However, this case also shows an increase of the role of local community in environmental protection. Namely, after the decision of the Ministry, the association of local communities and citizens of the disputed area made a decision to ban the construction of small hydropower plants in the area of the Nature Park and notified the Ministry thereof, pointing to omissions and neglected documents in the process of granting approval to the Study. Although the same reasons were emphasized in the process of granting approval to the Study, the Ministry identified the circumstances as a finding of new facts and, in accordance with the General Administrative Procedure Act[51], adopted a decision on the repetition of the procedure for determining the nature protection conditions and the repetition of the approval procedure on the Study.[52] This decision was annulled by the Administrative court who found that administrative procedure could be repeated only if the Institute for Nature Conservation issued different conditions or otherwise

[47] Decision of the Ministry of Environmental Protection no. 353-02-1374 / 2017-16 of 18 June 2017

[48] According to the Code of Regulations on the Declaration and Protection of Strictly Protected and Protected Wild Species of Plants, Animals and Fungi ("Official Gazette of RS", No. 5/10, 98/16), their destruction, use and undertaking of activities that could endanger these species and their habitats is prohibited. In addition, the fact was disregarded that according to the Law on Sustainable Use of Fish Fund ("Official Gazette of RS", No. 128/14), the said area enjoys a special protected status

[49] Report on the Professional Surveillance of the Institute for Nature Protection of Serbia of 10-12 July 2017 no. 026-3083 / 2 of 26 December 2017

[50] *Ibid.*

[51] General Administrative Procedure Act ("Official Gazette of RS", No. 18/16), Art. 176 para. 1

[52] Decision of the Ministry of Environmental Protection no. 353-02-1374 / 2017-16 of 23 January 2018

decided on the conditions and measures necessary for the natural protection.[53] It is also supported by the fact that in the reasoning of the disputed decision the Ministry stated that it would be necessary to obtain a new decision on the conditions of nature protection from the Institute for Nature Conservation as there are new facts provided by the supervision due to which the validity of the decision on EIA Study is arguable. After the Ministry had filed a lawsuit, the Supreme Court of Cassation found that the request for review of the challenged verdict was established and that the request was upheld. Consequently, the Supreme Court of Cassation reversed the ruling of the Administrative Court and dismissed the lawsuit. This Court stated that the decision of the Institute on the conditions of nature protection is one of the acts submitted in the procedure for assessing the environmental impact of the project in the protected area. The EIA study can not be completed without that decision. The Supreme Court of Cassation decided that the decision of the Administrative Court was unacceptable.[54]

What this shows is that Serbia implemented an EU model which uses EIA and balancing different interests of environmental protection as the basis for protection of water. The European Commission issued a Recommendation on Collective redress that should root collective redress allowing persons and groups affected by the same violation of environmental rights access to justice using the right to appeal or take procedure under the court in order to seek injunctive or compensatory relief.[55] In 2018, EU reported that the Recommendation did not have significant influence, as only five Member States introduced legislation that recognize proposed measures.[56] One of the examples where the idea of collective redress in environmental protection is transposed is the new Serbian General Administrative Procedure Act (2016). It entrusted the right of participation in decision-making in an administrative procedure to 'representatives of collective interests'.[57] After those changes, legal standing is granted to legal persons and associations of citizens dealing with protection, improvement and promotion of environmental protection, as protectors of collective and broader public interests, assuming that they have a legal interest for participating in procedures concerning environmental protection.

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[53] Judgment of the Administrative Court, 9 U. 2424/18 of 17 April 2018

[54] Judgment of the Supreme Court of Cassation, Uzp 189/2018 of 26 September 2018

[55] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L 201, 26.7.2013,* pp. 60–65

[56] Friel, A., Commission report highlights lack of EU commitment towards ensuring collective redress for environmental protection, [https://www.clientearth.org/commission-report-highlights-lack-eu-commitment-towards-ensuring-collective-redress-environmental-protection/] Accessed 07.03.2018

[57] General Administrative Procedure Act, Official Gazette of the Republic of Serbia, No. 18/2016, Art. 44, para. 3

## 6. CONCLUSION

Conducted analyses show that the right to water can be protected as a right to a specific unit of water (eg. river, all its tributaries and ecosystems), or as a right that protects a certain value (eg. the quantity or quality of water). The first approach leads to the development of the right to water, leading to further elaboration of a model that perceives water as a subject of rights giving it a legal person status. The second approach leads to the development of the right to water that introduces the possibility of protecting water as a value for itself based on criteria that start from weighing up different interests of environmental protection. In both cases we find the need to provide a group of people with the opportunity, in the name of a protected interest, to have a right to legal protection, in the first model, or to take part in weighing up the overriding interest in the second model.

In the jurisprudence of the CJEU we find the criteria which, in matters of importance for the further development of small hydropower plants, would guarantee the implementation of the second model, taking into account the elements of the first model that provides protection of the right to water as a special value. On a case-by-case base, different interests have to be balanced: whether the project would give rise to the sustainable benefits for the environment; how an adverse impact of that project on the environment is mitigated; is there another project which would have been a "significantly better environmental option". In addition to the above criteria, weighing up the interests should be accompanied by a process in which various groups that have an interest, including those who speak in the name of water as a special value, are able to engage and direct the adoption of higher quality decisions. The development of models of collective redress contributes to such involvement. Good balancing of interests and finding the one that overrides may indicate that in some cases the interest of protection of (the quality of) water is overriding, while in other cases the overriding interest is the one that can only be achieved through construction of small hydropower plants, by implementing the procedure in accord with the described methodology.

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# REGULATING THE AREA OF CONSTRUCTION AT EUROPEAN UNION LEVEL*

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***ABSTRACT***

*The field of regulation of construction at the European Union level is complex and it encompasses standardisation at several levels by various stakeholders in the system. Namely, construction regulatory systems are the work of various European Union institutions and European standardisation organisations (European Committee for Standardization and European Committee for Electrotechnical Standardization). Precisely this fact may lead to specific misalignments of the system itself thereby jeopardizing legal certainty as well as physical safety of citizens. Therefore, this paper aims to present regulations in the field of construction at the European Union level, placing an emphasis on individual standards of the above standardisation organisations, and discuss problems attached to regulation at multiple levels.*

*The aforementioned instances and European standardisation organisations regulate construction products, works, professional qualifications of stakeholders in the system, occupational safety and health, environmental impact etc. and therefore the paper provides a review of sources of law which exist at the European Union level in the ambit of construction – regulations and decisions of appropriate European Union bodies – and significance of Eurocodes as standards. In terms of contents, these documents are related to regulation of the field of a technical nature and technical rules. Therefore, awareness and application of these sources of law is important because the general design itself and its components, as parts of documentation submitted in special administrative proceedings to obtain a construction licence, for instance in the Republic of Croatia, must be aligned with the aforementioned sources of law. Such alignment contributes to the principle of lawfulness and ultimately to legal certainty in the procedure to obtain a construction licence.*

*This paper employs, with the purpose of a scientific approach to this topic, analyses and syntheses as well as inductive and deductive methods to research the theoretical part of the paper.*

* This paper, in its theoretical and empirical part stems from a research performed for the purpose of development of a doctoral thesis of the primary author of this paper.

*A part of results obtained through an empirical research conducted for the purpose of development of a doctoral thesis is also analysed in this paper and descriptive statistical methods are used within the framework of this analysis. The analysis of the results reviews the degree of use of the European Union sources of law in procedures to obtain construction and operating licences in the Republic of Croatia. The discussion employs logical and teleological methods of interpretation. Recommendations for improvements to the system considering a part of the analysed empirical research results are provided accordingly within the concluding considerations.*

***Keywords***: *building regulations, sources of European Union law, European Union, European standardisation organisations, building licences,*

## 1. INTRODUCTION

Since the start of human history, people build, demolish and rebuild and adapt the natural environment their needs. Construction itself entails design development, construction[1], use, maintenance and removal of structures[2] which must not jeopardise human life and health, the environment, nature, other structures and possessions or stability of surrounding soil.[3] It is therefore among the most significant activities of any society, demanding thoughtful and systematic standardisation rendering regulations clear and foreseeable. This paper shall analyse how individual sources of law appear in the field of construction within the framework of European standardisation organisations (coordinating with the European Commission) and identify the sources of law in the field of construction at the level of the European Union (hereinafter "the EU"). Sources of the EU law, within the meaning of the primary and secondary sources of law, general legal principles and case-law as well as their impact and effects are known. The paper shall separately present specificities of systems of standards generated within the framework of the European standardisation organisations. There shall be a separate analysis of creation of EN Eurocodes and their implementation in national systems of the Member States. This actually gives rise to a complex regulatory action at multiple levels and by multiple stakeholders rendering application of the adopted regulations more difficult. Importance of the above sources of law in our national law is

1 Construction is execution of civil and other works (preparatory works, earthworks, construction, installation, and finishing works and installation of construction products, equipment and plant) building a new structure, rebuilding, maintaining or removing an existing structure. Construction Act, Official Gazette, 153/13, 20/17, 39/19 Article 3(1)(4)

2 Removal of a structure or a part of the structure is execution of works to remove a structure or a part of the structure from its site including disposal of debris found in the structure and the construction plot as well as construction material and construction waste generated through dismantling of the structure in compliance with regulations applicable to waste management and arrange the construction plot, i.e. the land previously occupied by the structure appropriately. *Ibid.*, Article 3(1)(23)

3 Radujković, M.; Izetbegović, J.; Nahod, M. M., *Osnove graditeljske regulative*, University of Zagreb, Faculty of Civil Engineering, Zagreb, 2008, p. 8

significant in procedures to obtain construction and operating licences because the sources of law are used in development of general designs enclosed to construction licence applications. It is therefore necessary that stakeholders in the process are familiar with the relevant sources of EU law and that the sources are available to them. The degrees of use and awareness of the above sources are presented in a part of the empirical research results used for the purposes of this paper.

In accordance with the above, a hypothesis is formulated that the field of construction is regulated at the EU level within the framework of the secondary law of the EU and by the European Standardisation Organizations and such existing regulations governing the activity leads to a large number of sources of law and difficulties in monitoring and application of the same. Recommendations for improvements to the system shall be provided in the concluding considerations depending on whether the hypothesis is proven or otherwise.

## 2. METHODOLOGY

The following research methods are used to prove the proposed hypothesis: analysis and synthesis, induction and deduction in the theoretical part of the paper analysing the primary sources of the European Union law and statistical presentation of data within the framework of the empirical portion of the paper. A portion of the results of an empirical research shall be used to achieve objectives of this paper. The research has been performed with the aim of confirming hypotheses formulated in the doctoral thesis of the primary author of this paper, whose fundamental objective was to determine defects in legislation and the procedure of obtaining construction and operating licences. The research was performed on two categories of subjects. Competent county and city-level administrative departments of local and regional self-government and their regional offices issuing construction and operating licences were selected as the first surveyed category, while architects, members of the Croatian Chamber of Architects were selected as the second survey category. The survey was performed on-line (using Google Drive) and two types of survey questionnaires were prepared for the two categories of survey subjects. The sample consisted of 116 competent county and city-level administrative departments of local and regional self-government and their regional offices as well as 1000 architects, members of the Croatian Chamber of Architects. Ultimately 41 competent offices and 104 architects have taken part in the survey. Considering the two categories of respondents, two types of survey questionnaires were prepared, but individual questions and claims were formulated identically in order to allow a comparison of the responses offered by the two groups of respondents in discussion of the thesis. 41 competent county and city-level administrative de-

partments or corresponding branch offices participated in the survey. Since the questionnaire was sent to 116 e-mail addresses, this corresponds to response rate of 35.35%. Also, 104 architects (members of the Croatian Chamber of Architects) took part. That questionnaire was sent to 1000 e-mail addresses and therefore the response rate was 10.4%. Those response rates are deemed appropriate and they are suitable for the following analysis. In the results analysis, tabular depiction of data and analysis of obtained results are relevant.

The discussion shall employ logical and teleological interpretation methods.

## 3. REGULATING CONSTRUCTION AND CREATION OF REGULATIONS IN THE FIELD OF CONSTRUCTION AT THE EU LEVEL

Regulations on construction have a long history. The most ancient provisions concerning regulation in the field of construction are related to the Code of Hammurabi, the oldest preserved document regulating legislative system of a state. It is thought to date to about 1780 BC. Provisions of the Code are related to *lex talionis* i.e. the principle of "an eye for an eye, a tooth for a tooth" and the above is particularly apparent in provisions concerning construction – specifically Articles 228–233. [4] In the Book of Deuteronomy and in the Leviticus[5] the Bible also provides the earliest evidence of regulation in the fields of design development and construction. Development of regulation of construction was spurred on by various circumstances, impact of nature or human activities which led to disasters (large-scale fires, floods, storms) contributing to formulation of regulations requiring defined framework for construction. In 1666, the Great Fire of London thus triggered enactment of the *London Building Act* and similar circumstances were the basis for regulation of construction on American soil from the 18th to the 20th century.

It should be emphasised that the regulatory systems tackling construction at the EU level are complex and this affects how they are studied, analysed and interpreted. Van der Heijden thus points out what is generally relevant in terms of regulation and regulatory documents as well as the method of application of the same in relation to regulations in the field of construction. He states that it is the quality of rules and regulations that is relevant, as well as a strategy for their implementation, methods of implementation of rules and participants in the implementation and

[4] According to: Harper, R. F., *The Code of Hammurabi, King of Babylon: About 2250 B.C.*, Second edition, The Lawbook Exchange, LTD. Union, New Jersey, 1999, pp. 82–83

[5] *Biblija, Stari i Novi zavjet,* Kršćanska sadašnjost, Zagreb, 2009, Deuteronomy 22:8 and Leviticus 14:37–45

therefore, taking this in consideration while interpreting construction regulations, he concludes that the field of construction should not be neglected in professional and scientific literature as it is at this time. This might be the case because nature of the the regulations in the field of construction is quite technical at the first glance and it is repulsive to scientists studying regulations while, on the other hand, specific professional and scientific papers dealing with regulations and design of rules may appear less applicable to scientists pursuing design development and construction technologies. However, regulation and subsequent interpretation of legal rules is necessary to guarantee public and individual interests and to render social actions and interactions predictable. Considering the fact that design development and construction are affected by modern technologies while becoming increasingly sophisticated, the volume of regulations and legal rules applicable specifically to contemporary trends in the field is also growing and the volume of regulations of the former is also increasing. This renders the intended deregulation concerning the rules on construction pointed out in previous works of this author actually impossible under influence of contemporary trends.[6]

The EU has established a complex legislative and regulatory framework for the construction sector. Within the framework of regulatory activities in the field of construction at the EU level, it may be said, from the present-day point of view, that an emphasis is placed on technical regulations and performance of works as well as on construction materials and construction products. Thus in accordance with the Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification)[7], Article 1(f) determines a technical regulation as "...technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7,

[6] According to: Van der Heijden, J., *Building regulatory enforcement regimes,* Delft University of Technology, the Netherlands, Delft, 2009 See also: Visscher, H.; Meijer F., *Dynamics of building regulations in Europe*, ENHR 2007 International Conference on Sustainable Urban Areas, Rotterdam, 2007, p. 3

[7] Regarding to this area of regulation: Regulation on the procedure of official notification on technical regulations and information society services (Government of the Republic of Croatia), Official Gazette, 105/15 and the Law on Technical Requirements for Products and Conformity Assessment, Official Gazette 80/13, 14/14, 32/19

prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider."[8]

The EU legislative framework less attention is paid to procedures for adoption of construction- and utilisation-related documents and this regulation remains in the ambit of competence of each Member State. Therefore, at the EU level, there are no specific administrative procedural rules pertaining to issuing of construction or operating licences. However, in compliance with applicable legal system, the rules of administrative procedure followed by EU institutions are derived from the sources of primary and secondary EU law as well as the general principles affirmed through the case-law of the European Court of Justice.[9] The same rules may serve as a model in shaping of a general and special administrative procedures including the procedure for obtaining construction and operating licences at the Member State level.[10]

Special administrative procedure for obtaining a building permit in the Republic of Croatia, in accordance with Article 108 of the Construction Law is initiated at the request of the investor, who, along with the said request, submits the necessary documentation, which also includes a main project. The main project, in accordance with Article 69 (1) and (2) of the Construction Act, depending on the type of building, contains architectural, construction, electrical engineering and engineering projects, and depending on the type of construction, the construction of the landscape, geomechanical, traffic, conservation and other necessary elaborations may be preceded. Important parts of the main project (especially the construction project) have to be aligned with individual sources of EU law and

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8 It should be mentioned here that so-called Building Codes are adopted elsewhere in the world with the aim of standardizing the field of construction. The purpose of these construction rules is to provide the minimum standards for safety, health and general well-being including structural design, mechanical engineering (including sanitation, water supply, lighting fixtures and ventilation), egress, fire protection and energy conservation control devices. Building Codes are largely separate from urban development rules, but external limitations may fall into both categories. According to: Hageman, J. M., *Contractor`s Guide to the Building Code*, Craftsman Book Company, Carlsbad, 2008, pp. 9–11

9 Đerđa, D., *Pravila upravnog postupka u europskom pravu*, Proceedings of the Faculty of Law in Rijeka, University of Rijeka, *Vol.* 33., no. 1, 2012, pp. 109–144. See: Ljubanović, B., *Pravo EU u upravnom pravu i postupku*, in: Procesno – pravni aspekti prava EU, Osijek, Faculty of Law Osijek, J. J. Strossmayer University of Osijek, 2016, pp. 173–208

10 In order to ultimately contribute to codification of the procedure at the European Union level, a draft Regulation "Proposal for a Regulation of the European Parliament and of the Council on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies", developed by the *Research Network on EU Administrative Law (ReNEUAL)* workgroup appointed by the Legal Affairs Committee of the European Parliament. For more information see: Vitez Pandžić, M., *Reguliranje upravnog postupanja u pravu Europske unije,* 8th international conference Development of Public Administration, Lavoslav Ružička Polytechnic in Vukovar, Vukovar, 2018, pp. 258–266

European norms, which will be further discussed in the paper, all in order to meet the basic building requirements governed by Articles 8 to 15 of the Construction Law. Therefore, although the procedure for issuing building permits is the responsibility of EU member states by own, the assumptions that are important to fulfill in this process, concerning the main project and its constituent parts, include the mentioned sources of EU law. That is why this topic is a subject of study in this paper.

Regulating construction at the EU level in accordance with the above includes:

- rules on types of authorisation (licences) for construction and supervision;
- building Codes including regulatory requirements for design development and building construction;
- referential standards pertaining to testing, installation and maintenance of individual types of construction supervision;
- references to professional rules for design engineers originating from professional organisations;
- the minimum design engineer and contractor training requirements and the minimum requirements for their authorisation to perform activities;
- market mechanisms, especially in cases of public procurement or insurance systems;
- environmental protection rules;
- health and safety rules;
- energy efficiency rules;
- fire protection rules;
- spatial planning.[11]

Health and safety in construction itself and free movement of engineering/construction services and products are important development priorities of the sector. European legislation defines significant requirements applicable to construction products at the time of market placement and the European bodies tasked with standardization are tasked with designing appropriate technical specifications for individual construction products – which shall be elaborated below. Specifically, initiatives and drafts of proposed secondary sources of law pertaining to construction stem from the European Commission and/or its departments and services and the departments are known as the Directorates-General. The most important Directorates-General whose activities are related to construction are:

[11] Visscher, H. J.; Meijer, F., *The Impact of Climate Change on Building Regulatory Systems*, World SB14 Barcelona Conference, October 28/30th 2014, Session 93, pp. 1–2

- Energy (ENER) – dealing with issues related to energy policy, energy efficiency, implementation of the Energy Performance of Buildings Directive (EPBD), renewable energy sources etc.
- Internal Market, Industry, Entrepreneurship and SMEs (GROW) – dealing with issues related to general business relations
- Environment (ENV) – all issues related to the environment and building markings
- Research and Innovation (RTD) – issues related to research projects and development of research programmes
- Climate Action (CLIMA) – issues related to "F-gases"
- Informatics (DIGIT).[12]

These Directorates-General have tied their operations to the assigned field of work including required regulatory activities whose substance is also related to the construction sector. The above view of fragmentation of regulatory approach to construction is also supported by stratification in relation to proposed legislation within EU institutions. Therefore proposed secondary sources of law are generated in diverse Directorates-General of the European Commission. However, the construction sector and relevant information related to the sector are researched and examined within the aforementioned GROW Directorate-General – responsible for industry – which also generates specific proposals and initiatives concerning the regulatory framework applicable to construction in the EU. In accordance with determinations of the survey performed for the purposes of the doctoral thesis of the first author of this paper and considering the above, it may be said that this is a fragmented regulatory approach i.e. the construction regulatory systems are products of different EU institutions within the framework of production of the secondary law and European standardisation organisations and mostly European Committee for Standardisation – CEN[13] and partly European Committee for Electrotechnical Standardisation – CENELEC, and this may lead to mismatches of the system itself and it represents a risk for future users of completed structures as well as for people who must apply such regulatory framework in they work.

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12 According to: [http://www.rehva.eu/eu-regulations/eu-legislation.html] Accessed on 20.02.2019

13 CEN provides a platform for the development of European standards and other technical documents in relation to various kinds of products, materials, services and processes. Also, CEN supports standardisation in a range of fields and sectors: chemicals, construction, consumer products, defence and security, energy, the environment, food, health and safety, healthcare, ICT, services, transport etc. According to: [https://www.cen.eu/about/Pages/default.aspx] Accessed on 20.02.2019

### 3.1. Sources of EU law and the European standardisation system

One of important objectives of the EU is embodied in Article 26 of the Treaty on Functioning of the European Union and it pertains to the freedom of movement of services, persons, goods and capita.[14] In view of the above, according to the data concerning construction regulations found in the doctoral thesis of the first author of this paper, the secondary EU law provides 21 regulations, 27 directives and 158 decisions in the field of construction, stemming from the framework of standardisation procedures conducted by EU institutions. It is important to emphasise that their specification does not exhaust the list of relevant legislation, but it is certainly significant and this indicates regulatory complexity of the field of construction.[15] According to the content of these sources of law, it can be concluded that EU-level construction regulation, as mentioned above, is related to several different areas (for example construction products, works, professional qualifications, health and safety at work, impact on environment, etc.), and many aspects of construction are really within the competence of EU member states. Therefore, the legislation pertaining to the construction sector also applies to other areas of regulation and it does not directly regulate this sector, and thus also becomes a source of overburden and legal uncertainty.[16]

In order to fully implement provisions of the aforementioned Article 26 and Articles 14, 151, 152, 153, 165, 166, and 168 of the Treaty on Functioning of the European Union[17], the European standardisation system has been established at the EU level[18] whereby the Regulation (EU) no 1025/2012 directs the method of European standardisation and regulates mutual functioning of various organisations involved in the procedure. This Regulation therefore prescribes the rules:

- on cooperation between European standardisation organisations, national standardisation bodies, Member States and the Commission,

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[14] Consolidated versions of the Treaty on European Union and the Treaty on Functioning of the European Union, Official Journal of the European Union, (2016/C 202/01), 07.06.2016

[15] See: Vitez Pandžić, M., *Upravno pravni aspekti ishođenja dozvole za gradnju i uporabnu dozvolu, doctoral thesis*, Faculty of Law Osijek, J. J. Strossmayer University in Osijek, 2018, pp. 61–74

[16] According to: [http://ec.europa.eu/DocsRoom/documents/16103/attachments/1/translations/] Accessed on 09.05.2019

[17] Consolidated versions of the Treaty on European Union and the Treaty on Functioning of the European Union, *op.cit.* in note 14

[18] Standardisation is an activity of establishment of provisions for general and repeated use concerning existing or potential problems to achieve the best degree of regulation in a given context and this activity consists of formulation, publication and application of standards. According to: Boljanović, A. M., *Normizacija u području kulturne baštine*, Yearbook of Protection of Cultural Heritage of Croatia, *Vol.* 35, No. 35, 2011, p. 51, and Croatian Standards Institute, *Internal Rules for Standardization – Part 1: Standardization in general, aims and general principles,* [https://www.hzn.hr/UserDocsImages/pdf/UPN_1_2014-02-20.pdf] Accessed on 11.04.2019

- on establishment of European standards and European standardisation deliverables for products and for services in support of Union legislation and policies,
- on the financing of European standardisation and stakeholder participation in European standardisation.[19]

Areas of standardisation are services, construction, chemicals, chemical engineering of agricultural and food products, machine engineering, metallic materials, non-metallic materials, the environment, health, information technology, transport, handling and packaging, household products, general electrical engineering, electronics, energy electrical engineering, telecommunications etc. European standardisation is regulated by a special legal framework pertaining to Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification)[20], Decision No 1673/2006/EC of the European Parliament and of the Council of 24 October 2006 on the financing of European standardisation and Council Decision of 22 December 1986 on standardization in the field of information technology and telecommunications (87/95/EEC).[21] European standards are adopted by the aforementioned European standardisation organisations – CEN, CENELEC but also ETSI (European Telecommunications Standards Institute) – and the norms are rooted in the principles of alignment, transparency, openness, consensus, voluntary application, independence of particular interests and efficiency. The European standardisation system itself is actually based on a special system of a privileged public-private partnership between the European Commission and the above organisations in compliance with provisions of Regulation (EU) No 1025/2012.[22] Initiative for adoption of standards is based on annual work programme adopted by the Commission taking into account long-term growth strategies of the Union.

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[19] Regulation (EU) No 1025/12 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, Official Journal of the European Union, L 316/12, 25.10.2012, Article 1

[20] Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), Official Journal of the European Union, L 241/1, 19.9.2015

[21] Regulation (EU) No 1025/12 of the European Parliament and of the Council of 25 October 2012, *op. cit.* in note 19, item 7

[22] According to: [https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:52018DC0686&from=EN] Accessed on 09.04.2019

The annual work programme specifies European standards and standardisation deliverables that the Commission, in accordance with Article 10 of the above Regulation, requests from the European standardisation organisations. The main objective of standardisation is to define voluntary technical or qualitative specifications met by present-day and future products, production processes and services and the aforementioned voluntary aspect[23] concerns application of European standards and this property makes them separate sources of law considering the secondary sources of EU law. In addition to the main objective, an objective of standardisation is to ensure successfulness and effectiveness of standards because they are an instrument and support to Union policies and legislation with mutual cooperation of European standardisation organisations, national standardisation bodies, the Member States and the Commission. In order to achieve the standardisation objectives laid down in Regulation (EU) No 1025/2012, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.[24]

It should be pointed out at this junction that, according to provisions of Regulation (EU) No 1025/2012, national standards, adopted by national standardisation bodies, are also created within the framework of the standardisation system[25]. Thus conflicting standards may occur and therefore it is necessary for efficiency

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23 Also on the topic: Kuzle, K., *Neka pitanja normizacije u Hrvatskoj*, Croatian Public Administration, *Vol.* 7, No. 4, 2007, p. 860

24 Consolidated versions of the Treaty on European Union and the Treaty on Functioning of the European Union, *op. cit.* in note 14

25 National standardisation bodies are: ASI – Austrian Standards in Austria, NBN – Bureau de Normalisation in Belgium, BDS – Bulgarian Institute for Standardization in Bulgaria, HZN – Croatian Standards Institute in the Republic of Croatia, UNMZ – Czech Office for Standards, Metrology and Testing in the Czech Republic, DS – Dansk Standard in Denmark, EVS – Estonian Centre for Standardisation in Estonia, SFS – Suomen Standardisoimisliitto in Finland, AFNOR – Association française de normalisation in France, DIN – Deutsches Institut für Normung in Germany, NQIS/ELOT – Hellenic Organization for Standardization in Greece, MSZT – Hungarian Standards Institution in Hungary, IST – Icelandic Standards in Iceland, NSAI – National Standards Authority of Ireland in Ireland, UNI – Ente Nazionale Italiano di Unificazione in Italy, LVS – Latvian Standards in Latvia, LST – Lithuanian Standards Board in Lithuania, ILNAS – Institut Luxembourgeois de la normalisation, de l'accreditation, de la sécurité et qualité des produits et services in Luxembourg, MCCAA – Malta Competition and Consumer Affairs Authority in Malta, NEN – Nederlands Normalisatie-instituut in the Netherlands, PKN – Polish Committee for Standardization in Poland, IPQ – Instituto Português da Qualidade in Portugal, ASRO – Romanian Standards Association in Romania, SUTN – Slovak Standards Institute in Slovakia, SIST – Slovenian Institute for Standardization in Slovenia, UNE – Asociación Española de Normalización y Certificación in Spain, SIS – Swedish Standards Institute in Sweden, BSI – British Standards Institution in the United Kingdom. According to: [https://www.evs.ee/EVS/Li] Accessed on 09.04.2019

of standardisation within the Union to exchange information[26] among the national standardisation bodies, European standardisation organisations and the European Commission concerning their present and future activities in the sphere of standardisation. In the Republic of Croatia, the national standardisation body is the Croatian Standards Institute established as a public institution through a regulation of the Government of the Republic of Croatia[27], and basic legislation in the field of standardisation are the Standardisation Act[28], the Product Technical Requirements and Compliance Assessment Act[29], the Accreditation Act[30], the Metrology Act[31], and the General Product Safety Act[32].

Effect of the European Union sources and legislation is known[33], but even though application of the European standards is voluntary, the following sub-chapter of the paper shall demonstrate how Eurocodes, as standards, are incorporated in the national law. It is important to emphasise that EU regulations and directives provide a framework for a method for standardisation at the level of the European standardisation organisations in coordination with the Commission and a method for creation of standards. The basic regulation on standardisation in the field of construction and construction products at the EU level is Regulation (EU) No 305/2011 of the European Parliament and the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC[34]. In addition to Eurocodes, the European standards are aligned standards and European Assessment Documents regulated by the above Regulation.

It may be concluded that the construction sector is regulated at multiple levels through regulation of construction products, works, professional qualifications of stakeholders encompassed by the system, health and occupational safety, en-

[26] On the topic: Van Leeuwen, B., *European Standardisation of Services and its Impact on Private Law,* Hart Publishing, Portland, USA, 2017, pp. 57–60

[27] Regulation on Establishment of the Croatian Standards Institute, Official Gazette No 154/04, 44/05, 30/10, 34/12, and 79/12

[28] Standardisation Act, Official Gazette No 80/13

[29] Product Technical Requirements and Compliance Assessment Act, Official Gazette No 80/13, 14/14, and 32/19

[30] Accreditation Act, Official Gazette No 158/03, 75/09, and 56/13

[31] Metrology Act, Official Gazette No 74/14, and 111/18

[32] General Product Safety Act, Official Gazette No 30/09, 139/10, 14/14, and 32/19

[33] On the topic: Ćapeta, T.; Rodin, S., *Osnove prava Europske unije*, Narodne novine, Zagreb, 2011, pp. 10–20

[34] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, Official Journal of the EU L 88, 4.4.2011

vironmental impact etc. Creation of normative acts, i.e. sources of law, within the framework of EU institutions was previously surveyed in a large number of professional papers. Furthermore it is an intention of this paper to demonstrate the manner of creation of the rules on construction at the level of European standardisation organisations in coordination with EU bodies. Therefore, creation of harmonised Eurocodes standards.

### 3.2. Eurocodes

In 1975, the Commission of the European Communities initiated establishment of a group for development of harmonised technical rules for structural analysis and engineering works. Those activities were aimed at elimination of technical obstacles to commerce and harmonisation of technical specifications. In the first stage, such rules would be applicable as an alternative to national rules of the Member States and replace them accordingly in the final stages of application. Between 1975 and 1989, the Commission, assisted by the Committee composed of Member State representatives, developed the Eurocodes programmes. In 1984, the first *Building Codes,* i.e. the Eurocodes, were adopted at the level of the Community or the Union. In 1989, under an agreement between the Commission and the CEN, the Member States and the European Free Trade Association (EFTA) members transfer preparation and publication of the Eurocodes to CEN[35] in order to ensure their future status of standards. The above fact ties the Eurocodes with provisions of all Commission directives or decisions related to European standards. In 1992, publication of the Eurocodes started and, in 2003, the Commission made a recommendation on implementation and use of the Eurocodes in all Member States. In 2007, publication of the Eurocodes concluded and, in 2012, the Commission submitted a request to CEN to amend the existing Eurocodes for a greater scope of the construction Eurocodes. The Eurocodes development practice and implementation differs among countries, especially at the Member State level and a further review of methods of implementation of the Eurocodes in legal systems of the Member States is given.

The EN Eurocodes, as European standards are a set of rules for structural analysis of buildings and engineering works as well as construction products created by the CEN. They are recommended means for fulfilment of prerequisites for compliance with the basic requirements of Regulation (EU) No 305/2011 of the

[35] According to: Sêco e Pinto, P.S., *Interaction Between Eurocode 7 – Geotechnical Design and Eurocode 8 – Design for Earthquake Resistance of Foundations*, Geotechnical Engineering for Disaster Mitigation and Rehabilitation, Proceedings of the 2nd International Conference GEDMAR08, Nanjing, China, Science Press Beijing and Springer-Verlag GmbH Berlin Heidelberg, 2008, p. 37

European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC[36], and Regulation on construction materials bearing the CE mark as well as preferred references for technical specifications of public procurement agreements.[37] They are deemed the most advanced rules in the world for structural analysis of civil engineering structures.

The third generation of standards (EN) is in effect, published between 2007 and 2009, and the period for repealing of contradictory national standards expired in March 2010.[38] The Eurocodes comprehensively cover all principal construction materials (concrete, steel, wood, masonry works and aluminium), all principal fields of structural engineering (fundamental structures, fire and earthquake protection etc.), and a wide range of structures and products (buildings, bridges, silos, towers etc.). The structural Eurocodes programme comprises the following standards which generally consist of multiple parts (58 standards in about 4900 pages):

- "EN 1990, Eurocode: Basis of structural design
- EN 1991, Eurocode 1: Actions on structures
- EN 1992, Eurocode 2: Design of concrete structures
- EN 1993, Eurocode 3: Design of steel structures
- EN 1994, Eurocode 4: Design of composite steel and concrete structures
- EN 1995, Eurocode 5: Design of timber structures
- EN 1996, Eurocode 6: Design of masonry structures
- EN 1997, Eurocode 7: Geotechnical design
- EN 1998, Eurocode 8: Design of structures for earthquake resistance
- EN 1999, Eurocode 9: Design of aluminium structures."[39]

The following intended purpose of the EN Eurocodes is recognised:

- means to demonstrate compliance of buildings and other structures with the basic requirements of Regulation (EU) No 305/2011 of the European Parlia-

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[36] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, *op.cit.* in note 34

[37] According to: [http://eurocodes.jrc.ec.europa.eu/showpage.php?id=1] Accessed on 21.022019, Gaćeša-Morić, V., *Normizacija u području graditeljstva*, Građevinar, *Vol.* 53, No. 8, 2001, p. 549 and Sêco e Pinto, P.S., *op.cit.* in note 35, p. 36

[38] The first generation of standards (EN) came in force in 1985, and the second in 1989. (author's comment)

[39] Sêco e Pinto, P.S., *loc.cit.*, p. 36

ment and the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, especially the parts from the above regulation pertaining to: The basic requirement 1 “Mechanical resistance and stability” and The basic requirement 2 “Safety in case of fire”;

- basis for determination of construction works contracts and related engineering services;
- framework for development of harmonised technical construction product data (European standards (EN) and European technical approvals (ETA)).

The Eurocodes confirm responsibility of administrative bodies for adoption of rules of each Member State and ensure their entitlement to determine values concerning prescription of safety issues at the national level where they vary among countries.[40] They provide common structural analysis rules for everyday use in analysis of whole structures and parts of structure and structures of traditional and innovative construction. Unusual forms of construction and analysis conditions are not specially encompassed and in such cases the design engineer is directed to consult experts additionally.[41]

It can be noted here that these standards in the process of obtaining building and use permits in the Republic of Croatia are related to design (as an integral part of the main project) in order to meet the foregoing basic requirements for the building referred to in Article 6 of Construction Law, primarily mechanical resistance and building stability.

The Eurocodes are implemented in national systems as national standards. If an EN Eurocode is available from CEN (date of availability), state administration bodies and national standardisation bodies[42] should:

- translate the Eurocode or a part thereof which is amended or supplemented into the standard national language (the integral text of the Eurocode must be transposed without any modification);
- develop a national supplement containing nationally determined parameters (NDP) where permitted by the EN Eurocode, and the NDPs are applied in analysis of buildings and engineering structures built in the relevant country, i.e. as:

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40 Croatian standard HRN EN 1990, Eurocode: *Basis of structural design (EN 1990:2002+A1:2005+A1:2005/AC:2010)*, Croatian Standards Institute, second edition, Zagreb, 2011, p. 5

41 *Ibid.* The Eurocodes do not encompass: action of sea waves, glass and plastic structures, new materials and special types of structures (nuclear power plants, dams, offshore oil platforms etc.)

42 See: [http://www.hzn.hr/default.aspx?id=73] Accessed on 21.02.2019

a) values and/or classes where the Eurocode specifies other options;
b) values where only a symbol is s specified in the Eurocode;
c) country-specific (geographical, climatological etc.) data, e.g. a snow load map;
d) procedures to be applied if the Eurocode specifies other possible procedures;

and it may also contain:

a) decisions on application of informational supplements;
b) references to non-contradictory supplemental data to assist users in application of the Eurocode;

- publish national standards transposed through the EN Eurocode and the national supplement;
- adopt own national provisions to allow use of the implemented EN Eurocode or a part thereof in the territory of the relevant state.
- promote education on the Eurocodes.[43]

Therefore, in accordance with the above, the national standards implementing the Eurocodes shall contain full text of the Eurocode (including all supplements as published by CEN), which may be preceded by a national cover page and a national foreword and it may be followed by a national supplement.[44]

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[43] According to: Croatian standard HRN EN 1990, Eurocode: Basis of structural design (EN 1990:2002+A1:2005+A1:2005/AC:2010), *op. cit.* in note 40, p. 6, DG Enterprise and Industry Joint Research Centre: The Eurocodes: Implementation and Use, 2008, p. 5 and Faradis, M. N. *et al.*, *Seismic Design of Concrete Buildings to Eurocode 8*, CRC Press, Taylor and Francis Group, Boca Raton, 2015, pp. 2–3

[44] *Ibid.* These are examples of names of national standards implementing the Eurocodes in the Republic of Croatia:
- HRN EN 1990:2011
Eurocode: Basis of structural design (EN1990:2002+A1:2005+A1:2005/AC:2010);
- HRN EN 1991-1-1:2012
Eurocode 1: Actions on structures -- Part 1-1: General actions -- Densities, self-weight and imposed loads for buildings (EN 1991-1-1:2002+AC:2009);
- HRN EN 02/01/1991:2012
Eurocode 1: Actions on structures -- Part 1-2: General actions -- Actions on structures exposed to fire (EN 1991-1-2:2002+AC:2009);
- HRN EN 03/01/1991:2012
Eurocode 1: Actions on structures -- Part 1-3: General actions -- Snow loads (EN 1991-1-3:2003+AC:2009);
- HRN EN 04/01/1991:2012
Eurocode 1: Actions on structures -- Part 1-4: General actions -- Wind actions (EN 1991-1-4:2005+AC:2010+A1:2010) etc.

Considering years of application of the Eurocodes and their effectiveness and a developed system for implementation of the above standards in the EFTA and the Member States, it may be concluded that the advantages of their use are:

- an uniform level of safety of structure and their characteristics in the Member States;
- ensured common structural analysis criteria and methods for fulfilment of mechanical resistance, stability and fire protection requirements considering durability and cost-effectiveness;
- ensured mutual understanding among owners, entrepreneurs, users, design engineers, contractors and manufacturers;
- facilitated exchange of construction services;
- facilitated promotion and use of construction components and tools;
- facilitated promotion and use of construction materials and products;
- allowed preparation of common design development aids and software;
- increased competitiveness of European construction companies, contractors, design engineers and manufacturers worldwide;
- provided common foundations for research and development;
- a route to an uniform level of safety of construction in Europe.[45]

It may be noted here that all parts of the Eurocodes are published in the Republic of Croatia by the Croatian Standards Institute as national standards. They are translated into the standard Croatian language. As regards application, design engineers may opt to apply other technical conditions and plans while complying with the basic requirements concerning the structure and pertaining to mechanical stability and resistance of structures, but the resulting safety must be at least as high as safety achieved through application of the Eurocodes. However, since other national standards are not concurrently available in the Republic of Croatia, the practice of application of the Eurocode is mandatory.[46]

In order to make the Eurocodes as standards also available through regulations, Article 17 of the Construction Act regulates adoption of technical regulations in the field of the basic requirements for structures and properties of construction products. The technical regulations are adopted by the minister in the form of

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[45] *Ibid.*, p. 9

[46] According to: Dimova, S. *et al.*, *State of implementation of the Eurocodes in the European Union,* European Commission, Brussels, 2015, p. 32

rules and provisions of those regulations refer specifically to national standards applying the Eurocodes rendering thus regulated standards mandatory instead of voluntary.

As pointed out above, voluntary application of standards is a fundamental principle of European standardisation. Nonetheless, in individual EU Member States, national legislation may pertain to standards whereby alignment with those standards is actually mandatory. In a comparative analysis of data published in 2015[47], even though they are generally considered to be non-mandatory, i.e. voluntary, the Eurocodes are, in practice, the only method available for structure design development in Austria, the Republic of Croatia, Estonia, Finland, Hungary and Poland because there are no other technical standards which would provide an identical or greater degree of safety. As regards Malta and Spain, rate of publication of national supplements has reached a stage where design development is not possible in compliance with the Eurocodes. Application of the Eurocodes is mandatory for individual parts of buildings in the Czech Republic and Bulgaria. 25 Eurocode parts are mandatory means for development of designs of road structures. Then, in France, application of 22 Eurocode parts is mandatory for seismic and fire protection design development. In Belgium, 6 Eurocode parts are mandatory means of fire protection design development. In Slovenia, Eurocodes EN 1990, EN 1991, and EN 1998 are mandatory means of structural design development, while 41 Eurocode parts are mandatory for the same field of design development in Denmark. 11 Eurocode parts are mandatory for structure design development in Romania, while 43 Eurocode parts are mandatory in Germany and 46 in Sweden. According to the research data, 38 parts of Portuguese national standards should have been implemented and/or aligned with Eurocodes and then they should be adopted through legislation along with national supplements.

In accordance with the above data, it may be pointed out that the Eurocodes are used in EU Member State national implementation of the Eurocodes as voluntary national standards as well as a regulatory framework encompassing, as presented above, different numbers of the Eurocode parts. Given the widespread application of parts of Eurocodes in Europe, they can be considered effective.

## 4. PRESENTATION OF A PART OF THE EMPIRICAL RESEARCH DATA

A portion of the results of the empirical research has been used for the purposes of this paper. The empirical research has was performed for the purpose of develop-

[47] According to: *Ibid.*

ment of the doctoral thesis aiming to offer a comprehensive analysis of legal aspects of obtaining construction and operating licences in the Republic of Croatia.

The first part of the paper reviews regulation in the field of construction at the EU level, but this part of the paper is intended as an analysis of the manner in which the two categories of respondents deal with the sources of EU law themselves and to find out if the administration officials themselves are acquainted with the sources of EU law and if they use the sources of EU law in the course of procedure concerning obtaining of construction and operating licences. Responses to the claims and their comparison may be reviewed in the following tables.

**Table 1:** Agreement with claims concerning issuing of construction licences (%) – competent county and city-level administrative departments and/or their branch offices

| | **Disagree completely** | **Disagree** | **Neither agree, nor disagree** | **Agree** | **Agree completely** |
|---|---|---|---|---|---|
| Considering their number, it is hard to keep track of EU standards (EU regulations, directives, decisions, Eurocodes, harmonised standards etc.) | 0.0 | 2.4 | 17.1 | 43.9 | 36.6 |

Source: Processing of the empirical research results by the authors

**Table 2:** Agreement with claims concerning issuing of construction licences (%) – architects, members of the Croatian Chamber of Architects

| | **Disagree completely** | **Disagree** | **Neither agree, nor disagree** | **Agree** | **Agree completely** |
|---|---|---|---|---|---|
| Considering their number, it is hard to keep track of EU standards (EU regulations, directives, decisions, Eurocodes, harmonised standards etc.) | 1.0 | 4.9 | 6.8 | 31.1 | 56.3 |

Source: Processing of the empirical research results by the authors

**Table 3:** Use of the sources of EU law – competent county and city-level administrative departments and/or their branch offices

| Activity | Yes (%) | No (%) |
|---|---|---|
| Utilisation of the sources of EU law in conduct of administrative procedure concerning obtaining of construction and operating licences | 7.7 | 92.3 |
| Officials of this administrative office have attended some forms of education (seminars, conferences, courses etc.) regarding use of the sources of EU law or they have attained the same knowledge through formal systems of education (universities, polytechnics, colleges). | 12.5 | 87.5 |

Source: Processing of the empirical research results by the authors

Following the above, according to the claims presented in the Tables 1 and 2 and according to the rate of agreement with the same, it is evident that the competent administrative departments agree or agree completely with the same at a high rate of 80.%, while 87.4% of the architects agree or completely agree with this claim that the respondents find it difficult to keep track of all the sources of law which are actually indispensable for their daily work. According to data shown in the Table 3, it is evident that a large percentage of the officials of the competent administrative bodies are not acquainted with the EU law and they are accordingly unable to use it.

## 5. DISCUSSION

Following the above, it may be concluded that the regulatory framework for construction at the EU level is systematic, numerous, and stratified. Its development involves numerous EU Directorates-General in formulation of secondary legislation as well as European standardisation organisations and national standardisation organisations through creation of standards in the standardisation procedure. It may be deemed that this is so because the field of construction is of interest to many economic operators and all activities taking place in the sector must be clear and predictable. Namely, this sector provides 18 million jobs directly and contributes about 9% to the GDP of the EU, but it also provides solutions for social, climate and energy challenges and therefore it is an objective of the European Union to help this sector to become competitive, efficient and sustainable.[48] It is therefore necessary that all elements of the process are regulated. Van der Heijden thus points out that design development and construction are becoming increasingly sophisticated under influence of modern technologies and the overall administrative aspect of construction is expanding under their impact[49]

[48] According to: [https://ec.europa.eu/growth/sectors/construction_en] Accessed on 12.04.2019

[49] About the tendency of growing administrative organizations in Pusić, E., *Nauka o upravi*, Školska knjiga, Zagreb, 2016, pp. 49–56

and regulations and legal rules are thereby becoming proportionally more numerous. However, it is important to distinguish here that the sources of law presented in the paper also have a different effect and that they may be applied differently. Namely, application and impact of the EU sources of law towards the EU Member States is known and the standards stemming from the European standardisation organisations coordinating with the European Commission are characterised by voluntary application. Nonetheless, this voluntariness is actually conditional because, according to the 2015 research data, it is apparent that the EU Member States are implementing the Eurocodes in their legal systems as standards and they even frame them with their own regulations – as the Republic of Croatia does through the technical regulations adopted by the minister.

After all, the regulations are there primarily to serve stakeholders in the system and primarily they must be available to them because it is not possible to develop a general design for the purpose of obtaining a construction and operating licence in the Republic of Croatia without the presented sources of law. Results of the research thus lead to the conclusion that the above sources must be more accessible and better presented, as well as that the system should provide better ways to become acquainted with and use the aforementioned sources and this shall be given as a recommendation in the conclusion of the paper.

In accordance with the information presented in the theoretical part of the paper and the results of a part of the empirical research, the hypothesis formulated in the introduction of the paper may be deemed confirmed, i.e. the construction-related regulatory systems at the EU level, apart from being specifically realised within the framework of the secondary law, are also generated by the European standardisation organisations in coordination with the European Commission and therefore such existing regulatory work leads to a large volume of the legislation and difficulties in its monitoring and consequently in its application by stakeholders in this system – as revealed by the research results.

## 6. CONCLUSION AND RECOMMENDATIONS FOR IMPROVEMENTS

In conclusion, it may be said that the construction sector is regulated at multiple levels and the areas of regulation in construction concern construction products, works, professional qualifications of stakeholders encompassed by the system, health and occupational safety, environmental impact etc. At that, the specified fields of regulation are subject to regulation within the framework of processes of standardisation within EU bodies as well as within the European standardisation organisations coordinating with EU bodies although voluntary application

of norms is one of the fundamental principles of European standardisation. This leads to a significant number of sources of law where persons who are intended recipients of these standards cannot keep track of all the relevant sources (for example engineers and architects) or apply them, for instance in processes for obtaining construction and operating licences (for example officials of competent administrative bodies) – as demonstrated by the research results.

Even though publication of the sources of EU law is performed at the level of the Official Journal of the EU, the persons meant to be recipients of those sources of law on construction are unable – as revealed by the empirical research results – to monitor publication of this source of law on a daily basis. In accordance with the above, it is hereby recommended to make all the regulations more accessible at the level of the Republic of Croatia. This could be achieved at a single spot if chambers (of architects, electrical engineers, machine engineers and civil engineers), working together with the Ministry of Construction and Physical Planning, specifically the Sector of Construction, Housing and Public Utility Management of the Directorate for Construction, Real Estate Appraisal and Energy Efficiency in the Buildings Sector and the Sector for Building and Use Permits of the Directorate for Permits of State Significance, establish a central repository of all sources of EU law relevant for this special area of administration. Regulations should be distributed in respect of their topic, in a manner which renders all the most recent amendments to the regulations available. The Croatian Chamber of Architects has made a step in this direction since it consistently publishes and makes available various types of regulations for the needs of its members, but this list suffers from lack of all relevant amendments to individual regulations. This would greatly contribute to better understanding of regulations as well as enhance implementation of the principle of lawfulness at all levels.

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# VACCINE INJURY - BURDEN OF PROOF OF THE DEFECT AND THE CAUSAL LINK IN THE LIGHT OF THE JUDGMENT IN THE CASE C-621/15

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***ABSTRACT***

*In the European Union the liability of producers for harm caused by defective products manufactured or imported by them is regulated in Directive 85/374/EEC of 25 July 1985 on the liability for defective products. The purpose of Directive is to lay down a system of producer liability for damage caused by a defect in its product. Crucial is that it sets out a system of strict liability, so that the injured person does not have to show evidence of fault on the part of the producer. The injured person will have to prove the defect, the damage and the causal link between these. However, when it comes to the damage caused by vaccines, in case law the causal link has often been almost impossible to prove because in the scientific literature there are a number of opposing views on the risk of vaccination. Nevertheless, to the facilitation of the victims burden of proof could contribute the judgement of the Court of the European Union according to which a national court may consider that vaccination has led to the disease or damage even when there is no proof based on medical research. But, if there are other serious, specific and consistent evidence, such as the temporal proximity between the vaccination and the occurrence of a disease, the lack of personal and familiar history of that disease, together with the existence of other reported cases of the disease that occurred after such vaccines being received. Still, the Court retains caution by opposing any presumptions and warns that such cases are extremely fact-specific and require careful case-by-case considerations. In this article the author discusses the aforementioned judgement about liability for vaccine injury and its implications in the European Union.*

***Keywords:*** *liability for defective products, vaccine, burden of proof, access to justice*

## 1. INTRODUCTION

In scientific and professional literature is often stressed that the vaccination is the greatest public health achievement in history, that is preventing thousands of illnesses and deaths,[1] and that, at the population level, risks of vaccines are small and

[1] Miller, E. R.; Moro, P. L.,; Cano, M.; Shimabukuru, T. T., *Deaths following vaccination: What does the evidence show?*, Vaccine, *vol.* 33, issue 29., 2015, pp. 3288-3292

balanced with the benefits of population immunization (so-called herd immunity). The theory of herd immunity is based on the immunization of a large number of individuals within the population thus reducing the possibility of spreading infection and contributing to the preservation of the public interest.[2] In the exercise of this fundamental purposes of the immunization - the preservation of public health, there are potential benefits, but also burdens of human rights.[3] Vaccines, though considered and designed for (preventive) protection against diseases,[4] can cause side effects ranging from mild to very severe. The most common side effects of vaccination are temperature, swelling, pain and redness at the injection site. Although serious side effects are less frequent, they include life-threatening allergic reactions, multiple sclerosis, brain inflammation, epileptic seizures, rheumatoid arthritis, and even death.[5] Because of that, doubts about the safety[6] of the vaccines are as old as vaccines themselves - dating back to the anticompulsory vaccination

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[2] Fine, P.; Eames, K.; Heymann, D. L., *Herd Immunity: A Rough Guide*, Clin. Infect. Dis., *vol.* 52, no. 7., 2011, pp. 911 – 916

[3] Habaus, L. K.; Holland, M. *Vaccine Epidemic: How Corporate Greed, Biased Science, and Coercive Government Threaten Our Human Rights, Our Health, and Our Children*, Skyhorse Publishing, Inc., New York, 2011

[4] The assumption is that vaccination has affected a significant reduction in the number of diseased and deaths from contagious diseases. V. State of the world's vaccines and immunization, 3rd ed. Geneva: World Health Organization; 2009. Available at: [https://apps.who.int/iris/bitstream/handle/10665/44169/9789241563864_eng.pdf;jsessionid=E0E650E2AAE62EFE954B2035AAD59006?sequence=1] Aaccessed 13.03.2019

[5] The official data on reported side effects of vaccination in the Republic of Croatia can be found on the website of the Croatian Institute of Public Health. Available at: [https://www.hzjz.hr/sluzba-epidemiologija-zarazne-bolesti/nuspojave-cijepljenja-u-hrvatskoj/] Accessed 03.12.2018.; For more information about vaccine safety surveillance program run by CDC and the Food and Drug Administration (FDA) see the Vaccine Adverse Event Reporting System (VAERS), available at: [https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/vaers/index.html] Accessed: 03.01.2019

[6] Some papers about the safety of some specific adjuvants in the vaccine, for ex.: Hooker B. S.; Kern, J.; Geier, D.; Haley, B.; Sykes, L.; King, P.; Geier, M., *Methodological issues and evidence of malfeasance in research purporting to show thimerosal in vaccines is safe*, Biomed. Research Int., *vol.* 2014, available at: [https://www.hindawi.com/journals/bmri/2014/247218/] Accessed 15.03.2019; Nakayama, T.; Aizawa, C.; Kuno-Sakai, H., *A clinical analysis of gelatin allergy and determination of its causal relationship to the previous administration of gelatin-containing acellular pertussis vaccine combined with diphtheria and tetanus toxoids,* The journal of allergy and clinical immunology, *vol.* 103, no. 2., 1999, pp. 321 - 325; Shaw, C. A., Tomljenovic L., *Aluminum in the central nervous system (CNS): toxicity in humans and animals, vaccine adjuvants, and autoimmunity,* Immunologic Research, *vol.* 56, issue 2-3., 2013., pp. 304-316. Some papers on questionable safety of a certain type of vaccine, for ex.: Hernan, M. *et al.*, *Recombinant Hepatitis B Vaccine and the Risk of Multiple Sclerosis a Prospective Study,* Neurology, *vol.* 63, no. 5., 2004, pp. 838–842; Le Houézec, D., *Evolution of multiple sclerosis in France since the beginning of hepatitis B vaccination,* Immunologic Research, *vol.* 60, issue 2-3, 2014, pp. 219–225; Tomljenovic, L., *Human papillomavirus (HPV) vaccine policy and evidence-based medicine: are they at odds?,* Annals of medicine, *vol.* 45, no. 2., 2013, pp. 182-193

league against mandated vaccination in the mid-1800s.[7] Specifically, those who question the safety of vaccines emphasize that an individual sometimes carries a great burden for the benefit of the rest of the population. In its analysis of the human rights and responses to the challenges of public health, some authors even believe that health policies and programs could be considered discriminatory and burdensome for human rights until otherwise proven.[8]

A person who has been injured by the vaccine has the right for compensation. Since proving the liability for defective medical products is subject of analysed judgment of the Court of Justice of the European Union[9] (hereinafter: Court), this type of strict liability will primarily be a matter of the subject of this paper. In all member states of the European Union, strict liability for defective products was introduced in 1985 with Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (hereinafter: Directive on liability for defective products).[10] While the liability based on fault is primarily focused on the behavior of the producer, strict liability is focused on characteristics of the product. In strict liability for damage an mitigating circumstance for the burden of proof is that there is no obligation to prove guilt of the defendant. On the other hand, in practice, particularly in proceedings for compensation for damage caused by the vaccine side effects, it is extremely difficult to prove another significant assumption of responsibility, a causal relationship and, in the case of liability for defective products, defect.

The aim of this paper is to recognize and analyze what is needed to be proven in the case of strict liability for a damage caused by the defective medical product[11]

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7 Larson, H. J.; Cooper, L. Z.; Eskola, J.; Katz, S. L.; Ratzan, S., *New Decade of Vaccines 5, Addressing the vaccine confi dence gap*, Lancet, *vol.* 378, 2011, pp. 526–535; Spier, R. E., *Perception of risk of vaccine adverse events: a historical perspective.* Vaccine, *vol.* 20, 2001; pp. 78–84

8 Gostin, L.; Brennan, T.; Lazzarini, Z.; Fineberg, H., *Health and Human Rights*, in: Mann, J. M.; Gruskin, S., *et.al* (eds.), Health and Human Rights, Routledge, Taylor and Francis Group, New York, London, 1999., pp. 7-20; Acosta, Juana I., *Vaccines, Informed Consent, Effective Remedy and Integral Reparation: an International Human Rights Perspective*, Vniversitas, *vol.* 131, 2015, pp. 19 – 64

9 The Court of Justice of the European Union (Court) is institution of the European Union based in Luxembourg, and includes Court of Justice and General Court

10 Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29 – 33.)

11 The term product from the Directive on liability for defective products includes all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable (art. 2. of the Directive on liability for defective products). Because of that, it also includes medical products. For more see: Hervey, T. K.; McHale, J. V., *Health Law and the European Union,* Cambridge University Press, 2004, p. 308

- vaccine. When we talk about liability for damage caused by side effect of some medicinal product, first question is whether the medicinal product that caused the side effect shoud be classified as a defective product. Explicitly affirmative answer to this question would certainly have bad and demotivating effect on the development of medicine and the treatment of a range of diseases. Namely, it is clear that there is almost no such a medicinal product that does not have any side effects, they are easier or harder, and sometimes even with the most serious consequence - death. Therefore, the very fact that some medicinal product is dangerous and has side effects may not necessarily mean that it is a defective product. The Directive on liability for defective products stipulates that a product is defective if it does not provide the safety that a person has the right to expect.[12] But this Directive gives little indication on how this defectiveness should be assessed, as the standard set by Article 6 is extremely vague.[13] Because of this subjectivity, courts must undertake a risk-benefit analysis to evaluate what an person may expect and to what extent is producer's care relevant.[14] Maybe the hardest assumptions to prove the liability for defective product is causation. Therefore, in the practice so far, the courts have generally hardly accepted the possibility that the vaccines have side effects.[15] It is a fact that in most medical studies the evidence to accept or reject a causal link between the vaccine and health impairment is inadequate.[16] First of all, this is the consequence of the lack of consistent and concrete medical scientific evidence about the risks of vaccination. This is what also the European Court in the judgment of 21 June 2017[17] has recognized, leaving the possibility of proving a defect of product and causal relationship on the basis of evidence that does not arise solely from medical research, about which more *infra*.

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[12] Art. 6. of the Directive on liability for defective products

[13] Rajneri, E.; Borghetti, J.; Fairgrieve, D.; Rott, P., *Remedies for Damage Caused by Vaccines: A Comparative Study of Four European Legal Systems*, European Review of Private Law, 1-2018, pp. 57 – 96, p. 87

[14] Cavaliere, A., *Product Liability in the European Union: Compensationand Deterrence Issues*, European Journal of Law and Economics, *vol.* 18, pp. 299 – 318., p. 302

[15] For example, such an understanding is apparent from the judgment of the French Appeal Court of Paris of 7 March 2014, which, after case was returned to it on the occasion of the cassation appeal, found that there was no scientific consensus that between the vaccine against hepatitis B and the occurrence of multiple sclerosis there is a causal link and that all national and international health authorities have refused to link the likelihood of the occurrence of this disease with the vaccine (from the judgement of the Court of Justice of the European Union, case C621/15, *W and Others v Sanofi Pasteur MSD SNC*, 21 June 2017., par. 16.); Knol Radoja, K., *Naknada štete prouzročene cijepljenjem,* Zbornik Pravnog fakulteta u Rijeci, *vol.* 39, no. 1., 2018, pp. 507 – 534, p. 514

[16] Stratton, K.; Ford, A.; Rusch, E.; Wright Clayton, E., *Adverse Effects of Vaccines: Evidence and Causality,* Committee to Review Adverse Effects of Vaccines, Institute of Medicine, (ed.), Washington, DC: The National Academies Press., 2012, available at: [http://vaccine-safety-training.org/tl_files/vs/pdf/13164.pdf] Accesed 04.12.2018

[17] Decision of the Court of Justice of the European Union in case C621/15, *W and Others v Sanofi Pasteur MSD SNC*, 21 June 2017. (hereinafter: Decision)

The author concludes that the existence of medical evidence should not be the only criterion for deciding on a causal relationship, since the Directive on liability for defective products does not give any special probative strenght to any of these types of evidence, so also the other relevant evidence must be taken into account. Relying on certain evidence alone unduly hampers the ability of the national court to assess all relevant evidence and thus violates the right to a fair trial. The right to a fair trial in the European Convention is guaranteed by Article 6. In considering the aspects of Article 6 of the Convention, we can cite the words of prof. Uzelac who number the following elements of the right to fair trial: access to court, legal aid and advice, equality of arms, public hearing, fair hearing, rights to proof, public pronouncement of judgments, tribunal established by law, impartiality and independence, reasonable time, effective enforcement, legal certainty and ban of arbitrariness.[18]

## 2. LIABILITY FOR DAMAGE

Due to the perceived vaccine safety problems there is visible increasing trend of refusing or delaing of recommended vaccination.[19] A series of literature has been written about the conflict between the public interest and the individual's right to reject vaccination,[20] but there is no final consensus at EU level, so in some states within the EU vaccination is prescribed as optional and somewhere as compulso-

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18 Uzelac, A., *Pravo na pošteno suđenje: opći i građanski aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda,* in: Usklađenost zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda (ed. Radačić, I.), Centar za mirovne studije, Zagreb, 2011., pp. 89-125

19 Siddiqui, M., Salmon, D. A., Omer, S.B., *Epidemiology of vaccine hesitancy in the United States*, Hum. Vaccin. Immunother., *vol.* 9, 2013, pp. 2643 – 2648

20 Tucak, I., *Legal and Ethical Justification of Compensation Regarding Compulsory Vaccination Injuries,* Facta Universitatis, Law and Politics, *vol.* 15, no. 2., 2017, pp. 145 – 155; Jefferson, T., *Vaccination and its adverse effects: real or perceived. Society should think about means of linking exposure to potential long-term effect*, British Medical Journal, vol. 317, 1998, pp. 159 – 160; Andorno, R., *Global Bioethics at UNESCO: In Defence of the Universal Declaration on Bioethics and Human Rights*, Journal of Medical Ethics, *vol.* 33, no. 3., pp. 150-154; Neustaedter, R., *The Vaccine Guide: Risks and Benefits for Children and Adults,* 2nd ed., North Atlantic Books, Berkeley, 2002; MorItz, A., *Vaccine-Nation: Poisoning the Population, One Shot at a Time*, Ener-Chi Wellness Center, Morris, Illinois, 2011; Allen, A., *Vaccine: the Controversial Story of Medicine's Greatest Lifesaver*, WW Norton & Company, New York, 2007; Offit, P. A., *Deadly Choices: How the Anti-Vaccine Movement Threatens Us All*, Basic Books, New York, 2011

ry.[21] In states where vaccination is mandatory, giving informed consent[22] to this preventive medical procedure remains only at the declarative level because legal possibilities of rejection are almost unfeasible. On the other hand, the states that give people the right to choose, but through comprehensive education and by providing complete information encourage them on voluntary vaccination, they often, by the number of general screening, achieve better results. This policy is not only ethically acceptable but can also contribute to savings on claims for damages.[23] But regardless of whether vaccination is mandatory or optional, the existence of an elaborated system of compensation is essential. In a number of states, various programs of out-of-court compensation have been for this purpose established,[24] while in some states, such as in the Republic of Croatia, the injured parties can rely solely on judicial protection. Court proceedings can be difficult and long-lasting, but in medical disputes, due to the injuries of close persons, along with these, emotionally and financially exhausting. In addition, also the labeling of a passively legitimate person in these cases is often confusing and it is unclear whether to sue a physician, institution (eg. health center), state, vaccine manufacturer or all of them. In these proceedings, it is often questionable whether the defendants are liable for compensation based on subjective or strict liability.[25]

For the formation of liability stipulated assumptions, such as the existence of subjects, damaging action, damage and causal link between harmful act and damage, must be fulfilled. In some cases are required also special assumptions, such as the existence of gulit, increased risk of harm, a special relationship between the offender and the responsible person etc. According to these specific assumptions are distinguished different types of liability, the rules on the possibility of limiting or exempting from liability, the ways of repairing the damage and the amount of

[21] In the Republic of Croatia, mandatory vaccination is prescribed against several, mostly children's infectious diseases. In its decision of 30 January 2014 concerning the proposal to review the constitutionality of the Law on the protection of the population against infectious diseases (Official Gazette, no. 79/07., 113/08., 43/09.) the Constitutional Court of the Republic of Croatia states that the vaccination is aimed to eliminate infectious diseases from the total population, which is a positive obligation of the state and which the legislator wants to achieve by stipulating the general obligation of the vaccination against certain infectious diseases. Constitutional court also considers that such an approach of the legislator falls within the scope of its discretion and that it does not extend beyond the constitutional framework (Decision of the Constitutional Court of the Republic of Croatia no.: U-I-5418/2008 of 30 January 2014)

[22] Acosta, *op. cit.* note 8, p. 25

[23] Tucak, I., *Obvezno cijepljenje djece: za i protiv*, in: Rešetar, B.; Aras Kramar, S.; Lucić, N.; Medić, I.; Šago, D.; Tucak, I.; Mioč, P., Suvremeno obiteljsko pravo i postupak, Pravni fakultet u Osijeku, Osijek, 2017, pp. 137 –165, p. 16

[24] For more see: Knol Radoja, *op. cit.* note 15

[25] *Ibid.*

compensation. According to whether for the liability to be established the guilt of the offender is needed, liability can be subjective or strict (causal). For example, pursuant to the Croatian Civil Obligations Act (hereinafter: COA),[26] a person who has caused damage to another person, if he has not proven that the damage has not happen because of his fault, shall compensate for this damage.[27] However, side effects associated with the vaccine rarely appear due to negligence and most often there is no simple way to prove someone's guilt.[28] The health care professional and/or the institution is responsible for the adverse consequences of the medical procedure when in the conduct of its employees, under principle of guilt, the existence of elements of liability are determined. This means that there would be liability if a failure was made during the vaccination procedure or the vaccination was carried out contrary to the generally accepted rules for that type of medical procedure, which would be in a causal relation with the health condition of the injured party which is claiming for damage compensation.[29] According to the principle of guilt, liability also exists, if there has been a lack of due attention, if the physician does not check the health status of the child before vaccination or in accordance with the Croatian Act about medicinal products[30] does not determine whether the vaccine passed necessary testing prior being placed on the market.[31] The strict liability is imposed regardless of the fault and exists where damage results from things or activities that are considered to be dangerous for the environment.[32]

Special form of strict liablity is strict liability of the producer, which is the primarly subject of this paper. The rules of strict liability of the producer apply to damages that may arise as a result of the defect of a product. In the Republic of Croatia the liability of the producer is thoroughly regulated in the COA[33] (in articles 1073-1080). As a Memmber State of EU, the Republic of Croatia has the obligation to act in accordance with EU law, so this provisions are in accordance with EU Directive on liability for defective products. According to this Directive (and COA) the producer bears the liability for the damage if the damage is caused because of a defect in his

[26] Civil Obligations Act, Official Gazette, no. 35/05, 41/08, 125/11, 78/15

[27] Art. 1045/1 COA

[28] For more see: Looker, C.; Kelly, H., *No-fault Compensation Following Adverse Events Attributed to Vaccination: A Review of International Programmes*, Bulletin of the World Health Organization, 2011., pp. 371 –378; available at: [http://www.who.int/bulletin/volumes/89/5/10-081901/en/] Accesed 29.11.2018

[29] Knol Radoja, *op. cit.* note 15, p. 514

[30] Act about medicinal products, Official Gazette, no. 76/13, 90/14

[31] Knol Radoja, *op. cit.* note 15, p. 514

[32] Art. 1045/3 COA

[33] Civil Obligations Act, *op. cit.* note 26

product.[34] Also, any person who imports a product for sale, hire, leasing or any form of distribution in the course of his business will be responsible as a producer.[35] To prove the liability for the defective product, the injured person will have the burden to prove ''the damage, the defect and the causal relationship between defect and damage."[36] By the evaluation of the medical product, [37] all circumstances, such as its presentation, the use to which it could be put and the time when it was put into distribution, must be taken into account. Apart from the obvious defects such as expiration of use, defective packaging, etc., analysis of Article 6 of the Directive on liability for defective products leads to the conclusion that it is of crucial importance the expected level of safety. According to the Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use[38] the package leaflet must be clear and understandable, enabling the users to act properly, when needed with the support of health professionals. The package leaflet of the medicinal product must be clearly readable in the official language of the Member State in which is put on the market. Therefore, a medicinal product will be defective if the level of the danger of the product is not clearly indicated to the intended recipients and because of that undermines certainty about the risks. And this makes it necessary to analyse whether is the level of danger of the product clearly indicated and is there sufficient information on contraindications and side effects of medicinal product.[39] If it is found that the vaccine was not defective, liability will generally exist if it is proven the fault of the defendant according to the general rules on liability.[40] From proving that the product is defective it is even more difficult to prove the causation. The burden of proof of a causation is also on the plaintiff.[41] Hard provability of a causal relationship between vaccination and damage often is result of the fact that the damage sometimes occurs after a few weeks or even months.[42] Prooving damage

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[34] Art. 1. of the Directive on liability for defective products

[35] *Arg. ex.* Art. 3. of the Directive on liability for defective products

[36] Art. 4. of the Directive on liability for defective products.

[37] Baretić, M., *Product Liability in Medicine,* in Beran R. (eds), Legal and Forensic Medicine, Berlin, 2003, p. 1805; Art. 4. of the Directive on liability for defective products

[38] Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, Official Journal L 136, 30/04/2004 P. 0034 – 0057

[39] Article 63. of the Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use

[40] Baretić*, op. cit.* note 37, p. 1805

[41] *Arg. ex.* Art. 4. Directive on liability for defective products

[42] Keelan, J.; Wilson, K., *Balancing Vaccine Science and National Policy Objectives: Lessons From the National Vaccine Injury Compensation Program Omnibus Autism Proceedings***,** Am. J. Public Health. *vol.* 101, no. 11., 2011, pp. 2016 – 2021

due to the side effects of vaccination will be extremely difficult, in practice sometimes impossible, because in the scientific literature there are many controversial standpoints on the risks of vaccination and the medical professionals generally claim that there is no specific medical scientific evidence that confirms that vaccines cause damage. However, the existence of one certain evidence such as medical evidence, should not be only criterion for deciding on a causal relationship. That is also what has, in analized decision,[43] the Court of Justice of the European Union concluded, leaving the possibility of proving a causal relationship based on evidence that does not arise from medical research.

## 3. THE COURT OF JUSTICE OF THE EUROPEAN UNION (JUDGMENT OF 21 JUNE 2017 IN CASE C-621/15 *W AND OTHERS V SANOFI PASTEUR MSD SNC*).

The Court of Justice of the European Union has recently**,** in Case C-621/15 *W and Others v Sanofi Pasteur MSD SNC,* made a pronouncement on the interpretation of the provision of the Directive on liability for defective products in the light of damage caused by vaccine. Namely, on the basis of the Treaty on the Functioning of the European Union,[44] (hereinafter: TFEU) national courts have been able to raise questions about the interpretation and application of Union law before the Court. Court is competent to decide on the previous issues concerning the interpretation of the Treaty and of acts of the other institutions, offices, bodies or agencies of the EU.[45] Therefore, if such a question[46] arises before any court of a Member State, that court may request the Court to give a ruling about it. The legal doctrine found that this procedure before the Court played a central role in the development of the legal system of the Union and has through uniform interpretations contributed to the harmonization of EU law.[47] The decisions made in the preliminary procedure have *erga omnes* effect and thus are binding not only for the state from which the issue is addressed but also for all other Member States.[48]

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43 Decision *op. cit.* note 17

44 Treaty on the Functioning of the European Union 2012/C 326/01, *OJ C* 326, 26.10.2012, p. 47 – 390

45 Article 267 TFEU

46 Into consideration come only questions concerning European Union law and which are raised before the court of a Member State. Procedures about general or hypothetical issues are not subject of Article 267. TFEU. Broberg, M., Fenger, N., *Preliminary references to the European Court of Justice*, Oxford University Press, Oxford, 2010, pp. 105 –117; Case C-244/80 *Foglia v. Novello* (no. 2) [1981] ECR 3045, par. 18

47 De la Mare, T., Donnelly, C., *Preliminary Rulings and EU Legal Integration: Evolution and Stasis*, in: Craig, P.; De Búrca, G., The Evolution of EU Law, Oxford University Press, New York, 2011, pp. 363 – 404

48 Craig, P.; de Búrca, G., *EU Law*, Oxford University Press, New York, 2003., p 442; Goldner Lang, I., *Učinci presuda Europskog suda u prethodnom postupku*, in: Ćapeta, T.; Goldner Lang, I; Perišin, T.; Ro-

Therefore, every individual in proceedings before the national court may invoke on the law of the Union but also on the Court's jurisprudence and the national courts are obliged to apply it. The failure of a Member State's court to apply the EU legal norm in the way that Court interprets it can lead to serious violations of Union law and, in some cases, the State's liability. Member States are therefore liable if other persons are harmed by the fact that the state did not in time or failed to comply with the Directive or has applied a different norm of European Union law.[49] The general conditions of liability for damage Court has been set up in joined cases *Francovich* i *Bonifaci*,[50] and in joined cases *Brasserie du Pêcheur* i *Factortame*.[51] The special form of liability of the judges that have failed to fulfill the obligation to refer the preliminary question is defined in the case Köbler.[52]

In view of the above mentioned effect, the Court's decision on the preliminary question on the liability for defective products could be of importance in proving defect of product and causal relationship between vaccination and damage. With its *erga omnes* effect at the level of the national courts of the EU Member States it confirms the parties' right to a fair trial in which all evidences have equal strength. The judgment was delivered on the request for the preliminary ruling concerning the interpretation of Article 4 of the Directive on liability for defective products, sent by the french *Cour de Cassation*, and received by the Court on 23 November 2015.

### 3.1. The circumstances of the case

The circumstances of the case are  the following: Mr. W. received three hepatitis B vaccines (manufactured by Sanofi Pasteur) between December 1998. and July 1999. His health problems began in August 1999, culminated in November 2000. with the diagnosis of multiple sclerosis and and finally in 2011 with death. In year 2006 Mr. W. and his family initiated proceedings for compensation of damage before the French court against Sanofi Pasteur. They claimed a producer to be

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din, S. (eds.), Prethodni postupak u pravu Europske unije, suradnja nacionalnih sudova s europskim sudom, Narodne novine, Zagreb, 2011, pp. 89 – 93

49 For more see: Ćapeta, T., *Odgovornost država za štetu u pravu Europske  zajednice*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 53, 200., pp. 3 – 4

50 Joined cases Francovich and Bonifaci (C-6/90 i C-9/90 Andrea Francovich and Danila Bonifaci and others v.  Italian Republic (1991) ECR I-5357)

51 Joined cases *Brasserie du Pêcheur and Factortame* (C-46/93 i C-48/93 Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte:  Factortame Ltd and others (1996) ECR I-1029)

52 Case C-224/01 *Gerhard Köbler v. Republik Österreich* (2003) ECR I-10239. In the *Köbler* case Court stated that the court is obliged to initiate the preliminary proceedings under Art. 267 TFEU, and if it did not do so and misapplies the EU law, there are grounds for claiming compensation for damage from the State

liable for damage because of a product defect. They argued that the close timing between the vaccination and the beginning of symptoms of his illness, as well as the lack of any family or personal history of the disease gave rise to specific, serious and consistent presumptions about the existence of a defect in the vaccine, and a causal link between it and the development of the multiple sclerosis.[53]

The litigation has going through a various instances of French courts that have taken different standpoints. So the Regional Court of Nanterre at first instance upheld the claim, but by the Court of Appeal of Versailles it was subsequently overturned. The latter court held that the relied evidence was sufficient to establish presumptions capable of proving a causation between the vaccination and the manifestation of the disease but were not sufficient to establish a vaccine's defect. However, Court of Cassation quashed this decision.[54] The case was sent before the Court of Appeal of Paris which again overturned the first instance judgment. For purposes of this paper, the most important thing that the Court of Appeal of Paris pointed out is that there is no scientific consensus that support a causation between the vaccination and multiple sclerosis and that all the health authorities, international and national, had rejected the correlation between this disease and the vaccination. In the light of various elements, the Court of Appeal of Paris concluded that the criteria relating to time interval between receiving of the vaccines and the occurrence of first symptoms and the lack of personal and family backgrounds could not, together or individually, establish specific, serious and consistent presumptions that support the conclusion of there being a causation between the vaccination and the multiple sclerosis.[55] In those events, after new appeal brought by W and Others against that judgment, in 2015 the Court of Cassation decided to address to the Court for a preliminary ruling.

### 3.2. Proving the defect and the existence of a causal relationship

The first important issue the Court had decided was can the Article 4 of Directive, in the area of liability of pharmaceutical laboratories for the vaccines that they manufacture, be interpreted as precluding. The problem was in a method of proof by which the court is ruling on the merits. Namely, whether ''the court may consider that the facts relied on by the applicant constitute serious, specific and consistent presumptions capable of proving the defect in the vaccine and the existence of a causal relationship between it and the disease, notwithstanding the finding that medical research does not establish a relationship between the vaccine and

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53 Decision, *op. cit.* note 17, par. 11

54 *Ibid*, par. 12 – 15

55 *Ibid*, par. 16

the occurrence of the disease."[56] In its reasoning the Court poited out that if the only method of proof a plaintiff can rely on is medical research, it would be excessively difficult or even impossible to establish liability of the producer, and would undermine the effectiveness of Directive.[57] Because of that, the Court answered that Article 4 of Directive must be interpreted in the way that a national court may consider that, despite the finding that medical research neither establishes nor rules out the existence of a causal link between vaccination and the disease, certain factual evidence ''constitutes serious, specific and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease."[58]

Second and third question was about establishing presumptiones. In the doctrine appeared concerns about this questions because the Court ruled that national courts may use the same evidence to conclude that there is a defect in the vaccine as they do to conclude that there is a causal link between that defect and the disease.[59] It is stated that this seems to open the door to lower courts' decisions that would consider vaccine, in this case vaccine for hepatitis B, as defective because this product has been presumed to cause severe disease in one given case, even though its global risk/benefit ratio remains positive.[60] But we must not forget that the Court stated that  Article 4 of Directive ''must be interpreted as precluding evidentiary rules based on presumptions according to which, where medical research neither establishes nor rules out the existence of a link" between the vaccination and the disease, the existence of causation between the defect of the vaccine and the damage will always be supposed to be established when some predetermined evidence is given.[61] Court argued that such a irrefutable presumption would result that the producer would be deprived of opportunity to carry out facts and even scientific arguments to disprove that presumption, and the court would not be able to evaluate all the facts. Being so automatic would destabilize the principle of burden of proof lay out in Article 4 of Directive, and risk the effectiveness of the system of liability established by that Directive.[62] Also, even if the presumption were to be refutable, the producer could, even before the courts ruling, find itself in the situation of having to invalidate that presumption in order to successfully

[56] *Ibid*, par. 17

[57] *Ibid*, par. 31

[58] *Ibid*, par. 43

[59] Rajneri; Borghetti; Fairgrieve; Rott, *op. cit.* note 13, p. 88

[60] *Ibid.*

[61] Decision, *op. cit.* note 17, par. 55

[62] *Ibid*, par. 53

defend itself. This would also result that the burden of proof provided for in Article 4 of Directive would be neglected.[63]

### 3.3. Commentary on the Decision

An example from the French judiciary suggests that there is a danger that sometimes in court proceedings is, at the expense of other evidence, too much attention paid to certain types of evidence. Court's decision confirms the right of the national court to assess all relevant evidence without questioning whether it can make a decision without some specific evidence. That such a decision obviously was necessary arises also from some criticisms of the judgement that soon came. The critics state that such a decision makes a distortion of science and insensibility to the legitimate methods that generate scientific knowledge in the context of vaccines.[64] Critics consider that, in relation to other evidences in this case, to the relevant scientific evidence should be given greater respect because of the method by which it was produced.[65] However, despite the fact that scientific knowledge arises from specific methods which are based on testing the hypothesis ''against the data, though a process of systematic process of observation and experimentation",[66] scientific methods also, as the critics themselves admit, ''tend to be naturally progressive and forward-thinking."[67] Therefore, because once some scientific discoveries were considered true, this does not mean that they will forever be perceived as such. They must be subject to equal treatment and re-examination as any other evidence. Also, how the Advocate General Bobek in his Opinion states, the Directive does not necessitate that certain weight should be given to scientific or medical research.[68] In addition, he states that Article 4 of the Directive regulates burden of proof but does not dictate kind of evidence, methods, standard of proof or the weight to be given to partucular evidence.[69] The Directive also does not stipulate that absence of medical research establishing a causation is convincing proof of absence of defect or causal link. The Directive only obliges the establishment of a causation between defect

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63 *Ibid*, par. 54

64 Smillie, L. R.; Eccleston-Turner, M. R., Cooper, S. L., *C-621/15 - W and Others v Sanofi Pasteur: An Example of Judicial Distortion and Indifference to Science*, Med. Law Review, *vol.* 26, no. 1., 2018, pp. 134 – 145

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

68 Opinion of Advocate General Bobek delivered on 7 March 2017 in Case C621/15 *W and Others v Sanofi Pasteur MSD SNC Caisse primaire d'assurance maladie des Hauts-de-Seine- Caisse Carpimko*, par. 39

69 *Ibid*. par. 40

and damage.[70] As stated by the Advocate General Bobek, it has been acknowledged by the Court that, when determinating rules of proof and evidence, Member States may restore imbalances between the consumer and the producer, which sometimes result from information asymmetry. That option reflects the broader EU law requirements of access to justice.[71] Advocate General underlines that, in line with the principle of procedural autonomy, it is on each Member State to determine comprehensive rules of proof for implementation of the Directive.[72] However, the procedural autonomy of Member States in laying down that rules is not unlimited. The effect of national rules must obey to the principles of effectiveness and equivalence.[73] Therefore, national rules of proof that inhibit the court's ability to assess relevant evidence, or that in practice result in a reversal of the burden of proof, would not be consistent with this principles. Which ultimately may bring to a breach of the principle of effective judicial control or the right to a fair trial.[74] To this we can add the argument that any limitation of the freedom of evidence evaluation would be a violation of the principle of seeking for the truth and would return us to a system of formal search for truth. However, experience shows that this system does not ensure the attainment of absolute truth in the modern stage of development of the judicial investigation. Only a lack of legal constraints can create a platform for achieving satisfactory results. Therefore, during the free evaluation of evidence it is the duty of the court to conscientiously and carefully evaluate each evidence individually and all the evidence together and make its decision on the basis of the results of the entire procedure.[75]

Critics also argue that these judicial approaches may fuel the vaccine scepticism in Europe.[76] They warn the Court to be mindful to not encourage the give a cover to ideas that ''benefits of vaccines do not outweigh concerns about the harm they may cause" without the scientific evidence for doing so.[77] However, the Court did not rule on the facts of case, only on questions of law. The Court's decision does not mean that vaccines can be blamed for every damage without scientific evidence, but it means that the scientific evidence does not have the exclusive power, and it is necessary to take all the circumstances of the case into account. Besides that, with this critic we could not agree because, although the Court has stated that a

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70 *Ibid*, par. 42

71 *Ibid*. par. 23

72 *Ibid*. par. 21

73 *Ibid*. par. 24

74 *Ibid*. par. 25

75 For more see: Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2004, pp. 158 – 173

76 Smillie, *op. cit.* note 64

77 *Ibid*.

national judge may consider that some factual evidence ''constitutes serious, specific and consistent evidence" allowing it to decide that there is a defect and a causal relationship,[78] what Court specifically emphasized is that, despite the existence of such indications, Article 4 of Directive must be interpreted as precluding evidentiary rules based on presumptions. Court also highlights that the use of such presumptions would undermine Article 4 and would risk the very effectiveness of the system of liability that the Directive introduced.[79] In addition to that and although critics state that this judgement might have an impact on the increase number of liability claims for vaccine harm, Stein, an expert in civil (medical) liability law, for *Nature* magazine said that ''credible medical evidence showing that the vaccine is safe will win the case" and ''those who say that the Court decision has opened a floodgate for multiple vaccine liability suits are therefor mistaken."[80] Also, he adds that, if courts would have to use only scientific methods of proof, ''they would hardly be able to make decisions and to deliver timely justice to people."[81]

## 4. CONCLUSION

In many cases, the causal link between damage and the vaccine is difficult, if not impossible, to prove. This is partly because damage from the side effect of the vaccine sometimes occurs after days, weeks or even months after vaccination, but also because the vaccine safety studies are often opposed and inadequat.[82] Despite the increasing number of opponents of the vaccine and the allegations on its side effects, medical experts generally state that there is no concrete scientific medical evidence that confirms that the vaccine cause harm and generally promote a high level of vaccination rate in the population for the purpose of public health protection (so-called herd immunity). However, making only medical proof a prerequisite for establishing products' defects and causation with its discouraging effect indirectly denies plaintiffs right to a fair trial. As stated by the Advocate General Bobek, such a high evidentiary standard, which are excluding any method of proof other than medical proof, could make it hard or even impossible to de-

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78 Decision, *op. cit.* note 17, par. 43

79 *Ibid*, par. 55 and 57

80 Castells, L.; Butler, D., *Vaccine ruling from Europe's highest court isn't as crazy as scientists think,* Nature, June 28, 2017, available at: [https://www.nature.com/news/vaccine-ruling-from-europe-s-highest-court-isn-t-as-crazy-as-scientists-think-1.22222] Accessed 27.01.2019

81 *Ibid*.

82 For some studies see: CDC, available at: [https://www.cdc.gov/vaccinesafety/research/publications/index.html] Accessed 29.01.2019; Vaccine Safety Commission, available at: [https://vaccinesafetycommission.org/studies.html] Accessed 29.01.2019

termine liability of the producer. In such cases, the national court's freedom to evaluate evidence would be excessively inhibited.[83]

The recent ruling of the Court in case *W and Others v Sanofi Pasteur MSD SNC* is ''balanced and in line with long-standing legal traditions,"[84] but it surely contributes to clarifying the basic principles of product liability across the EU. Because of the issue of interpretation of the analyzed provisions of the Directive on liability for defective products the case has been stretched for several years at different instances of French courts. This decision strikes a more judicious balance because it affirms an individual's right to sue producer of defective product for harms that were not reasonably expected.[85] Namely, it confirms to the national courts the ability to assess all relevant evidence without considering and questioning whether it may make a decision without some specific evidence. With its interpretation, the Court may influence that the same does not happen again before some another national court of the EU Member State, possibly Croatian. In accordance with this judgment, if certain factual evidence constitutes serious, specific and consistent evidence, such as the temporal proximity between the vaccination and the manifestation of a disease, the lack of history of that disease and the existence of other similar reported cases, this may lead a national court to consider that a injured person has fulfilled his burden of proof. In this case, taking all circumstances into account, the national court can consider that the vaccine does not offer the safety that the patient may expect.[86]

However, the Court also points out that national courts may not use evidentiary rules based on presumptions. Namely, if the existence of a causation would be automatically presumed, the producer could find itself, even before the courts had the opportunity to hear producer's arguments, in the position that he must strike that presumption in order to defend himself. Such a situation would lead to the burden of proof being ignored.[87] In view of the above, it is important to emphasize that the interpretation of the decision of the Court should not result in the reversal of the burden of proof to the defendant. The burden to prove damage, defect and causation has to remain with the plaintiff. A reversal is not allowed.[88]

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83 Opinion, *op. cit.* note 68, par. 45

84 Castells; Butler, *op. cit.* note 80

85 Holland, Mary S., *Liability for Vaccine Injury: The United States, the European Union, and the Developing World,* Emory Law Journal, *vol.* 67, 2018, pp. 415 – 462., p. 459

86 Decision, *op. cit.* note 17, par. 41

87 *Ibid.*, par. 54

88 Verheyen, T., *Full Harmonization, Consumer Protection and Products Liability: A Fresh Reading of the Case Law of the ECJ*, European Review of Private Law *vol.* 1-2018, pp. 119 – 140, p. 124

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# HISTORICAL AND PHILOSOPHICAL BACKGROUND OF GENETIC ENGINEERING IN THE EU CONTEXTS

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***ABSTRACT***

*Biotechnology as a science has a significant role in society and as such, it significantly changes the status of genetics. Biotechnology can be considered an interdisciplinary science, as it implies modern achievements in chemistry, biochemistry, biology and engineering. There are several types of biotechnology, but it is important to mention the distinction between traditional biotechnology and genetic engineering. Specifically, genetic engineering, as opposed to traditional biotechnology that involves crossing close species, means creating new non-cellular hereditary materials outside the cell and connecting them with a transmitter. With its emergence, biotechnology changes the position of parenting in society, the meaning of life in general and is the subject of numerous discussions in politics, economy, research work etc. However, especially high level of disagreement is in the area of consumer protection. With genetic modification of food, there has been a significant shift in consumer awareness and citizens themselves insist on active participation in the formulation of regulatory rules because the consumption of genetically modified food can negatively affect the health of consumers. In this case, consumers created a network and became active both nationally and supranationally. Despite the various methods of study, the formulation of legal regulations has led to mutual disputes between* the *EU Member States. Therefore, the central part of the work relates to the jurisprudence of the European Court of Justice in the field of geotechnical engineering. Court judgments and percentages of "obtained" verdicts in favour of the Member States have been analysed.*

*The paper consists of several chapters. In the first chapter, the term of biotechnology, its significance for society, and the elemental division of the same are clarified. In the second chapter, in short theses, genetically modified foods and the consumer's position in relation to the same are clarified. Namely, the aim of the paper is to illustrate the consumer's view in order to obtain a complete picture before analysing jurisprudence of the Court of Justice of the European Union. The central part of the paper is devoted to studying jurisprudence of the European Court of Justice in the field of genetic engineering. Namely, the number of disputes regarding the mutual relations between the European Union and the Member States, as well as jurisprudence and the position of the Court of Justice of the European Union have been analysed in regard to favourable regulations.*

*In the creation of this paper, a number of methods will be used. Above all, the method of analysis will be used for systematic analysis of the problem / phenomenon and this method will try to obtain patterns of behaviour based on scientific knowledge. In contrast, a synthesis method will*

*be used to reach a final conclusion. It is also important to mention both the historical method and the descriptive method. Another significant method used will be comparative method and finally teleological method will be used for the purposes of making a conclusion.*

***Keywords:*** *European Union, Court of Justice of the European Union, Member States, genetic engineering*

## 1. INTRODUCTION

Science and technology are growing uncontrollably; at this point their ascending path is unpredictable. Therefore, the purpose of this paper is to present, briefly, the state of biotechnology in society, its potential consequences, and the position of the European Court of Justice and taking a stand in a relatively young discipline. The biotechnology and its divisions are described in the first subsection. Related concepts are also mentioned: eugenics and cloning, based on the scientific assumptions of biotechnology. Different approaches to the concept of biotechnology have been explained. Namely, the aim was to study biotechnology from different aspects in order to gain a complete insight into the positive and negative aspects of this young scientific discipline. A user group that is directly affected by the effects of biotechnology are consumers who consume food produced from genetically modified organisms or foods containing ingredients produced from genetically modified organisms. The last subtitle refers to the practice of the European Court of Justice on genetic engineering. At the end of the introductory part, it is important to note that the work came from the doctoral thesis: Regulatory System of Genetically Modified Organisms in the European Union.

## 2. DANGERS OF MODERN BIOTECHNOLOGY

The simplest definition of biotechnology is as follows: "Biotechnology is the application of biology for human needs".[1] Every part of human history carries with it the flourishing of certain activities. Thus, biotechnology in natural sciences is what is computing in social sciences. Both disciplines are intertwined in all aspects of today's society. At this point, only one rational question can be asked: Where is the end of the aforementioned activities?

According to the Convention on Biological Diversity, i.e. according to the Confirmation of Convention on Biological Diversity Act, it is stated: "Biotechnology is any technology that uses biological systems, living organisms or parts thereof,

[1] Reiss, M.,J.; Straughan, R., *Poboljšati prirodu?,* Biblioteka: Scientia, Book 5, Zagreb, 2004, p. 12

to produce or change products or processes for special purposes."[2] Biotechnology is key in the following disciplines: industry, agriculture, food industry, medicine, environmental protection, conservation of natural resources, etc. As for the division of biotechnology, there are the following types:

1. Red biotechnology is applied in the fields of medicine. It is also considered the most important area of biotechnology since it is usable in drug production and diagnostics. It is believed that red biotechnology is worth approximately $70 billion in the USA alone.[3]

2. Green biotechnology or agrobiotechnology is oriented towards the production or development of new genetically modified organisms in order to improve appearance, increase in yield, to build resistance to insects, fungal diseases, viruses and herbicides.

3. White biotechnology refers to the chemical industry, for the purpose of producing environmentally acceptable substances, i.e. the principle of moderation in production and environmental impacts.

4. Grey biotechnology is based on environmental protection, i.e. soil sanitation, waste gas purification, sewage treatment, etc.[4]

In regards to the time of emergence, there are traditional and modern biotechnology. The beginning of traditional biotechnology are found in 10,000 BC, and it was focused on agriculture, the use of microorganisms in the production of beer, wine, bread, yogurt and cheese. Modern biotechnology is divided into genetic engineering, cloning and tissue engineering. "Genetic engineering (or recombinant DNA technology) is the generation of new hybrid hereditary materials outside the cell and their attachment to a transporter (virus, plasmid or other), enabling it to be introduced into a host organism in which they naturally do not exist but in they can be multiply)."[5] Since recombinant DNA is produced, technology is called recombinant DNA technology or rDNA technology, and the genome-engineered organism is called a genetically modified organism (hereinafter referred to as GMO). In everyday life, GMOs are often mixed with foods derived from genetically modified organisms or animals. Genetic modification involves the transfer

[2] Decision on promulgation of the Confirmation of Convention on Biological Diversity Act, Official Gazette, International treaties, 6/96, Article 2

[3] Beljo, J.; Herceg, N.; Mandić, A., *Biotehnologija i ekologija*, Mostariensia, *Vol.* 19, 2015, pp. 83-92

[4] *Ibid.*, pp. 83-92

[5] Delić, V., *Trideset godina genetičkog inženjerstva: kako je došlo do otkrića mogućnosti rekombiniranja DNA molekula in vitro*, Molecular Biology Department, Faculty of Science-Mathematics, Priroda, January 2004, p. 42

of a part, the whole or a group of genes from DNA of one organism and insertion into DNA of another organism. The fundamental difference between traditional and modern biotechnology is in the affinity of the species that are combined, i.e. in traditional biotechnology, related species are combined, which cannot be said for modern biotechnology. Modern biotechnology creates a new hereditary material that does not exist in the natural environment.[6] Genetic engineering should get its place on a social ladder. Thus, it is necessary to stop (red light), wait for effects (yellow light) or let it be in all directions – medicinal, dietary, natural etc.[7]

In the introduction the cloning was already mentioned, which is also one of the dangers of modern biotechnology. Clone (Greek – twig) "means a group of individuals or individual organisms, created by asexual propagation, from a sexually acquired unit. Cloning is the process of creating a clone population".[8] It appeared for the first time in 1962 when British scientist John Gurdon created a frog by transferring nucleus from a frog cell from a frog to another frog's egg nucleus and then he destroyed the nucleus using the UV rays. The first cloned mammal is considered to be a sheep named Dolly where scientists took a cell from adult mammary gland of a sheep and transferred it to another egg cell whose nucleus was previously removed. The first human embryo cloning occurred in 2001 in America.[9] However, as far as is publicly known, human cloning has not been performed. Since biotechnology has become "an illusive" science, a need arose to define the rules of responsible behaviour that necessarily imply caution and discretion when making a final decision. For example, during reproductive cloning human inequality is created, i.e. unequal individuals are created, human identity is being infringed upon etc.[10] Because of the dire need, the term biolaw appeared which constitutes a special branch of law derived from numerous biomedical sciences. Biolaw enabled incorporation of the entire rational legislation, i.e. the prediction of certain situations that have not even happened yet with the aim of creating as high quality national legislation as possible.

It is also necessary to briefly mention the eugenics, a science which is believed to have roots in the far past. This is also mentioned by Plato, who is also considered to have advocated eugenics as a learning that is based on the improvement of the physical and mental qualities of a particular community by influencing

6 Reiss;Straughan, *op. cit.,* note 1

7 Lauc, A., *Metodologija društvenih znanosti*, Sveučilište J.J. Strossmayera u Osijeku, Pravni fakultet, Osijek, 2000., str. 25

8 Reiss;Straughan, *op. cit.,* note 1. p. 43

9 Kešina, I., *Etika terapeutskog kloniranja i manipuliranja matičnim stanicama*, Crkva u svijetu, *Vol.* 40, No. 4, 2005, p. 485-505

10 Polšek, D., *Sloboda kloniranja*, Filozofska istraživanja, *Vol.* 93, No. 2, 2004, p. 609-620

conception and birth. "As shepherds and breeders "*purify* "their herds, so does the legislator must "*cleanse*" his country."[11] There are several types of eugenics: old eugenics is divided into positive and negative eugenics. Negative eugenics includes forced abortion, euthanasia, sterilization, etc. Positive eugenics refers to combining parents with pronounced intellectual abilities. The new eugenics also has two types: positive and negative. Positive eugenics strives to trough genetic engineering efforts allow replication of normal genes if spontaneous pathways would cause various diseases, malformations or deaths, while negative eugenics eliminates undesired combinations.[12]

Of the many approaches to biotechnology, theology retains one of the more negative attitudes. The Church protects human life, considers it the greatest good, and the only lord of life is God. However, today human life is not placed on the level of holiness. People turn to the other side and create human life themselves. The fact is that human interventions into human survival have always been present, but there is a clear difference between the Middle Ages and today when euthanasia, abortion or other forms of defining the beginning or end of human life are recognized in national legislations. Eugenics and genetic engineering are completely contrary to the Church's understanding and attitude.[13] With regard to the philosophical approach, it is considered that a man is never fully shaped. One of the most prominent philosophers in the field of eugenics is Nietzsche who created the concept and character of "superhuman". The process was conceived as a revolution, then evolution, i.e. the aim was the demolition of the world and its rebuilding. Since the effects of biotechnology are both positive and negative, they are also discussed and argued in the field of ethics, and because of the knowledgeable communication, the term bioethics appeared. Bioethics is a discipline that has emerged as a product of the two areas of action: the advancement of technology in biomedicine and the frequent ecological risks that have emerged as a result of human exploitation of nature. Bioethics as a term was first used by an American scientist Rensselaer Potter of the 1970s. As evident, it consists of two terms: bio" which assumes the meaning of biological and ethics that makes up the system of moral values. The following terms refer to bioethics: multidisciplinarity (a set of all activities of crucial importance for bioethics), interdisciplinarity (finding methods for the purpose of co-operation of all activities), transdisciplinarity (overcoming

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[11] Platon, *Država*, fifth edition, Beogradski izdavačko-grafički zavod, Beograd, 2002

[12] Vuk, M., *Eugenika i moderna medicina*, Spectrum, Bioetički blok; available at: [file:///C:/Users/Mirela%20Mezak%20Matijev/Downloads/Martina_Vuk_Eugenika_i_moderna_medicina%20(1).pd] Accessed 12.5.2019

[13] Matulić, T., *Charles Darwin o podrijetlu čovjeka: teološko propitivanje metode i argumenata*, Bogoslovska smotra, *Vol.* 78, No. 3, 2008, p. 583-619

differences between activities), multiperspectivity (cooperation between different fields) and integrativeness.[14] When it comes to the relationship between a man and technology, there is a need to deal with this relationship, i.e., it needs to be understood that technology are not means that enslave humans, but the means that make human work easier. This process is called demystification of technological development. The second situation of demystification concerns the status of "mother of nature", who has several tasks: to be fertile; suffer numerous pollutions; be self-sufficient and constantly forgiving. The third situation of demystification refers to the progress that needs to be understood both in qualitative and quantitative terms. Man and nature must have a relationship based on a reconciliation basis, and the situation must not move in the direction of war and disorder. In time, the need of special science emerged, and in 1866, the German biologist introduced the term of ecology that studies the relationship between the organism and the environment in which it lives. Of course, the very concept of ecology has evolved, and today it is understood as a set of scientific disciplines that observe the relationship between living beings and the environment. At the end of the last century, ecology has become dominant, and it is assumed that the trend will continue to grow. The goal of ecology, but also of all other sciences, is to achieve a self-regulation ecosystem based on a system that should have the optimal basis regarding input and output elements. I freely dare to point out that the whole world is struggling with the ecological balance, i.e. homeostasis is, at this point, unattainable. In fact, whether it is at all practicable is the question of subjective nature or does everyone have their own perception of ecological or any other balance, and does this makes achieving balance at the global level unattainable? At all times, there whether we consider positive or negative context of any occurrence, balance needs to be taken into account.[15] Since the negative concept of biotechnology has already been mentioned, a positive concept of biotechnology in medicine should also be mentioned. In its first steps, biology was a descriptive discipline, and the knowledge on regulating and controlling life processes came later. W. Weaver first mentions a new branch of biology, i.e. molecular biology. With the discovery of deoxyribonucleic acid (DNA), basic understanding of life has changed since after that knowledge of hereditary properties and the way in which living beings function has emerged since. The fact is that medicine is not possible without experimentation, but the principle of proportionality should be taken into account at all times.[16] There are certain principles that should be, realistically, leading in the course of medical interventions and research. The first principle refers to a person

[14] Matulić, T., *Bioetika*, Glas Koncila, 2001

[15] Cifrić, I., *Društveni razvoj i ekološka modernizacija*, Hrvatsko sociološko društvo, 1998

[16] Polšek, D.; Pavelić, K., *Društveni značaj genske tehnologije*, Institut društvenih znanosti Ivo Pilar, Zagreb, 1999

and his/her transcendental value in relation to other living beings. The second principle is the principle of the totality or the therapeutic principle advocating the sacrifice of one part of the organism in order to save the whole. This section emphasizes the enormous effect of the principle of proportionality. In layman terms, at certain times, it is justified to perform GMO research for the purpose of obtaining medicines, treatment of certain diseases etc. The last principle is the principle of social solidarity, which means a partial sacrifice for some higher goal, and society cannot ask for an individual's sacrifice greater than he is willing to offer. In this case, it is assumed that there is a written consent. Throughout the years of study, another special discipline emerged - human cytogenetics, which studies the number and form of chromosomes in many human diseases, and the observed numerical and structural chromosome changes may indicate an upcoming disease.[17] With the development of a technology, other disciplines emerged: pre-implantation diagnosis of hereditary diseases (allows avoiding genetic disorder or disability on the basis of selecting characteristics of an unborn child), *in vitro* fertilization (a process of fertilization outside the body), molecular genetics (studies gene structure), gene therapy (meaning therapeutic treatment for the purpose of manipulating gene expressions), etc. Soon, new discoveries in medicine began: cell cloning; in 1977 extrauterine fertilization was accomplished, and in 1983 the first child conceived using *in vitro* fertilization was born; genetic engineering also produced the first drug, Nutritin; also, an important discovery came in 1981 when the 25$^{th}$, so-called, mitochondrial or cytoplasmic chromosome was discovered, the only chromosome located outside the cell nucleus.[18] In 1990, the four-year-old girl Ashanti de Silva became the first human treated with genes. The girl was suffering from ADA deficiency and mostly stayed isolated in her house because she was subject to various diseases. The doctors took a blood sample, "purified" the white blood cells and mixed them with the virus containing the ADA gene. After that, the white blood cells containing the ADA genome were reintroduced to the girl's body and thus enabled the functioning of the immune system.

## 3. EUROPEAN JURISPRUDENCE IN GENETIC ENGINEERING CASES

According to Maslow's hierarchy, food needs are at the bottom of the pyramid along with other existential needs. All needs have to be maintained at the optimum level, at the homeostasis level, but there is a huge difference between consumers. Consumers at any level, cannot be understood in a homogeneous sense because

[17] Paediatrician Lejeune found in 1958 numerical chromosomopathy for Down syndrome

[18] It is inherited exclusively from the mother since her egg keeps cytoplasm during fertilization

they differ in behaviour, attitudes, values, beliefs, age, gender, education level, and income. Likewise, perceptions about the importance of food are different so there are two different schools on food quality. One of them is a school based on a holistic approach, i.e. it equates quality with all the desirable properties the product needs to have. [19]As the theory of self-organization has already been explained, it can be freely applied in the previous case. Hence, the holistic approach advocates autonomous shaping of each human's health. It is based on sustainability, flexibility and networking settings. On the other hand, there is a principle of excellence that "suggests that products may have desirable characteristics that the consumer cannot, using their palate, experience as a part of quality".[20] It is evident that the holistic approach is one that is protective in terms of consumer protection policy.

According to the European Consumer Protection Strategy, the following objectives are foreseen:

1. Promoting consumer safety through enhanced product identification and traceability, increased food safety measures, etc.

2. Better knowledge of consumer rights through various tools, for example *Consumer Classroom* that has the purpose of educating consumers to better understand the market;

3. Better implementation of consumer protection regulations by introducing simple and speedy court procedures, cross-border actions against violations of the EU regulations, etc.

4. Grouping consumer interests according to sectors, for example energy, traffic, food, etc.

5. Strengthening the role of consumers by providing choices, better information, awareness of rights and legal protection.[21]

In the 1990s, when GM corn was put on the market, consumer concerns about food products increased. Likewise, there has been a series of affairs in Europe, so consumers have become active through various associations, they have worked on raising awareness, they have initiated court proceedings, etc.

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[19] Grunert, K., *Food quality and safety: consumer perception and demand*, European Review of Agricultural Economics, *Vol.* 32, No. 3, 2005, pp. 369-391, 372

[20] *Ibid.*, p. 372

[21] According to [https://ec.europa.eu/info/policies/consumers/consumer-protection/consumer-strategy_hr] Accessed 05.02.2019

The starting point of consumer protection is the precautionary principle that consists of the following elements: scientific insecurity, risk assessment and risk management. The principle advocates action in scientific disagreement situations, i.e. in the case of lack of scientific evidence of the negative impact of food on human health and the environment. Measures taken in such circumstances must be proportionate and the trade restriction must be consistent and proportionate to the limitations. In such situations, when a precautionary principle requires action, a moratorium or a ban on certain products or technological processes may be required. Risk Assessment must be based on scientific evidence that must be taken into account in an independent, objective and transparent manner. Risk management is a system in which, the most appropriate political action is chosen among many available actions, and that is the action that includes the results of the risk assessment with scientific data and the social, economic and political interests. The following paragraphs will cover the case law on genetic engineering and analyse the relationship of precautionary principle for consumer protection and European jurisprudence.

Judicial proceedings in genetic engineering cases do not have a long history since food scandals appeared only at the beginning of the 1990s. Court[22] of the European Union *(Court of Justice of the European Union)* has the following judicial instances: the Court *(European Court*)[23] which is competent to resolve the claims on the previous decisions of the national courts, annulment proceedings and appeals and the General Court, which is competent in the proceedings of annulment brought by individuals, companies and governments of individual Member States. Certain changes have been introduced in the European court practice after the Lisbon Treaty. Among other things, the Charter of Fundamental Human Rights became legally binding and thus affected certain rights: for example "ban on making the human body and its parts as such a source of financial gain"[24], "ban on reproductive cloning human beings".[25] The Charter's application is limited and difficult because it does not apply to the regulations of Poland and the United Kingdom.[26] In the procedural sense, certain changes have also been made: active

[22] There is a controversy over the translation and use of the term "justice" in Court's name. For example, the term is used in the English, French, Italian system, while for example Germans remove that term from the official name

[23] In Article 19 of the UEU only the word "Court" is used, while the adjective European has been defined through practice

[24] Charter of Fundamental Human Rights of the European Union, Official Journal of the European Communities, 2000 / C 364/01, Art. 3 (2) C

[25] *Ibid.*, Art. 3(2)d

[26] Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, Official Journal of the European Communities C 202 (2016)

legitimacy is also extended when it comes to the individual as the applicant[27] and also to the Committee of the Regions[28] and in an indirect manner to national parliaments.[29] In addition to the changes above, the Court has been empowered to control the validity and interpretation of acts of agencies, bodies and offices. The novelty in the system is the introduction of an emergency pre-trial procedure, when a request is made by a national court before which proceedings are in progress for a person in custody.

The analysis of judgements of the Court of Justice was done chronologically. Judgment of 5 October 2005 of the First Instance Court (Fourth Chamber) was on a dispute between Oberösterreich Estate and the Republic of Austria and the Commission of the European Communities on harmonization of laws and national provisions on the derogation from the harmonization measures, the ban on the use of genetically modified organisms in Upper Austria and the conditions for application of Article 95(5) of the Treaty establishing the European Community[30] reads as follows: *"after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of*

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27 Article 230 of the EU Treaty, and in terms of procedural legitimacy of individuals read: " Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." However, Article 263/4 of the Treaty on the Functioning of the European Union has changed the status of the applicant and reads: " Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures." There are differences in the above-mentioned settings (for example deleting certain terms, defining a regulatory act, implementing measures etc.) and the meaning itself depends on the interpretation of the EU Court

28 Pursuant to Article 263/3 of the Treaty on the Functioning of the European Union "the Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives." In addition, Article 8 (2) of the Protocol on the Application of the Principles of Subsidiarity and Proportionality clearly states the following: "... he Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted."

29 Except for the changes envisaged in the Lisbon Treaty, Protocol no. 2 on the application of the principle of subsidiarity and proportionality in Article 8 (1), which provides that: " The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative as adopted pursuant to Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it."

30 Merged cases T-366/03 and T-235/04, Oberösterreich Estate and Republic of Austria v. Commission of the European Communities [2005] ECR II-04005; ECLI:EU:T:2005:347

*the envisaged provisions as well as the grounds for introducing them."*[31] In November 2003, the Republic of Austria and the Oberösterreich Estate filed a lawsuit against the European Commission. The subject of the dispute referred to deviation from Guideline 2001/18 or Article 95(5) on the derogation from national legislation due to the specificity of the Member State. After the procedure was conducted, the Court ruled in favour of the European Commission and ordered the applicants to pay court costs. In the appeal (Joined Cases C-439/05 P and C-454/05 P), the Republic of Austria and the Oberösterreich Estate sought to annul the judgment in joined cases T-366/03 and T-235/04.[32] However, on 13 September 2007, a verdict was also issued, also with a negative outcome for the Republic of Austria. In the described court proceedings, despite the principle of subsidiarity and the promotion of national legislation, the precautionary principle has prevailed in the legal process.

The following is Case C-165/08 between the Commission of the European Communities and the Republic of Poland of 16 July 2009[33] where a Member State has failed to fulfil its obligations, i.e. has breached Articles 22 and 23 of the Guidelines 2001/18[34] and Articles 4(4) and 16 of the Guideline 2002/53/EC of 13 June on a common catalogue of varieties of agricultural plants.[35] The Republic of Poland is obliged to pay for its own and 2/3 of the Commission's expenses. The remaining 1/3 of the cost is at the expense of the Commission because the Commission has partially succeeded. Namely, the Republic of Poland has called upon on the circumstances within their state borders. The population is largely devoted to Christian values, as are the members of Parliament themselves. In addition, the political parties, represented by the majority in the parliament, have advocated those values in their programs. The Republic of Poland departs from stereotypes in the field of genetic engineering in Europe. Specific national interest has prevailed over supranational uniformity.

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[31] Consolidated version of the Treaty establishing the European Community, Official Journal C 325, December 24 2002

[32] Court judgement (Third Chamber) of September 13 2007, Oberösterreich Estate and the Republic of Austria against Commission of the European Community. Joined cases C-439/05 P and C-454/05 P; ECLI: ECLI:EU:C:2007:510

[33] Case C-165/08 Commission of the European Communities v. Republic of Poland [2009]; ECLI: ECLI:EU:C:2009:473

[34] Article 22 refers to Member States that, by fulfilling the criteria set out in the Guidelines, may prohibit, restrict or impede the placing of GMOs on the market either on their own or as a part of the product. The second article refers to safeguard clauses

[35] Article 4(4) lays down all the necessary measures when introducing GMOs into the environment to avoid affecting human health and the environment. Article 16 prescribes the conditions under which certain Member States may prohibit the use of genetically modified varieties

The next case is T-139/07[36] concerning the proceedings before the First Instance Court between "Pioneer Hi-Bred International" and the Commission of 4 September 2009 on the harmonization of laws in the deliberate introduction of genetically modified organisms into the environment. The applicant is "Pioneer Hi-Bred International" and the defendant is the Commission of the European Communities. The Commission has not fulfilled its obligations under Article 18(1) of Directive 2001/18/EC.[37] Since an oversight occurred, there was no necessity of court proceedings and the Commission shall reimburse its costs and expenses of the applicant. Case T-139/07 is purely technical in nature because the lawsuit was filed due to a failure to fulfil obligations. Since the European Commission has in the meantime committed its obligations, the lawsuit lost its purpose and there was no need for a verdict to be issued. Thereafter, a series of correspondence between the applicants, the Court and the European Commission followed regarding the amount of court fees, so it is unnecessary to analyse numerous notices that are not the subject of this paper.

Judgment of the Court (Grand Chamber) of 6 September 2011[38] referring to Regulation (EC) No. 1829/2003 (Articles 2 to 4 and Article 12)[39], Guideline 2001/18/EC (Article 2)[40], Guideline 2000/13/EC (Article 6)[41] and Regulation (EC) No. 178/2002 (Article 2)[42]. The judgement refers to the presence of pollen from GM plants and the consequences when placing the product on the market, the definition of "organism" and " food for human consumption containing ingredients produced from genetically modified organisms". According to Article 2.5 of Regulation (EC) 1829/2003 the definition of GMOs does not include pollen from different GM maize which has lost its reproductive capacity and is completely incapable of transferring the genetic material it contains. In accordance with Articles 2.1, 2.10 and 2.13 and Article 3(1)(c) of Regulation 1829/2003, Article 2 of Regulation 178/2002, Article 6(4)(a) Guideline 2000/13/EC under GMO does not consider the substance as a pollen containing genetically modified DNA or genetically modified protein; products such as honey or food additives containing such substances as "food ... containing ingredients produced from [genetically modified organisms]". Finally, Articles 3(1) and 4(2) of Regulation 1829/2003

36 Case T-139/07 Pioneer Hi-Bred International v. Commission; ECLI: EU: T: 2009: 307

37 This article refers to the procedure of publication of the decision and the content thereof

38 Case C-442/09 Karl Heinz Bablok and Others v. Freistaat Bayern [2011] ECR Page 00000;ECLI:EU:C:2001:541

39 Articles 2-4 refer to the definition of terms, scope and requirements of the Regulation, and Article 12 on labelling procedures

40 Definitions of terms that are characteristic of this Guideline

41 Article 6 deals with the concept of ingredient, labelling, presentation of the same etc.

42 Article 2 defines the term food

imply an obligation to approve and supervise food and the tolerance threshold for labelling provided for in Article 12(2) of the same Regulation cannot be applied analogously to the preceding articles. In this case, the Court did not recognize the pollen emanating from GM maize as a GMO, and it has lost the ability of transferring genetic material.

In Case C-313/11[43] it was ruled in favour of the Republic of Poland, and the case was complaint of the European Commission's that Poland failed to fulfil its obligations under Regulation (EC) 1829/2003. Thus, the Republic of Poland has adopted an act prohibiting the production, placing on the market and the use in animal feed of genetically modified animal feed as well as GMOs intended for use in animal feed. With the subsequent extension of the entry into force of the above-mentioned Act, the Republic of Poland notified the European Commission, and the Commission sent back a letter citing a violation of Regulation 1829/2003 because the whole procedure ultimately affects market placement, free circulation, movement and use of animal feed already approved on the basis of that Regulation. The Republic of Poland has emphasized the fact that the prohibition has not yet came into force at the time of the judgement, thus the suit was rejected and the European Commission was obliged to compensate for the costs of the proceedings. The Court considered that the European Commission did not submit enough elements to prove the violation of the principles of legal certainty and has ruled in favour of the Republic of Poland.

The judgment of the General Court (Ninth Chamber) of 13 December 2013 was made on the dispute between Hungary and the Commission (T-240/10).[44] It was based on the annulment of the Commission's Decision 2010/135/EU on placing genetically modified potatoes on the market. The European Commission was obliged to compensate for the costs of the proceedings in this case. The whole case was based on the precautionary principle, i.e. possible release into the environment or placing on the market of GMOs only if there is scientific certainty in the actual release of genetically modified potatoes.

In a case of 2 October 2014 (Case C-478/13) - European Commission v Republic of Poland (Infringement of a Member State's obligation - Directive 2001/18/EC - Intentional introduction of genetically modified organisms (GMOs)into the environment - Placing on the market - Article 31, paragraph 3, item (b) - Location of GMO crops - Obligation to notify competent authorities - Obligation to es-

[43] Case C-313/11 Infringement of a Member State's obligation - Regulation (EC) 1829/2003 - Animal feed - Genetically modified food - Production, placing on the market or use - National ban which has not yet entered into force; ECLI: EU: C: 2013: 481

[44] Case T-240/10 - Hungary v. Commission - of 13 December 2013; ECLI: EU: T: 2013: 645

tablish a public register - Loyal co-operation), the Republic of Poland was obliged to reimburse the costs because it failed to inform the local authorities regarding the deliberate introduction of GMOs into the environment, did not publish the locations publicly.[45]

The next item according to the chronology is the General Court Resolution of 16 September 2014 (Case T-405/10) concerning the annulment of Commission's Decision 2010/135/EU on placing genetically modified potatoes on the market.[46]

TestBioTech eV, European Network of Scientists for Social and Environmental Responsibility eV, Sambucus eV lodged an appeal on 14 February 2017 (Case T-177/13) against the Verdict of the General Court (Fifth Chamber) of 15 December 2016 (Case C-82/17 P[47]). TestBioTech eV, European Network of Scientists for Social and Environmental Responsibility eV, Sambucus eV appealed to the abolition of the judgment delivered on 19 December 2016. Finally, it was decided that the complaints were not based on Decision 2012/347 granting Monsanto approval for placing genetically modified soybeans on the market and the European Commission had to be compensated for court costs.

Judgment of the Court of 13 September 2017 in Case C-111/16 concerns the request for a preliminary ruling - Agriculture - Genetically modified food and feed - Emergency measures - National measure prohibiting the cultivation of genetically modified maize MON 810 - Retention or extension measures - Regulation (EC) No. 1829/2003 - Article 34 - Regulation (EC) No. 178/2002 - Articles 53 and 54 - Conditions of application - The precautionary principle concerns the Member States which should adopt a provisional measure, until the European Commission decides not to define the status of the product so as to not affect the safety of people, animals or the environment. The request referred to the group of manufacturers of genetically modified maize MON 810 whose production is in contradiction with national legislation. According to Article 34 of Regulation (EC) No 1829/2003, if approved products present a serious risk to human, animal or environmental health, and where there is a need to suspend or amend the author-

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45 Judgment of the Court (Ninth Chamber) of 2 October 2014 - European Commission v Republic of Poland (Infringement of a Member State's obligation - Directive 2001/18 / EC - Intentional introduction into the environment of genetically modified organisms (GMOs) - Placing on the market - Article 31st bullet point 3 (b) - Location of GMO crops - Obligation to notify competent authorities - Obligation to establish a public register - Loan co-operation); ECLI: EU: C: 2014: 2253

46 Case T-405/10: Judgment of the General Court of 16 September 2014 - Justice & Environment v Commission (Harmonization of legislation - Intentional introduction of GMOs into the environment - Procedure for marketing authorization - Internal review request - Annulment Challenged or Relevant Decisions - Termination of Disputes - Suspension of Proceedings); ECLI: EU: T: 2014: 821

47 Case: TestBioTech and Others v Commission C 82/17 P; ECLI:EU:T:2016:736

ization, it is necessary to act in accordance with Articles 53 and 54 of Regulation 178/2002. These articles provide emergency measures in serious risk situations. As to the first question, should the European Commission adopt urgent measures, the Court found that the Commission was not required to impose emergency measures (Article 34 of Regulation 1829/2003 in conjunction with Article 53 of Regulation 178/2002) in a situation where the product poses a serious risk to human, animal or environmental health. The second and fourth questions referred to Articles 34 of Regulation 1829/2003 in conjunction with Article 54 of Regulation 178/2002, i.e. whether a Member State should take urgent measures at national level until the Commission decides on their extension, modification or termination. The Court's view was that a Member State could take urgent measures at the national level. The third question referred to the precautionary principle, i.e. Member States are not allowed to, pursuant to Article 54 of Regulation 178/2002, adopt provisional emergency measures based solely on that principle without fulfilling material conditions laid down in Article 34 of Regulation 1829/2003 (on emergency measures taken if the product presents a serious risk to human, animal or environmental health).

Case C-528/16 of 25 July 2018 refers to the following: Request for a preliminary ruling - Intentional introduction of genetically modified organisms into the environment - Mutagenesis - Directive 2001/18/EC - Articles 2 and 3 - Annexes IA and IB - Genetically Modified Organisms - Methods of genetic modification which are conventionally used and considered safe - New techniques/methods of mutagenesis - Risks for human health and the environment - Margin of Member States' judgment when transposing the Directive - Directive 2002/53/EC - Common catalogue of varieties of agricultural plant species - Herbicide resistant herbal varieties - Article 4 - Acceptability for a common catalogue of genetically modified grains obtained by mutagenesis - Requirement in the field of human and environmental health protection - Exemption. GMOs, whether introduced for experimental purposes or as commercial products, may cross borders trough their reproduction. Guidelines 2001/18 has been drafted on the basis of precautionary principle and its provision should be interpreted in accordance with the said principle. The main point is that it has been agreed that organisms obtained by mutagenesis techniques / methods and not used conventionally enter into the scope of Guidelines 2001/18. Similarly, organisms obtained using conventional mutagenesis methods and are used conventionally and have a proven long-term safety are not subject to the same Guidelines.

## 4. CONCLUSION AND RECOMMENDATIONS

The problem of legal definition and managing of GMOs is as global as national. Member States can hardly co-ordinate on a supranational level and adopt a legal regulation that would regulate the GMO approval procedure. Hence, supra-national legislation is set on a unified basis, taking into account the specificities of individual Member States. In addition, consumer protection is an important part of the legal system, especially in sensitive cases such as genetic engineering. An extreme example is Poland (Case C-165/08) appealing to religious commitment of the majority of its citizens and expressing a different interpretation of certain legal provisions in view of the Church's stand on GMOs and biotechnology is clear. In Cases C-165/08 and C-111/16, there was a particular emphasis on advocacy of the principle of subsidiarity. In other words, national interests and the religious environment were a trigger for implementing the principle of subsidiarity. Proof of this are numerous court proceedings, which, in their judgements in most cases call for temporary measures to be taken by the Member States and regulate the GMO approval process, until the European Commission makes the final decision. Conditional, the conflict between the two principles, the principles of subsidiarity and the precautionary principle will always be present in genetic engineering. Although the precautionary principle is being implemented by the European Union and the Member States, in certain cases (for example Case T-240/10, C-528/16) it is necessary, for the purposes of protecting human and animal health and the environment, to define uniform rules in order to protect Member States, especially neighbouring states, against reproduction of unwanted products. Namely, the fact is that controversy of this nature will always exist because it is impossible for such a sensitive area to be thoroughly legally regulated in such a complex community. The purpose of regulating GMOs should be to protect the European Union at a supra-national level, and ensure the functioning of legal regulations at national level to Member States through certain provisional measures, until the European Commission confirms or denies the same decision.

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Topic 3

# EU law effects in international private law, national law and ECHR law

# CONCENTRATION OF JURISDICTION – IS FUNCTIONALITY OF JUDICIARY BECOMING AN OBSTACLE TO ACCESS TO JUSTICE?

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***ABSTRACT***

*Matters of jurisdiction seem to be among aspects of judicial cooperation in civil and commercial matters in which so far most regulatory activity of the European union (hereinafter: EU) has been undertaken. Upon close examination of the rules on jurisdiction of courts in civil and commercial matters in the existing legal framework at EU level, it becomes obvious that they contain the same principle of territoriality. At the same time, in the course of modernization both at the national and EU level it seems that the principle of functionality is becoming more dominant. A question whether it is justified to depart from rules on jurisdiction based on the principle of territoriality and confer jurisdiction on a court other than that of the defendant's domicile based on the principle of functionality in a cross-border case has arisen recently in joined cases C-400/13 and C-408/13. Within the context of a rather ambiguous view the CJEU took in its decision in the aforementioned cases, the paper examines if enhancing functionality through concentration of jurisdiction will eventually become an advantage or obstacle to access to justice. The analysis includes presentation and comparison of provisions on jurisdiction in cross-border cases based on the principle of territoriality and functionality respectively in several EU legal instruments regulating private international law and civil procedure matters. The paper attempts to draw attention to models of achieving procedural efficiency in different fields of EU's activity, such as enhancing consumer protection or introducing cross-border collective redress.*

***Keywords:*** *principle of territoriality, principle of functionality, access to justice, joined cases C-400/13 and C-408/13, concentration of jurisdiction*

## 1. INTRODUCTION

Matters of jurisdiction seem to be among the fields of judicial cooperation in civil and commercial matters in which so far most regulatory activity of the European union (hereinafter: EU) has been undertaken. Namely, along with the number of national legal systems of Member States, the fact that there is a great diversity among national rules which distinguish competence of national courts and other bodies and prescribe competence of national courts in cross-border cases (*compétence internationale*)[1] additionally emphasizes the challenge and complexity of addressing the question of jurisdiction at EU level. At the national level, traditional approach to determination of jurisdiction is based on the principle of territoriality. According to this principle court is entrusted with jurisdiction based on a connection between the parties or the subject matter of the dispute and the territory of the court.[2] Along with the general rule on jurisdiction based on the habitual residence of the defendant, special rules on jurisdiction determine jurisdiction of a certain court by taking into account the circumstances of the case and significant social interests.

National rules on jurisdiction in cross-border cases also determine jurisdiction based on the principle of territoriality. Hence, according to the general rule Member State court has jurisdiction in a cross-border case involving a defendant domiciled in a Member State.

When observing the rules on jurisdiction of courts in civil and commercial matters in the existing legal framework at EU level it is obvious that they contain the same principle of territoriality. The cornerstone of the rules of jurisdiction within the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (hereinafter: Brussels I Regulation) as well as Regulation (EU) 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[4] (hereinafter: Brussels I bis Regulation) is the principle that jurisdiction is

1 Triva, S.; Dika, M. *Građansko parnično procesno pravo*, Narodne novine, 2004, p. 259

2 *Ibid*., p. 271

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, **OJ L 12, 16.1.2001.** Recital (15) and Art 4 (1986) of the Preamble Brussels Convention and Brussels I Regulation, Art 2

4 Regulation (EU) 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., Art 4**

generally based on the defendant's domicile.[5] It is considered to be a guarantee of protection of defendants and weaker parties in legal proceedings.

The relevance of adapting the rules on jurisdiction in order to ensure that a dominant party will not gain advantage in the proceedings is confirmed in the Brussels I bis Regulation. Namely, in the Brussels I bis Regulation the territorial (or formal) scope of application in disputes involving weaker parties is extended and a number of new provisions to ensure a greater degree of protection for weaker parties are inserted. However, the protection of a weaker party does not seem to be ensured in the same manner and to the same extent in other EU instruments that unify certain rules of civil procedure and enhance the mutual recognition of judgments.[6] In example, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure[7] (hereinafter: Regulation No 1896/2006), Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure[8] (hereinafter: Regulation No 861/2007) and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims[9] (hereinafter: Regulation No 805/2004) as legislative instruments which created unified European civil procedures and contributed to gradual abolishment of the exequatur, contain some specific provisions on jurisdiction, which differ from those provided under Brussels I bis Regulation.

At the same time, in the course of modernization both at the national and EU level it seems that the principle of functionality is becoming more dominant. Difficulties in administration of justice and obstacles to securing a certain level of quality of a court decision in terms of length of the procedure and lack of managerial skills of the judge are present in national legal systems of Member States. Efforts made

[5] Dickinson, A.; Lein, E. *The Brussels I Regulation Recast*, Oxford University Press, 2015, p. 21

[6] See Lazić, V. *Procedural Position of a 'Weaker Party in the Regulation Brussels I bis*, in: Lazić, V.; Stuij, S. (eds.), Brussels I bis Regulation. Changess and Challenges of the Renewed Procedural Scheme, Springer, 2017, p. 115

[7] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L 399/1

[8] Regulation (EC) No 861/2007of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, [2007] OJ L 199/1. The Regulation 861/2007 was subsequently amended by the Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, [2015] OJ L 341/1

[9] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143

in order to remove them include changes in organization of judiciary, including rules on concentration of jurisdiction.

A question whether it is justified to depart from rules on jurisdiction based on the principle of territoriality and confer jurisdiction on a court other than that of the defendant's domicile based on the principle of functionality in a cross-border case has arisen recently in joined cases C-400/13 and C-408/13 *Sophia Marie Nicole Sanders v David Verhaegen and Barbara Huber v Manfred Huber* [10]. Namely, requests for preliminary ruling were made from the Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe (Germany) which concern the question whether according to the interpretation of the Article 3(a) and (b) of 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[11] (hereinafter: Maintenance Regulation) Paragraph 28(1) of [the AUG] is contrary to Article 3(a) and (b) of Maintenance Regulation.

Another question has arisen in regard to interpretation of Article 11(7) and (8) of the Brussels II bis Regulation in case C498/14 PPU *David Bradbrooke v Anna Aleksandrowicz*[12]. In the urgent preliminary ruling procedure Cour d'appel de Bruxelles (Belgium) requested the CJEU to examine whether national procedural rules providing for specialisation of courts according to the principle of functionality in situations of parental child abduction with respect to the procedure provided for in those [provisions] even where a court or tribunal has already been seized of proceedings concerning the substance of parental responsibility in relation to the child are contrary to provisions of Article 11(7) and (8) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[13] (hereinafter: Brussels II bis Regulation).

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[10] CJEU, Joined cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders v David Verhaegen and Barbara Huber v Manfred Huber, ECLI:EU:C:2014:2461, 18 December 2014

[11] 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, **OJ L 7, 10.1.2009**

[12] CJEU, C498/14 PPU David Bradbrooke v Anna Aleksandrowicz, ECLI:EU:C:2015:3, 9 January 2015

[13] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338/1, 23.12.2003

In case C498/16 *Maximilian Schrems v Facebook Ireland Limited*[14] Supreme Court of Austria (Oberster Gerichtshof) also referred an interesting question for preliminary ruling concerning concentration of jurisdiction, but here in consumer disputes, under Brussels I Regulation. The Supreme Court of Austria was uncertain whether Article 16 of the Brussels I Regulation is to be interpreted as meaning that a consumer in a Member State can also invoke at the same time as his own claims arising from a consumer supply at the claimant's place of jurisdiction the claims of others consumers on the same subject who are domiciled (a) in the same Member State, (b) in another Member State, or (c) in a non-member State, if the claims assigned to him arise from consumer supplies involving the same defendant in the same legal context and if the assignment is not part of a professional or trade activity of the applicant, but rather serves to ensure the joint enforcement of claims.'

Within the context of these several interesting judgments delivered by the CJEU, the paper examines if enhancing functionality through concentration of jurisdiction will eventually become an advantage or obstacle to *access to justice.* The analysis further includes a presentation and a comparison of provisions on jurisdiction in cross-border cases based on the principle of territoriality and functionality respectively in several EU legal instruments regulating private international law and civil procedure matters.

## 2. RELEVANT FACTS OF THE CASES

### 2.1. Joined cases C-400/13 and C-408/13

In joined cases C-400/13 and C-408/13 requests for preliminary ruling were made from the Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe (Germany) whether Paragraph 28(1) of the AUG is contrary to Article 3(a) and (b) of Maintenance Regulation. In order to understand the cases at hand as well as the decision of the CJEU it is necessary to state the facts of the cases.

These cases have arisen in two disputes relating to claims for maintenance payments, first, between Miss Sanders, a minor represented by her mother, Ms Sanders, and Mr Verhaegen, Miss Sanders' father and, second, between Mrs Huber and her husband, Mr Huber, from whom Mrs Huber is separated. Those claims were brought, respectively, before the Amtsgericht (local court of first instance) of the German towns in which the maintenance creditors concerned habitually reside. Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe, according to a provision implementing in German law the cases to which Article 3(a) and (b) of Mainte-

[14] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, ECLI:EU:C:2018:37, 25 January 2018

nance Regulation refers, declined jurisdiction in favour of the Amtsgericht in the town of the seat of the Oberlandesgericht (Higher Regional Court) in whose area of jurisdiction those applicants reside.

In its decision the CJEU took the view that Article 3(b) of Maintenance Regulation must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations in favour of a first instance court which has jurisdiction for the seat of the appeal court, *except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify.*

By putting forward the argument that national legislation which departs from the rules on jurisdiction based on the principle of territoriality and confers jurisdiction on a court other than that of the defendant's domicile is not contrary to Article 3 (b) of Maintenance Regulation where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, in its decision, the CJEU confirms that in the interpretation of national legislation such as that at issue, it is necessary to observe the objectives and scheme of the EU Regulation which prescribes rules on cross-border matters at issue.

Namely, in the Recital (15) of Preamble of the Maintenance Regulation reference is made to preservation of the interests of maintenance creditors and promotion of the proper administration of justice within EU. According to the Opinion of Advocate General these general aims form the basis for the rules of jurisdiction laid down by Maintenance Regulation.[15] But as the Advocate General further emphasizes at point 69 that objective must be understood not only as the most rationalised judicial organisation possible but also from the point of view of the interests of the litigant, whether applicant or defendant, in gaining, inter alia, easy *access to justice* and foreseeability of jurisdiction, owing to a close link between the court and the dispute.

### 2.2. Case C498/14 PPU David Bradbrooke v Anna Aleksandrowicz

In case C498/14 PPU *David Bradbrooke v Anna Aleksandrowicz*, at the request of the Cour d'appel de Bruxelles (Belgium), the CJEU examined whether national procedural rules providing for specialisation of courts in situations of parental

[15] See also Advocate General opinion, p. 40

child abduction with respect to the procedure provided for in those [provisions] even where a court or tribunal has already been seized of proceedings concerning the substance of parental responsibility in relation to the child are contrary to provisions of Article 11(7) and (8) of the Brussels II bis Regulation.

In the case at hand, the request for urgent preliminary ruling has been made by the Cour d'appel de Bruxelles in proceedings between Mr Bradbrooke and Ms Aleksandrowicz concerning parental responsibility for their son Antoni, who has been retained in Poland by Ms Aleksandrowicz.

Mr Bradbook lodged the first application on 18 October 2013 before the tribunal de la jeunesse de Bruxelles (the court for young persons in Brussels) seeking a ruling on, inter alia, how parental authority over the child was to be exercised and accommodation rights with respect to the child. Additionally, on 23 October 2013, the father brought an action before the judge hearing applications for interim measures claiming provisionally and as a matter of urgency that secondary accommodation rights in respect of the child should be granted to him.[16] The mother challenged the international jurisdiction of the Belgian courts, seeking the application of Article 15 of the Regulation and the transfer of the case to the Polish courts, which are particularly connected to the child's situation, since the child is residing in Poland and has in the interim been registered in a nursery school.

On 26 March 2014, the tribunal de la jeunesse de Bruxelles, confirmed its jurisdiction, held that parental authority should be exercised jointly by the parents, granted to the mother primary accommodation rights in respect of the child and temporarily granted to the father secondary accommodation rights on alternate week-ends, it being his responsibility to travel to Poland. The father brought an appeal against that judgment before the cour d'appel de Bruxelles, seeking, principally, the exclusive exercise of parental authority and primary accommodation rights in respect of the child.[17] Although the district court of Płońsk (Poland) found that the child had been wrongfully removed by his mother and that the child had been habitually resident in Belgium before the removal, it decided to issue an order on the non-return of the child on the basis of Article 13b of the

[16] He subsequently amended his claims before the judge hearing applications for interim measures and before the tribunal de la jeunesse de Bruxelles and sought, inter alia, the exclusive exercise of parental authority, primary accommodation rights in respect of the child and an order prohibiting the mother from leaving Belgian territory with the child. By order of 19 December 2013 the judge hearing applications for interim measures declared that he had jurisdiction and, provisionally and in the interests of urgency, upheld the father's claims

[17] At the same as bringing proceedings on the substance before the Belgian courts, on 20 November 2013 the father brought an application before the Belgian central authority for the return forthwith of the child to Belgium under the return procedure established by the 1980 Hague Convention

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[18] (hereinafter: 1980 Hague Convention).

The father then lodged submissions to the tribunal de première instance francophone de Bruxelles, which court had jurisdiction, in accordance with Article 1322*i* of the Judicial Code[19] to examine the question of custody with respect to the child, pursuant to Article 11(6) and (7) of the Regulation.[20] After the entry into force of the 2013 legislation, the case was reallocated to the tribunal de la famille de Bruxelles [the family court in Brussels]. The cour d'appel de Bruxelles declared that the Belgian court had international jurisdiction to rule on the substance of questions relating to parental responsibility. However, since an action based on Article 11(6) and (7) of the Regulation had in the interim been brought before the tribunal de première instance francophone de Bruxelles, the cour d'appel stayed its ruling on the substance of the dispute. During this period, the father was not able to exercise the right of access since the mother refused to disclose information on the child's residence. The Polish courts, after finding that the Belgian court had been first seized and had declared that they had international jurisdiction, held that they had no jurisdiction in the matter.

By final judgment delivered on 8 October 2014, the tribunal de la famille de Bruxelles referred the case to the cour d'appel de Bruxelles, on the ground that the Belgian courts had been seized by the father before the wrongful removal of the child for the purposes of Art 11(7) of the Regulation and that the substantive proceedings were pending before the cour d'appel. The cour d'appel de Bruxelles considers that, under Belgian law, it cannot regard itself as seized of the procedure set out in Art 11(6) to (8) of the Regulation by the referral judgment delivered by the tribunal de la famille de Bruxelles on 8 October 2014. The cour d'appel considers that it could be seized of that procedure only by an appeal being brought by one of the parties against that judgment. Hence, the cour d'appel de Bruxelles referred the question for a preliminary ruling to the CJEU.

The CJEU found that jurisdiction of a specialised court in a Member State to examine questions of return or custody with respect to a child in the context of the procedure set out in those provisions, even where proceedings on the substance

[18] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, concluded 25 October 1980

[19] In the version of the Judicial Code applicable prior to the entry into force of the loi du 30 juillet 2013 portant création du tribunal de la famille [law of 30 July 2013 on the creation of a family court]

[20] Under Article 1322*i* of the Judicial Code, the bringing of an action before that court entails that proceedings commenced before courts and tribunals seized of a dispute concerning parental responsibility or a related dispute are to be stayed

of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal is not contrary to Article 11(7) and (8) of the Brussels II bis Regulation.

### 2.3. Case C498/16 Maximilian Schrems v Facebook Ireland Limited,

The request has been made in proceedings between Mr Maximilian Schrems, who is domiciled in Austria, and Facebook Ireland Limited, which has its registered office in Ireland, concerning applications seeking declarations and an injunction, disclosure, production of accounts and payment in the amount of EUR 4 000 in respect of private Facebook accounts of both Mr Schrems and seven other persons who assigned to him their claims relating to those accounts. Mr Schrems has been a user of the social network Facebook since 2008.[21]

From August 2011, Mr Schrems lodged before the Irish Data Protection Commissioner 23 complaints against Facebook Ireland, one of which gave rise to a reference for a preliminary ruling before the Court.

Mr Schrems brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna, Austria), seeking, first, comprehensive declarations of the status of the defendant in the main proceedings as a mere service provider and of its duty to comply with instructions or of its status as an employer, where the processing of data is carried out for its own purposes, the invalidity of contract terms relating to conditions of use, second, an injunction prohibiting the use of his data for its own purposes or for those of third parties, third, disclosure concerning the use of his data and, fourth, the production of accounts and damages in respect of the variation of contract terms, harm suffered and unjustified enrichment. Mr Schrems claims to have *locus standi* on the basis of both his own rights and similar rights which seven other contractual partners of the defendant in the main proceedings, who are, according to the applicant, also consumers and residing in Austria, Germany or in India, have assigned to the applicant for the purposes of his action against Facebook Ireland. According to Mr Schrems, the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) has international jurisdiction as the forum of a consumer under Article 16(1) of the Brussels I Regulation. The Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) dismissed the action brought by Mr Schrems on the ground

[21] Initially, he used that social network only for personal purposes under a false name. Since 2010, he has been using a Facebook account solely for his private activities. since 2011, he has opened a Facebook page registered and established by him, in order to report to internet users on his legal proceedings against Facebook Ireland, his lectures, his participation in panel debates and his media appearances, as well as to call for the donation of funds and to publicise his books

that, since he is also using Facebook for professional purposes, he could not rely on jurisdiction over consumer contracts. According to that court, the jurisdiction *ratione personae* of the assignors of claims is not transferable to the assignee.

Mr Schrems brought an appeal against the order at first instance before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria). That court amended that order in part. It upheld the claims related to the contract concluded between the applicant in the main proceedings in his own name and the defendant in the main proceedings. By contrast, it dismissed the appeal in so far as it concerned the assigned claims on the ground that the forum of a consumer can be invoked only by an applicant relying on his own claims. Both parties brought an appeal on a point of law ('Revision') against that judgment before the Oberster Gerichtshof (Supreme Court, Austria). That court states that, if the applicant in the main proceedings were a 'consumer', the action should be brought in Vienna. The same would apply to any proceedings brought in relation to the rights of a consumer resident in Vienna. According to the referring court, there is no significant additional burden on the defendant in the main proceedings if it were to be required in the course of these proceedings also to defend itself against additional assigned claims.

The CJEU found that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a 'consumer' within the meaning of Art **15 of Brussels I Regulation**. However, according to the CJEU it is not possible for the consumer to rely on Art **16(1) of Brussels I Regulation** in order to assert, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries.

## 3. RULES ON JURISDICTION – TERRITORIALITY V. FUNCTIONALITY

Principle of territoriality is considered to be a traditional organizational standard according to which jurisdiction is awarded based on the geographical location of the court. It encompasses issues of timelines, hearing and understanding. Also, it contributes to accessibility, comprehensibility and visibility of the judiciary towards society.[22] It is equally important in the context of national and international

[22] Mak, E., *Balancing Territoriality and Functionality;Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany,* International Journal for Court Administration, *Vol.* 1, No. 2,

civil procedure litigation. However, in comparison to internal, in international dispute resolution jurisdictional issues have different function and relevance. Determining international jurisdiction is the first step that assures that dispute is resolved within one national juridical system.[23] For this utmost importance, regulation of international jurisdiction was in the past perceived as purely autonomous national issue.[24]

Rules on jurisdiction in Brussels I Regulation (arg. *ex* Art 2) and Brussels I bis Regulation (arg. *ex* Art 4) as significant private international law instruments apply if a defendant is domiciled in a Member State. Their function is twofold, as they establish the general rule for the territorial application of the jurisdiction of the jurisdiction chapter of the Brussels I regime/Brussels I bis regime and the general rule for jurisdiction.[25] The general rule, based on the territorial scope of application exists for the protection of the defendant, because it is considered that a person being sued is generally in a weaker position and should be favoured in order to compensate for the fact that he has to defend himself against the claimant's action.[26] Jurisdiction should always be available on this ground, save in situations which are considered as exceptions to the general rule.[27] These exceptions guarantee procedural justice and protection to weaker parties (consumers, employees and insurance policy holders) in proceedings against defendants in Member States. In example, special provisions relating to jurisdiction for disputes arising from consumer contracts (arg. *ex* Art 15-17 Brussels I Regulation; Art 17-19 Brussels I bis Regulation) ensure adequate protection for the consumer as the party deemed to be economically weaker and less experienced in legal matters than its counterparty.[28] Although similar provisions may also be provided in the national laws of the Member State, as the legal literature observes, such rules are not necessarily identical, so that the „level of protection" may vary among different Member States.[29]

In order to achieve enhanced functionality of court proceedings methods such as concentration of jurisdiction, case management, e-justice and specialization of

2008, p. 2-9, pp. 2

23 Vuković, Đ; Kunštek, E., *Međunarodno građansko postupovno pravo*, Zagreb, 2005

24 Župan, M.; Poretti, P., *Concentration of jurisdiction in cross-border family matters – child abduction at focus*, in: Vinković, M. (ed.), New developments in EU labour, equality and human rights law, Pravni fakultet Osijek, Osijek, 2015, p. 342

25 Dickinson; Lein, *op. cit.,* note 5, p. 113

26 *Ibid*., p. 116. CJEU Case C-295/95 Jackie Farrell v. James Long (1997) ECR I-1683, I-1708 para. 27

27 See also Dickinson; Lein, *op. cit.,* note 5, p. 21-22

28 CJEU, Case C-89/91Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, ECLI:EU:C:1993:15, 19 Januay 1993

29 Lazić, *op. cit*, note 6, p. 102

judges are employed more often in national civil procedure litigation. Although the level of their success in increasing *access to justice* and efficient administration of justice in general can be observed separately, their best result is achieved when combined. Namely, concentration of jurisdiction requires providing for both infrastructure which places jurisdiction before a limited number of courts in the Member States but also for offering training to judges which enables them to conduct such proceedings in appropriate manner. Such specialized and experience judges usually deliver judgments which are appealed less frequently, thereby generating less cost and providing more legal certainty. However, in employing these measures Member States should both observe the internal structure of the legal system concerned, but also, in the context of cross-border litigating, respect the requirements of regimes provided under EU instruments on judicial cooperation in civil and commercial matters.

## 4. PRINCIPLE OF TERRITORIALITY AND CONSUMER (WEAKER PARTY) PROTECTION

In case C498/16 CJEU analysed circumstances under which it is possible to derogate form the general rule provided in Art 2(1) of the Brussels I Regulation according to which the courts of the Member State in which the defendant is domiciled have jurisdiction in the matter. Exceptions, under which the defendant may or must be sued before the courts of another Member State, are considered as derogation from that principle and are to be strictly interpreted.[30] In regard to jurisdiction over consumer contracts such special provisions are provided under Articles 15 and 16 of the Brussels I Regulation and under Art 17 and 18 of the Brussels I bis Regulation. As highlighted in the legal theory, these provisions apply only to disputes between an individual consumer and his/her counterparty.[31] In a similar vein, the CJEU concluded that exception provided for a consumer as a weaker party under Art 16(1) Brussels I Regulation cannot be applied to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries. Obviously, CJEU differentiates between the position of a plaintiff as a consumer asserting his own claim and as a plaintiff to whom claims of other consumers have been assigned. One of the reasons for the CJEU not to acknowledge the 'privileged' position of the consumer in regard to the application

[30] See, to that effect, CJEU, case C464/01, *Gruber*, EU:C:2005:32, 20 January 2005, para 32

[31] Dickinson; Lein, *op. cit.,* note 5, p. 218

of the rules on jurisdiction in asserting the assigned claims, might be the fact that the assignment of a claim is a contract of lucrative nature.[32]

'Concentration' of several claims in the person of a single applicant discussed in this case differs from concentration of jurisdiction considered in the joined cases C-400/13 and C-408/13 or case C-498/14 PPU Bradbrooke which will be discussed in more detail later. Although it could be argued that at a certain level attempt of 'concentration of claims' in the case at hand was also aimed at enhancing functionality, it seems that CJEU did not accept such an argument.

Hence, it is interesting to try to advance arguments in both in favour and against the CJEU's approach. Respect for the Brussels I Regulation regime and the manner in which the exception provided under Art 16(1) is to be interpreted are certainly arguments in favour of the CJEU's position. Also, this restrictive interpretation reflects the position CJEU took in its earlier decisions, according to which the special head of jurisdiction in Art 16(1) Brussels I Regulation is only available personally to the consumer who is party to the consumer contract in question[33], and according to which the assignment of a claim does not affect international jurisdiction under the Brussels I Regulation[34].[35] But, it could also be argued that this restrictive interpretation of the introduced exceptions to the general rules on jurisdiction does not adequately take into account the requirements of ensuring functionality or facilitated *access to justice* in court proceedings. Therefore, critics of the CJEU's approach caution of the interesting, but nevertheless unfortunate side effect of this restrictive interpretation.[36] Namely, such interpretation of the rule under Art 16(1) Brussels I Regulation excludes the consolidation of the claims of other Austrian consumers in the same forum.

It seems that AG Bobek recognized the significance of offering a functional approach by way of providing for a common forum for resolving a large number

[32] In this sense, a judgment of the Supreme Court of Croatia II Rev 117/03-2 from 16 December 2003 in which the Supreme Court decided on the necessity of the change of a claim in case of cession during the proceedings.

[33] CJEU, Case C-89/91 Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, ECLI:EU:C:1993:15, 19 Januay 1993; case C-167/00 Verein für Konsumenteninformation v Karl Heinz Henkel, ECLI:EU:C:2002:555, 1 October 2002

[34] Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and others, ECLI:EU:C:2015:335, 21 May 2015

[35] See Ruehl, G., *Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook*, [http://conflictoflaws.net/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction and-assigned-claims-in-case-c-49816-schrems-v-facebook] Accessed 01.02.2019

[36] *Ibid.*

of assigned consumer claims. Hence, he proposed alternative routes for bringing claims assigned to a consumer by other 25,000 other consumers in the forum at the place of the consumer's domicile. In his opinion, since interpretation of Art 16 (1) does not provide for such a possibility, an *additional* forum in which such consumer claims could be brought could be created under national law (Opinion, 117). According to AG Bobek the fact that Art 16(1) of Brussels I Regulation does *not* establish a new special jurisdiction does not, in his view, mean that it would *prevent* it if it were internally provided for by national law. The logic of the local jurisdiction in Art 16(1) is that the consumer cannot be deprived of it. In any event, should an additional one be provided for under national law, within that Member State, that would, to his mind, not run counter to either the wording or the objectives of the Regulation. However, this does not seem to be the case in the present proceedings, inasmuch as the arguments of the applicant to establish jurisdiction (even within the same Member State), appear to rely exclusively on Art 16(1) of Brussels I Regulation. But, according to some authors it is questionable whether such a proposition appears easily reconcilable with the clear wording of Art 16(1).[37] Namely, in interpreting Art 18(1) Brussels I bis Regulation (corresponds to text of Art 16 (1) Brussels I Regulation, with no material amendment) the legal theory points out that the provision at hand appears to regulate both international and internal jurisdiction; in other words, it does not designate the court having international jurisdiction, but also the local court's venue in the State concerned. On this basis, application of national rules on the court's venue is therefore excluded.[38]

Another possibility for the claimant is to rely on the first alternative of Art 16(1) Brussels I (which mirrors Art 2(1)) and bring all claims in the defendant's Member State of domicile, the procedural law of which will then decide on whether the claims may be consolidated. This possibility is reconcilable with the meaning of Art 16(1) Brussels I Regulation. However, it fails to take into account the fact that the possibility for the court to establish jurisdiction as the court of the consumer's place of domicile (*forum actoris*) promotes consumer's *access to justice.* Namely, it could be argued that for reasons such as limited resources of the consumer, as well as the fact that the goods and services generally covered by the contract are typically (but not inevitably) of little value, it is unlikely that not only the individual consumer but 25,000 other consumers as well will bring proceedings in the foreign State of the trader's domicile (this is at least true for consumers in the State of consumer's domicile and all States other than the State of the trader's domicile). It should also be noted that the court seized at the consumer's domicile

[37] *Ibid*.

[38] Dickinson, *op. cit*, note 5, p. 232

will frequently have the advantage of deciding the case on the basis of the law of the forum (arg. *ex* Art 6 Rome I Regulation), which is also an important factor in terms of procedural economy.[39]

These are all valid arguments supporting the criticism of the Court's approach insofar for applying a rather flexible interpretation to Art 15(1) Brussels I, allowing for changes of circumstances to be taken into account but also distinguishing the enforcement of (consumer) rights from other types of professional activities. At the same time, CJEU interprets the special head of jurisdiction in Art 16(1) restrictively, limiting the privilege to each individual consumer and excluding the possibility of other consumers assigning their claims to one who is domiciled in what may appear as a more favourable forum.[40] In the light of the above, concerns regarding such nuanced approach of the CJEU to the special provisions for consumer contracts do not seem to be without (at least some) merit.

There is one more interesting aspect of this case, which the claimant tried to address by invoking the 'significance of consumer collective redress' argument. Undoubtedly, consumer collective redress mechanisms are important for the effective functioning of a consumer dispute resolution system. They provide an incentive to participate jointly in litigation cases, as they are a means of spreading litigation costs and risks among individuals. Also, collective redress mechanisms increase prospects of success for consumers, address the asymmetrical balance of power between the consumers and traders and contribute to procedural economy and legal certainty.[41] Still, special (protective) rule under Art 16 (1) Brussels I Regulation (Art 17 Brussels I bis Regulation) does not allow consumer associations to bring preventive actions in order to prevent the use by a trader of terms deemed to be unfair in contracts with individuals under it.[42] The legal theory is silent on the possibility of a representative plaintiff (claimant) as a person entitled to initiate collective redress procedures to bring such protective actions under the provision of Art 16 (1) Brussels I Regulation. However, the analogy with the interpretation in regard to the consumer associations would not allow for such a conclusion.

Hence, with no opportunity to rely on protective rules under the Brussels I Regulation, the claimant attempted to qualify national provisions which allow for the

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[39] *Ibid.*, p. 231

[40] Ruehl, *op. cit*, note 35

[41] Benöhr, I. EU *Consumer Law and Human Rights*, Oxford University Press, 2013, p. 192-193; Poretti, P. *Sudska zaštita prava potrošača – (naj)bolji put?,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *Vol.* 39, No. 1, 2018, p. 535-570.

[42] Case C-413/12 Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano Espăna SL (2013) ECLI:EU:C:2013:800, p. 49 - 50

so-called objective accumulation of claims as an adequate basis for the change of international jurisdiction or creation of a second layer of jurisdiction allowing for claims of all consumers to be asserted before the court of the claimant's domicile (arg. *ex* 227 öZPO). The provision on objective accumulation under 227 öZPO allows different claims of one applicant against the same defendant to be heard together in the same proceedings if two conditions are met. First, the court seized should have jurisdiction for each of the individual claims, including its territorial competence. Second, it must be possible to subject each claim to the same type of proceedings. Although the claimant offered a number of interesting propositions regarding the need for collective action for the protection of consumers in the European Union, in the view of AG Bobek, powerful as they may be on the level of policy, most of those arguments rather pertain to reflections on the potential future of the law, but find limited support in the law as it stands today. In the light of the nature of the provisions on objective accumulation and the characteristics of collective redress, it is only possible to agree with AG Bobek. Namely, provisions on objective acccumulation are not intended for facilitating collective redress. They are procedural rules allowing for a number of claims to be brought by the same claimant against the same defendant. In contrast, collective redress is regulated by specific provisions, adjusted to the fact that the claimant is entitled to initiate proceedings for protection of the interest of members of the group (class). Hence, it does not seem that either Art 16(1) Brussels I Regulation or Art 227 öZPO are reconcilable with the idea of advancing collective redress. As some critics explain, although there may well be strong arguments for the existence of such a possibility, especially in cases where each individual claim is too small to justify litigation but the sum of them is not, it seems questionable whether Art 16(1) Brussels I would be the right instrument to create such a mechanism of collective redress – and, indeed, whether it should be the Court's role to implement it.[43]

## 5. PRINCIPLE OF FUNCTIONALITY AND MAINTENANCE CREDITOR (WEAKER PARTY) PROTECTION

Since in joined cases C-400/13 and C-408/13 the CJEU was asked to interpret Regulation No 4/2009 for the first time, in its interpretation of a general provision on jurisdiction in Art 3 of Regulation No 4/2009 according to which in matters relating to maintenance obligations in Member States, jurisdiction shall lie with the court for the place where the defendant is habitually resident (arg. *ex* Art 3 (a)) or the court for the place where the creditor is habitually resident (arg. *ex* Art 3 (b)) the CJEU made use of the criteria which have arisen from interpretation of

[43] Ruehl, *op. cit*, note 35

related instruments. So the starting point of the analysis of Art 3 (b) of Regulation No 4/2009 which provides for protection of the maintenance creditor, who is considered to be the weaker party in the relationship arising from a maintenance obligation and in the proceedings which may follow[44] is the fact that this rule resembles to rules on jurisdiction in other legal instruments of the EU legislator.

Following the argumentation of the Advocate General which also takes into account other legal instruments which contain similar rules on jurisdiction and case-law in relation to those other instruments, in joined cases C-400/13 and C-408/13 the CJEU takes the view that although under the current regime maintenance obligations are excluded from the scope of application of the Brussels I and Brussels I bis Regulation, still these Regulations form a significant basis for the interpretation of Art 3(b) of Regulation No 4/2009. [45] This may be concluded from the wording of Art 5(2) of the Brussels Convention which states that jurisdiction in the matter lies with „the courts of the place where the maintenance creditor is domiciled or habitually resident" as well as the Preamble of the Regulation No 4/2009 which refers to the Brussels I Regulation several times and Art 68(1) which expressly states that Regulation No 4/2009 replaces the provisions of the Brussels I Regulation applicable to matters relating to maintenance obligations.[46]

As the law currently stands Article 1(2)(e) of the Brussels I bis (Recast) excludes maintenance obligation but although placing more weight on habitual residence than domicile, the relevant criteria for establishing jurisdiction in Articles 3(b) and (c) of the Regulation No 4/2009 follow those set out in Articles 2 and 5(2) of the Brussels I Regulation, with only one major difference: the Maintenance Regulation also sets out rules of jurisdiction for cases in which the defendant's habitual residence is in a non-Member State, and makes no reference to national law in this regard.[47]

In fact, as the Advocate General explains, one of the general objectives of the Regulation No 4/2009, following that established by the Brussels Convention and then by the Brussels I Regulation, is to avoid as far as possible referral to the rules of jurisdiction under national law and to facilitate the recognition of decisions in all the Member States, which is the cornerstone of the European system of judicial cooperation in civil matters. One of those special rules of jurisdiction is

[44] Compare Advocate General opinion, p. 62

[45] See Advocate General opinion, p. 30

[46] See Advocate General opinion, p. 29, 31

[47] See Dickinson. *op. cit.,* note 5, p. 87

Article 5(2) of the Brussels Convention, which is applicable to maintenance obligations, from which Article 3(b) of Regulation No 4/2009 is derived.[48]

In its decision the CJEU has further relied upon arguments given in judgements in Farrell, C 295/95, and Blijdenstein, C 433/01 where it has stated in the context of Article 5(2) of the Brussels Convention, that the derogation relating to the rules on jurisdiction in matters relating to maintenance obligations is intended to offer special protection to the maintenance creditor, who is regarded as the weaker party in such proceedings.

Arguments in favour of concentration of jurisdiction put forward by the EU Commission and the German government in joined cases C-400/13 and C-408/13 were scrutinized by the Advocate General. In his opinion, rule on concentration of jurisdiction in Paragraph 28(1) of the German implementation Law of 23 May 2011 on the Recovery of Maintenance in Relations with Foreign States (Auslandsunterhaltsgesetz, 'AUG') according to which if a party concerned does not have his or her habitual residence in Germany, the court which is to rule exclusively on applications in maintenance cases falling under Article 3(a) and (b) of Regulation (EC) No 4/2009 is the Amtsgericht which has jurisdiction for the seat of the Oberlandesgericht in whose area of jurisdiction the defendant or creditor has his or her habitual residence is not compatible with Art 3 (b) of Regulation 4/2009. Contrary to the view of the German Government that centralisation of jurisdiction in matters of international maintenance obligations would have a positive impact on the organisation of justice, by enabling specialised courts, with greater expertise to conduct the proceedings, the Advocate General warns against the effect that concentration might have on rules of cross-border jurisdiction laid down by EU law. Requirements of sound administration of justice include *access to justice* and foreseeability of jurisdiction, owing to a close link between the court and the dispute but at the same time Paragraph 28 of the AUG withdraws powers from the court which would normally have jurisdiction because it is in the place of the creditors' habitual residence, that is to say, on the basis of a close link between the forum and the dispute, although that jurisdiction remains in place for ruling on applications which are identical but which do not have a foreign aspect.

The view of the CJEU is not so straightforward as the view of the Advocate General because in delivering its decision, the CJEU took into account fundamental objectives of the Regulation No 4/2009, effective recovery of maintenance claims in cross-border situations, proper administration of justice and preservation of creditor's interests. Although the CJEU acknowledged that development of spe-

48 See Advocate General, 52

cific expertise which centralisation of jurisdiction promotes may satisfy all three objectives of the Regulation No 4/2009, he nevertheless warned of the possible restrictive effect that centralisation might have on recovery of maintenance claims.[49]

## 6. PRINCIPLE OF FUNCTIONALITY AND (CHILD AS A WEAKER PARTY) PROTECTION IN RETURN OR CUSTODY CASES

In contrast, in regard to interpretation of Art 11(7) and (8) of the Brussels II bis Regulation in case C498/14 PPU David Bradbrooke v Anna Aleksandrowicz CJEU found that if there is a specialised court which examines questions of return or custody with respect to a child in the context of the procedure set out in Art 11(7) and (8) of the Regulation, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal, it does not impair the effectiveness of the Regulation. *However, it must be ensured that such an allocation of jurisdiction is compatible with the child's fundamental rights as stated in Art* 24 of the Charter and*, in particular, with the objective that procedures should be expeditious.*

According to Advocate General Jääskinen such a rule for the internal allocation of jurisdiction *ratione materiae* and for the specialisation of courts, in itself, does not impair either the effectiveness of those provisions of the Regulation or the principles and objectives which underpin them, and in particular is not necessarily contrary to the objective of expedition. The rules of Belgian law which are the subject of the request for a preliminary ruling are based on objectives which are compatible with those of the Brussels II bis Regulation. As stated by the referring court, the grounds stated for the Belgian legislation indicated that the specialisation of courts and the concentration of jurisdiction was justified by the technical nature of the court proceedings relating to international child abduction, the desire to improve the effectiveness and rapidity of action of the Belgian courts in this area, and by the intended strengthening of direct cooperation between judges and magistrates of different Member States.

In delivering his judgment, CJEU most likely placed due weight on the fact that organisation of the Member States' court system is outside the scope of the Brussels II bis Regulation. At the same time, the judgment reflects the position that *due to the complexity and the nature of the matters regulated by different international instruments on child abduction, well trained and specialized judges are required. The experience of Member States in which jurisdiction under 1980 Hague Convention is concentrated on a limited number of courts and judges is positive and shows enhanced quality and ef-*

[49] Koutsoukou, G. *Report on recent German case-law relating to Private International law in family law matters*, RDIPP, p. 234

*ficiency.[50] Furthermore, if judges with specialized knowledge are included in the process, the functioning of the Convention and the Brussels II bis Regulation regime in regard to child abduction and related matters concerning children is optimized.[51]*

## 7. CONCENTRATION OF JURISDICTION AS MEANS OF ENHANCING *ACCESS TO JUSTICE* IN CROSS-BORDER CASES UNDER EU REGULATIONS

There is no coherent regulatory approach to weaker party protection in the European private international law of contractual and non-contractual obligations, family and succession law. Still, the comparison of the legal instruments in these fields shows that there are several (various) groups of protected weaker parties but protection of each of these groups is based on uniquely created provisions.[52] Protection of consumers is provided in Article 6(2) of the Rome I Regulation, Article 14(1) of the Rome II Regulation, Article 16 and 17 of the Brussels I Regulation and Article 17 and 18 of the Brussels I bis Regulation. Passengers, (mass) insurance policy holders or beneficiaries and employees present another group of weaker parties whose protection is guaranteed in provisions on jurisdiction in Sections 3, 4 and 5 of the Brussels I Regulation. Also, protection is granted to maintenance creditors, especially minors in Articles 7 and 8 of the Hague Maintenance Protocol. On the level of international civil procedure protection Article 15 and 23 of the Brussels I recast and Article 4(3) of the Regulation No 4/2009 complement protection afforded to weaker parties, apart from consumers.[53]

Although from the texts of these legal instruments it remains unclear why only certain groups are afforded weaker party protection, given that there are also numerous other vulnerable groups, still legal literature has managed to define three criteria. First, vulnerability is attributed to the lack of information or information asymmetries between parties, especially consumers, employees, (mass) insurance policy-holders or beneficiaries. Namely, the cost of acquiring information is much higher than its benefit.[54] As economically or socially dependent parties mainte-

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50 Practice Guide for the application of the Brussels IIa, Directorate General for Justice (European Commission), 2016, p. 50

51 *Ibid*. For the details on International Hague Judicial Network see [http://www.hcch.net/index_en.php?act=text.display&tid=21] Accessed 12.02.2019. European Network on Family Law Judges is a part of European Judicial Network in civil matters

52 Rühl, G. *The protection of Weaker Parties in the Private International of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, Journal of Private International Law, *Vol*. 10, 2014, pp. 335-358, p. 340

53 *Ibid.*, p. 340-342; Lazić, *op. cit.,* note 6, p. 102-103

54 *Ibid.*, p. 344-345

nance creditors, especially minors and employees are also perceived as weaker parties. This is emphasized in situation where a maintenance creditor is a minor and the debtor is his family member.[55] Finally, mental or intellectual disadvantage may also be considered to be a source of vulnerability.

However, if rules on jurisdiction under Brussels I or Brussels I bis Regulation regime are compared to EU instruments that unify certain rules of civil procedure, it is important to notice that they do not have the same level of consistency in approach towards the regulation of rules on jurisdiction for weaker party protection in proceedings.

In EEO Regulation certification of the judgement as European Enforcement Order is conditioned by compliance with rules on jurisdiction in Regulation No 44/2001 (arg. *ex* Art. 6 (b), 3(1) (a) and (d)). Similar requirements are prescribed in Art. 6 of the European Order for Payment Procedure. Consumer may only be sued in the courts of its domicile (arg. *ex* 6(2)) wherein domicile is to be determined in accordance with the Brussels I Regulation. If these requirements regarding jurisdiction are not met, an application for a European Order for Payment shall not be granted (arg. *ex* Art 11(a)).[56] However, protection of the weaker party in proceedings and the requirement for the court in the Member State of origin to respect certain jurisdictional rules in proceedings regarding weaker parties is not included in the wording of Regulation No 861/2007. At the same time, Art 25 of the Regulation No 861/2007 explicitly prescribes a possibility of concentration of jurisdiction. On the one hand, some legal scholars were of the view that recent developments in the field of international civil procedure and in particular, Commission's Proposal on revision of the Regulation No 861/2007 (resulting in the amending Regulation 2015/2421) brought further harmonisation and incorporated protection of weaker parties, in the same or a similar manner, in different EU legal instruments regulating certain aspects of international civil procedure.[57] On the other hand, as observed, there is a certain trend of abandoning rules on jurisdiction based on the principle of territoriality and opting for the concentration of jurisdiction based on the principle of functionality. Namely, according to the EU Commission interpretation of the Regulation 1896/2006 on the European Order for Payment Procedure (EOP), concentration of jurisdiction is also applicable in European Order for Payment Procedure. As the (non-public) minutes of a meeting on the implementation of the EOP-regulation show, this was a view

[55] *Ibid.*

[56] See Lazić, *op. cit.,* note 6, p. 115-116

[57] *Ibid.*, p. 116.

which EU Commission communicated in December 2008. Recent development in Dutch law shows that Member States are making use of the possibility.[58]

Since the discrepancy in rules on jurisdiction may be interpreted as a gradual shift towards principle of functionality, it is necessary to examine whether concentration of jurisdiction which is usually employed in such cases is means for realization of the principle of functionality and enhancing *access to justice.*

Concentration of jurisdiction may be defined as a mechanism through which one or more courts in specific territories on the basis of legal provisions or through agreements between courts are allocated exclusive competence to deal with certain categories of cases.[59] In terms of contributing to functionality of the court proceedings, crucial advantage of concentration of jurisdiction is a possibility to access specialized courts which have the necessary expertise in litigation of great factual and legal complexity. Indeed, legal literature perceives concentration of jurisdiction as one of several forms of specialization[60]. Other benefit of concentration of jurisdiction is the fact that by concentrating similar cases both quality and timeliness of decision making as well as legal certainty is improved.[61] The main disadvantage is different geographical remit of the courts which requires the creditor to travel further. However, legal instruments which provide for concentration of jurisdiction generally prescribe the use of modern communications technologies in order to facilitate taking of evidence and oral hearing, so that additional burden is not placed on the creditor.[62]

In the EU Commission Report on the application of Regulation (EC) No 861/2007 on ESCP the Commission points out that while specialization of judges and courts may be regarded as advantage of concentration of jurisdiction, at the same time, once again, the disadvantages of concentration in terms of geographical distance and increased cost of the procedure are meant to be overcome by use of electronic processing of cases and distance means of communication.[63] Similar arguments were introduced in the Dutch Proposal of amendments to the Implementation Act on Regulation (EC) No 1896/2006 creating a European order for payment procedure from 24 February 2015. Namely, it provides for applications for a European order for payment to be lodged with (exclusively) the District Court of The Hague (civil-law section). Introduction of the rule on concentration

[58] See *infra.*

[59] Hartendorp, R. C. *Notitie rechterlijke concentratie,* Raad voor de rechtspraak, 2003

[60] The other two forms are allocation and cooperation. Mak, *op. cit.,* note 22, p. 2

[61] *Ibid.*, p. 3

[62] Recital 20 of Preamble Regulation No 861/2007

[63] See EU Commission Report on the application of Regulation (EC) No 861/2007 on ESCP

of jurisdiction should contribute to simplification of litigation for (foreign) claimants, since they no longer have to establish which court has jurisdiction to issue a European enforcement order. It is submitted that the Proposal makes it easier for foreign claimants to manage cross-border debt collection.[64]

In the context of the posed question, it is significant to point out that the Regulation No 861/2007 as the only legal instrument on unified European civil procedure which (directly) prescribes concentration of jurisdiction was also introduced with the aim of facilitating *access to justice* and removing imbalances with regard to the functioning of the procedural means afforded to creditors in different Member States. According to the Recital (9) of the Preamble Regulation No 861/2007 seeks to promote fundamental rights and takes into account, in particular, the principles recognised by the Charter of Fundamental Rights of the European Union. The court or tribunal should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken.[65]

It seems that the underlying principle of the decision the CJEU delivered in joined cases C-400/13 and C-408/13 is that regardless of the nature and the source from which the rule on jurisdiction derives (the fact that *in concreto* Article 3(b) of Regulation No 4/2009 should be understood as precluding national legislation such as that at issue in the main proceedings which establishes a centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations in favour of a first instance court which has jurisdiction for the seat of the appeal court), in cross-border maintenance obligations cases preference should be given to rules on jurisdiction which in the best possible manner facilitate *access to justice* and sound administration of justice. Even if it means that the rule which precludes national legislation such as that at issue in joined cases C-400/13 and C-408/13 should be disregarded.

A similar point was used by the CJEU to justify its judgement in C498/14 PPU David Bradbrooke v Anna Aleksandrowicz. According to the CJEU, in order for the specialization of courts and concentration of jurisdiction provided by Belgian legislation to be compatible with the objectives of the Brussels II bis Regulation, *it must be ensured that such an allocation of jurisdiction is compatible with the child's fundamental rights as stated in Art 24 of the Charter and, in particular, with the objective that procedures should be expeditious.* It seems that again, CJEU accepts rules for the internal allocation of jurisdiction *ratione materiae* and for the specialisation

[64] Concentration of jurisdiction (NL) EOP- procedure, [http://uk.banning.nl/publications/detail.html/24178/concentration-of-jurisdiction-nl-eop-procedure] Accessed 16.01.2019

[65] Recital 7-9 of Preamble Regulation No 861/2007

of courts, provided that such rules enhance *access to justice* and help achieve sound administration of justice.

Apparently, under certain conditions[66], CJEU is willing to set aside the underlying idea 'that the Brussels II bis Regulation regime as well as regimes under other Regulations provide for a compete and closed set of jurisdiction rules, designated to grant jurisdiction to the court best qualified to ensure respect for the best interest of the child and/or sound administration of justice'.[67] In both cases analysed above CJEU considered application of national rules providing for concentration of jurisdiction as valid justification for such a choice.

All of the above implies that concentration of jurisdiction may be relevant in the context of considerations on the future developments and application of legal instruments of private international law and civil procedure. Distinction can be made between legal instruments based on their protective aim and purpose, which requires the traditional rules of jurisdiction to be abandoned and rules on concentration of jurisdiction to be integrated in order to facilitate *access to justice*. Thereby, the first group consists of legal instruments of private international law and civil procedure in the field of cross-border civil and commercial matters which provide protection of economic interest of the parties (Brussels I bis Regulation, Regulation 1896/2006, Regulation No 861/2007, Regulation No 805/2004). The second group covers legal instruments of private international law in the field of cross-border family law matters whose specific nature requires special social protection (Maintenance Regulation, Brussels II bis Regulation).

In cross-border consumer cases concentration of jurisdiction enables a plaintiff to detect in advance which court of the Member State has jurisdiction in the dispute, it provides for cost-effective proceedings and more legal certainty. In cross-border family law matters concentration of jurisdiction which enables specialised courts

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66 As AG Bobek explained in C498/14 PPU David Bradbrooke v Anna Aleksandrowicz 'as stated by the Belgian Government and by the Commission, such an approach is consistent with the recommendations, in favour of a concentration of international child abduction cases in a restricted number of courts, which are made in the guides produced within the European Union and by the Hague Conference on international private law. It seems to me important to maintain the systems for the specialisation of courts which have been identified as constituting 'best practice' in that connection, since the 1980 Hague Convention remains applicable as such between the Member States even though it is complemented by the Brussels II bis Regulation. I am therefore of the opinion that the provisions of the Brussels II bis Regulation do not, per se, preclude a Member State from choosing the specialisation of courts with jurisdiction to rule on the substance of the matter in situations where a child has been wrongfully removed or retained. It is not apparent that such specialisation presents any difficulty if a single set of proceedings concerning the custody of the child is commenced at the request of the parties'

67 See as example Recital 12, 13 of the Preamble Brussels II bis Regulation, Recital 15 Recital of the Preamble Maintenance Regulation, Recital 16 of Preamble Brussels I Regulation

with greater expertise to conduct the proceedings is especially relevant in cases involving children and minors. But at the same time geographical distance and increased cost of the proceedings does not seem to facilitate *access to justice* to children and minors (as weaker parties).

In cross-border consumer cases traditional rule on jurisdiction based on the principle of territoriality enables access to court without the use of modern technologies and it is still more adequate for national systems of Member States which do not have necessary IT infrastructure (i.e. *Croatia*). In comparison, traditional rule based on territoriality was introduced in Maintenance Regulation in order to ensure that the creditor may bring proceedings without too much financial difficulty as a result of journeys, but also that he may assert his rights before a court which is the best placed to be aware of particular local economic circumstances, in order to establish the creditor's resources and needs and, accordingly, the maintenance debtor's ability to contribute to them.[68]

## 8. CONCLUSION

As the analysis shows, there is no easy solution or a single answer to the question if enhancing functionality through concentration of jurisdiction will eventually become an advantage or obstacle to *access to justice.*

This recent development in the jurisprudence of the CJEU may be interpreted in a way that although rules on jurisdiction provided in EU Regulations were created in order to harmonize rules on jurisdiction and facilitate *access to justice,* supremacy of the rules of jurisdiction under EU Regulations, such as that at issue in Maintenance or Brussels II bis Regulation, is not absolute and under certain conditions it may be put aside. However, these conditions should be interpret restrictively and be limited to situations where national rules on jurisdiction enhance effectiveness and efficiency of administration of justice in a superior manner to the rules of jurisdiction provided in EU Regulations. It remains to be seen whether national courts will try to use this caveat as means of avoiding or circumventing application of the rules of jurisdiction under the EU Regulations even in situations where these conditions have not been met.

It should also be kept in mind that concentration of jurisdiction as a new approach towards the regulation of jurisdiction which introduces 'management principles'[69] in comparison to the traditional rule on jurisdiction based on the principle of territoriality in some cases may have a negative effect, as it might deteriorate tradi-

[68] See Advocate General opinion, p. 49

[69] See Mak, *op. cit.,* note 22, p. 4

tional principles of judicial independence and impartiality. Also, new „strategies" in facilitating *access to justice* by means of modern technologies might be considered as advantage in comparison to „classical" ways of approaching the court only if there are adequate resources for employing these strategies. So, it can be said that both approaches at the same time complete and supplement and also contradict each other in facilitating *access to justice*.

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# IS CROATIAN LEGISLATOR REDEFINING THE NOTION OF THE COURT: ANALYSIS FROM THE PERSPECTIVE OF THE CONVENTION LAW

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***ABSTRACT***

*The important doctrine in the case of the law of European Court of Human Rights (ECHR) is a "wide margin of appreciation" of the Member States when they take legislative or judicial actions. Moreover, national authorities are best acquainted with their regulations as well as other circumstances relevant to the adoption of specific laws. Therefore, they must assess which legal solution is the most appropriate. This is an advantage enjoyed by the national states, but they also have the responsibility for choosing the most appropriate legal solution. Therefore, legal disputes over the role of Judicial Advisors in simplified consumer bankruptcy procedure and enforcement procedure (according to the Draft of Enforcement Act) as persons conducting the procedure and persons obliged to render a decision, need to be analysed from the perspective of the standard "court established by law" according to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 29, 115 and 118 of the Constitution of the Republic of Croatia.*

**Keywords:** *reform, simplified consumer bankruptcy procedure, enforcement procedure (Draft), Judicial Advisors.*

## 1. METHODOLOGY

The complexity of the thesis and set tasks conditioned the choice of methods. Thus, the methodology used includes the study of domestic and foreign literature, appropriate legal regulations as well as the analysis of domestic and foreign case study. This paper also analyses the case study of the European Court of Human Rights (ECHR) in proceedings according to Art. 6 (*Right to a fair trial*), since we assume that this information plays the key role in understanding of the issue

concerned. Legislator, to reduce many unresolved cases and increase the efficiency of the judiciary, made various attempts to minimize work overload of the judges. Therefore, this research is going to closely examine the justification of delegating the right to conduct the proceedings and render the decisions to a Judicial Advisor in the simplified bankruptcy consumer procedures and enforcement procedures. Full analysis would imply a different view on the role of the state, courts, European law and the analysis of Croatian judicial system, which is currently too complex to research within the scope of this paper.[1] Nevertheless, based on the above-mentioned considerations, and the complexity of the thesis, authors will focus on a specific issue of the subject matter.

## 2. MAIN DEFINITIONS OF TERMS

Taking into consideration complexity of research thesis, it´s important to define the following concepts: tribunal/court established by law, Judicial Advisor, simplified bankruptcy consumer procedure and enforcement procedure.

The European Convention for Human Rights and Fundamental Freedoms (Convention) is a ″living instrument″[2] which means that it is evolving through the case law of the ECHR. Hence, the meaning of the concept of tribunal is likewise evolving through the case law according to Article 6. However, the concept of an independent and impartial tribunal is well established in ECHR case law. The term tribunal means not only a body which exercises judicial power in a country (see Article 2 of the Law of Courts: LC) [3], but also a body that can decide on matters within its competence and as prescribed by law. A tribunal must also satisfy a series of further requirements as e.g. independence and impartiality. In determining whether a body can be independent, ECHR has regarded several considerations such as the manner of appointment of court members and the duration of their terms in office, the existence of guarantees against outside pressures and the question of whether the body gives an appearance of independence.[4]

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1 E.g. Many unresolved land registration cases, that led to the overload of courts, legislator tried to solve by appropriate legislative interventions. Therefore, the Act on Amendments to the Land Registration Act of 2004 introduced into the Croatian legal system land registration referents, as a new type of land registry officers. Certain jurisdictional powers in solving land registration cases were assigned to them. In accordance with the amendments of the Enforcement Act from 2012, Financial Agency (FINA) had a new role in out of courts debt enforcement. Furthermore, with the entry into force of the Inheritance Act, legislator tried to prevent overload of the courts, by delegating to public notaries inheritance proceedings. Moreover, Act on Amendments to the Enforcement Act in 2003 implemented possibility of conducting enforcement procedure by public notaries based on trustworthy documents

2 Narodne novine - Međunarodni ugovori, br. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10

3 Official Gazette, No. 28/13, 33/15, 82/15, 82/16, 67/18

4 *Belilos v. Switzerland*, 10 EHRR 466 (1988)

Judicial Advisors' deontology emphasises that they are an institution that has been operating since 1946. Their function was designed to train and to enable them to serve as future judges.[5] Current trends point to the practical equalization of the function of judges and Judicial Advisors. Namely, the novelty in LC introduced changes in that direction. Article 109 of LC states (1) Courts may employ Advisers and Senior Judicial Advisors and Senior Judicial Advisors – specialists. (2) A person who has graduated from a faculty of law and has passed the bar examination may be admitted as a Judicial Advisor … Thus, this article implements a third type of court clerk into the existing system of Judicial Advisors, namely, the Senior Judicial Advisors-specialists. The powers of Judicial Advisors, Senior Judicial Advisors and Senior Judicial Advisors-specialists are also redefined. LC brings the possibilities for their independent undertaking of certain actions in court proceedings depending on their complexity, types of proceedings or the value of the case in dispute (Art. 110).[6] However, the powers of Judicial Advisors in non-litigious proceedings under the LC are different so it is the doctrine that indicates whether or not Judicial Advisors should be allowed to make independent decisions in the non-litigious proceedings they conduct.[7] This is interesting given that some special legal regulations prescribe the full independence of Judicial Advisors. For example, the Consumer Bankruptcy Act (hereinafter: CBA)[8] states that advisers are authorized to conduct a simplified consumer bankruptcy procedure and render decisions (Article 79).[9] The draft of the Enforcement Act (EA)[10] stipulates that in the first and second instance of the enforcement proceedings and insurance proceedings, an individual judge or the Judicial Advisor conduct the proceedings, if this law does not specify that the proceedings are conducted by a public notary.

In the implementation of a simplified consumer bankruptcy procedure, results suggested that the legal position of indebted consumers has not changed significantly, indicating that the implementation of the consumer bankruptcy procedure since 2016 has had no real results. Thus, Croatian government in its program for

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5 See, Zuglia, S., *Sudovi i ostali organi koji učestvuju u vršenju građanskog pravosuđa*, Školska knjiga, Zagreb, 1956, p. 100-101

6 Judicial Advisers and Senior Judicial Advisers and Senior Judicial Advisers – specialists are authorized to act and make decisions in certain procedures when it is prescribed by special laws (art. 110 (6) Law of the Courts)

7 See, Maganić, A., *Novi pravci reforme izvanparničnog prava u Republici Hrvatskoj*, Zbornik Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravno teorijska i praktična dostignuća, 2015, p. 147-172

8 Official Gazette, No. 100/15, 67/18

9 BA (Official Gazette, No 71/15, 104/17) has similar provisions. It states that judicial advisors are authorized to conduct shortened bankruptcy proceedings and bring decisions, except for the decision according to Article 433. (Art. 435(1))

10 See: [https://esavjetovanja.gov.hr/ECon/MainScreen ?entityId=9961] Accessed 02.03.2019

period from 2016 to 2020, proposed to partially solve the problem of indebted citizens. For this reason, amendments of CBA were adopted.[11] The most important novelty is a new section IX a ″Simplified consumer bankruptcy procedure″ (Art. 79 to 79v) where terms and conditions of conducting simplified consumer bankruptcy procedure are defined, with the purpose of releasing debts for larger number of persons. The legislator has applied the principle of proportionality because there is a legitimate aim pursued in a public interest. That is a necessary, appropriate and proportionate measure taken against excessive burden of the addressees. In principle, opening of a bankruptcy procedure is only possible if certain legal assumptions are met. We must point out that the ECHR case law according to Article 6[12] applies to bankruptcy procedures.[13]

Enforcement procedure has wide connotation and implementation. Standards of fair trial set out in Article 6 guarantee effective legal protection. So, in civil proceedings there must be an effective system of decisions enforcement.[14] However, in the enforcement proceedings, the civil rights and obligations are not determined, they are enforced. This is a procedure conducted by the courts and notaries according to the EA,[15] and has the purpose of forcible settlement of the creditor's claims on the assets of the debtor. It also regulates judicial and notarial securities based on an agreement of the parties and securities by compulsory creation of the right. However, enforcement procedure, along with the basic regulation, EA, is also regulated by other *lex specialis* laws. Aforementioned Enforcement act on monetary assets constitutes a legal framework for out-of-court enforcement conducted by FINA. According to the provisions of the General Taxation Act[16],

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11 Official Gazette, No 100/15, 67/18. The reform was multilateral and encompassed multiple regulations, new Law on the debts write-off to physical persons (Official Gazette, No 62/18.) and new Enforcement Act on monetary assets (Official Gazette, No 68/18.)

12 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

13 Arg., *S.p.r.l. ANCA and Others v Belgium* (1984) Decisions and Reports 40, *Interfina and Christian della Faille d'Huysse v Belgium* (1987), unreported, *Ceteroni v Italy*, (1996), Reports of Judgments and Decisions 1996-V, *Capital Bank AD v Bulgaria* (2005) Capital Bank AD v Bulgaria (2005) 44 EHRR 48 and *Sukobljević v. Croatia*, (2006), 27 EHRR 249

14 Uzelac, A., *Kako organizirati efikasno izvršenje nespornih tražbina - neka komparativna iskustva*, Zbornik Konferencije "Kako unaprijediti izvršni postupak u BiH", Sarajevo, 2009., [ww.hjpc.ba/pr/msword / PR0Alan Uzelac.doc] Accessed 12.02.2019

15 Official Gazette, No 112/12, 25/13, 93/14, 55/16, 73/17

16 Official Gazette, No 115/16, 106/18

enforcement proceedings are part of a tax-legal relation in which a tax body carries out the procedure of compulsory collection of tax debt based on enforceable and trustworthy documents. Likewise, the Law on collection of tax debt from natural persons[17] regulates the conditions and procedure of compulsory collection of the unpaid tax debt of a natural persons based on taxes, contributions and other public grants.

## 3. FRAMEWORK FOR DISCUSSION

Authors state that the role of the court in the Law on Forced Settlement, Bankruptcy and Liquidation (hereinafter: LFSBL) was undisputable in terms of its right to oblige all parties to the proceedings by its decisions, and in controlling legitimacy of procedure.[18] So, the court conducted the proceedings and had a supervisory, control function when deciding about the merits of the case. The insolvent debtor could, before bankruptcy procedure was initiated, and during bankruptcy procedure, propose creditors to conclude a forced settlement to avoid bankruptcy liquidation. Nevertheless, the Law was applied in the "atmosphere" where some of the questions of legal and economic life were regulated outside the law. Also, the bankruptcy regulations have often had the function of implementing political decisions. The principles of bankruptcy procedure were redefined by BA from 1997. [19] The bankruptcy procedure remained a judicial procedure that was conducted in accordance with the rules of non-litigious proceedings. Furthermore, bankruptcy procedure, unlike the other judicial procedures that are conducted exclusively by court bodies, also includes non-court bodies. Court bodies were Bankruptcy Council (abolished in 2003)[20] and later Bankruptcy Judges as single judges. Non-court bodies were, and still are, Bankruptcy Trustee, Assembly of Creditors and Creditors' Committee. In relation to the LFSBL, Bankruptcy Council or Bankruptcy Judge had greater responsibility, given that the number of functions in the proceedings has also increased. To sum up, an important role of the court has been retained. The court rendered decision on commencement of bankruptcy procedure, appointed Temporary Bankruptcy Trustee and Bankruptcy Trustee. Furthermore, the court approved payment of creditors and rendered decisions on ending of bankruptcy proceedings. In addition, the court analysed the economic and financial situation of the debtor deciding whether there is a possibility for opening a bankruptcy procedure. It also made decisions on the amount of cost and rewards in bankruptcy procedure, to which the experts, the Temporary

17 Official Gazette, No 55/13

18 Official Gazette, No 53/91, 9/94, 54/94

19 Official Gazette, No 44/96, 29/99, 129/00, 123/03, 82/06, 116/10, 25/12, 133/12

20 Official Gazette, No 123/03

Bankruptcy trustee, the Bankruptcy Trustee and the members of the Committee of Creditors were entitled. It also decided on complaints, supervised the operational implementation of bankruptcy procedure, and the work of the Bankruptcy Trustee. In doing so, it controlled the filing of the creditor´s claims, monetization, keeping and forming of the bankruptcy estate and potential settlement of the creditors. In other words, the Bankruptcy Council or Bankruptcy Judge decided on all matters of bankruptcy procedure, except for those that are entrusted, according to law, to other bankruptcy body. We can state that the Bankruptcy Judges conducted and supervised the entire bankruptcy procedure as well as that their duties varied because they, apart from rendering decisions in bankruptcy procedure, also coordinated individual bodies of bankruptcy proceedings. The scope of his responsibility derives from this. In 1996, a process of reorganization was implemented as one of the possible ways of conducting bankruptcy procedure and was the only alternative to liquidation bankruptcy. The new BA in 2000[21] has replaced reorganization by a wider and more precise legal technical term, bankruptcy plan. The court had the power to create, adopt, supervise and fulfil the plan. The Act on Financial Operations and Pre-Bankruptcy Settlement (hereinafter: AFOBS)[22] has been implemented not only because of the existing implementation of BA that led to evanesce of the legal person, but also because there is a tendency towards the USA model of pre-negotiated bankruptcy of a debtor prescribed in Chapter 11 of US Bankruptcy Code. The aim is to provide the possibility to the debtor to restructure and resume with its operations. The fundamental difference between BA and AFOBS was reflected in the authorised bodies that were conducting this procedure. Croatian legislator has decided to delegate the pre-bankruptcy settlement procedure to a legal person with public authority, Financial Agency (FINA), rather than to the courts. That is a precedent in the entire Croatian history concerning bankruptcy procedures since 1840.[23] With the implementation of the AFOBS, the bankruptcy procedure in the Republic of Croatia has been substantially altered and there were lots of deficiencies. That was resolved by the adoption of the latest BA 2015.[24] The most important novelties are articles of Chapter II (Art. 21 to 74), according to which the provisions on the pre-bankruptcy settlement are transferred from the AFOBS to the BA as a pre-bankruptcy procedure, according to which FINA is the body of the pre-bankruptcy procedure

21 Official Gazette, No 129/00

22 Official Gazette, No 108/12, 144/12, 81/13, 112/13, 71/15, 78/15

23 Garašić, J., *Stečajni plan nakon izmjena i dopuna Stečajnog zakona 2012.,* in: Djelotvorna pravna zaštita u parničnom postupku, izazovi pravosudnih transformacija na jugu Europe, Zbornik radova u čast prof. dr. sc. Mihajla Dike, Pravni fakultet, Zagreb, 2013, p. 479

24 Official Gazette, No 71/15

but can only technically and administratively assist the court. [25] Thus, the body of pre-bankruptcy procedure is now a Tingle Judge and a Trustee (Art. 21) not the Settlement Council and a Trustee of pre-bankruptcy settlement (Art. 32 AFOBS). The pressure to reform the pre-bankruptcy settlement and to strengthen the role of the court, was intensified by the implementation of Art. 6 of the Convention and ECHR case law. Furthermore, the ECHR case law indicates that Art. 6 applies to bankruptcy procedures.[26] The first question from above mentioned discussion is the legitimacy of the de-judicialization process through the model of the pre-bankruptcy settlement because the bankruptcy-legal protection must be within the competence of the body defined by the Convention as a "tribunal".[27] Presently, only the court has those features. For this reason, the provisions which prescribed that FINA *de facto* and *de jure* decided in the pre-bankruptcy settlement procedure were deleted. According to the new provisions an independence of the court is crucial, and it is exercised by judges as a body of a state authority through the special rules of procedure. FINA has only auxiliary functions in the procedure. CBA was implemented in 2015 on financial recovery postulates. In the institute of bankruptcy plan and pre-bankruptcy procedure, as an alternative to liquidation bankruptcy, we observe certain similarities with the institute of bankruptcy against consumer´s property as they all try to achieve the "economic recovery" of the debtor (Article 2). However, the fact that the proceedings are brought into the jurisdiction of municipal (Article 21(1)) and not commercial courts, that traditionally conducted this type of proceedings, may be indicative since it is questionable whether courts, which are not specialized in this type of cases, can conduct these cases adequately. The need for specialization of the courts results from the need for effective judicial protection in bankruptcy procedure. There is a difference between the aims of a consumer and a corporate bankruptcy. *Differntia specifica* of consumer bankruptcy resulted in the courts greater discretional powers. *Exempli causa*, without analysing the institute of "right to home" since the topic is too complex and institutionally sensible, authors point out that the court may, due to a request of the debtor and under certain conditions, delay the sale of debtor's home that is necessary for his habitation during a period of verification of his good behaviour (Art. 64). This allows the courts to legitimately formulate social policy when they´re deciding on the matters of the case. In doing so they are not only deciding on legal matters because it is their aim to create a certain social policy through which they can engage more people than that is the case in dealing with an individual case (so-called, judicial activism). With the exception of the

[25] It should be noted that the role of the Commercial court in the pre-bankruptcy settlement procedure is described in Art. 66 of AFOBS, which has been emended three times

[26] *Ismeta Bačić v. Croatia,* No. 43595/06 (2008)

[27] *H. v. Belgium* 10 EHRR 339 (1987)

AFOBS and the fact that there are wide variations in professional standards of the organization of courts and judicial procedure, authors point that the legal standard of judicial jurisdiction in the general enforcement procedure is the result of an aspiration to achieve fairness in pursuit of accomplishing the purpose of bankruptcy procedure and realization of the principle of the equality of creditors, relativized by the existence of payment orders.

Currently, the EA requires that the enforcement procedure and the insurance procedure is conducted in the first instance by a single judge who also renders decisions, if it is not determined by the EA that the procedure is conducted, and decisions are rendered by a public notary. When the new EA entered into force, Article 10 corresponded to Article 10 of the EA from 1996. Significant changes were made only in the amendments of the EA in 2014 but were soon repealed. According to the amendments of 2017, the provisions that regulate decision making of council of three judges at first instance court, and a body that decides in a role of second instance body against certain appeals in an enforcement procedure, were also repealed. The above-mentioned regulation proved to be ineffective in practice, especially in courts where only a few judges decides. Besides, it has led to an unequal deciding on appeals. So, instead of the Council of the first instance court, the appeal proceedings are conducted, and decisions rendered by the Single Judge of the second instance court. However, the proposal of the draft of EA in 2019 redefines the above-mentioned provisions by determining that in the first and second instance of the enforcement procedure and the insurance procedure decisions should be rendered by a Single judges or Judicial Advisors, unless this Act determines that the procedure is conducted by a public notary (Article 11). A relatively broad scope of Judicial Advisor's jurisdiction leads to the questions about the constitutionality of the aforementioned provisions.

## 4. SETTING UP THE THESIS

By regulating that a simplified consumer bankruptcy procedure as well as enforcement procedure (draft) is placed under the jurisdiction of Judicial Advisors who are civil servants,[28] not judges, the party to the proceeding is denied the right to a tribunal established by the law, the right to a fair trial and right to equal protection guaranteed by the Constitution and Convention. In the opinion of the authors, this constitutional guarantee excludes the possibility that a Judicial Advisor can independently conducts a proceeding and renders a decision in the determination of the rights and obligations of the parties. Also, the tribunal is characterised not only in the substantive sense by its judicial functions, but also as to its member-

[28] Ordinance on Judicial Officers and Employees, Official Gazette, No 55/01, 156/04

ship.[29] So, although there are many similarities but also a significant difference between the function of judges and Judicial Advisors, primarily in the criteria of independence and impartiality, it is crucial that Judicial Advisors are not part of the judicial authority.

## 5. LEGAL SOURCES RELEVANT TO THE SUBJECT MATTER

The Constitution of Republic of Croatia[30] states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in determination of his rights … (Art 29(1)). Furthermore, the judiciary is performed by the courts (Article 115(1)), and the judicial duty is entrusted to the judges themselves. Judicial Advisors and jurors are conducting the trial according to the Law (Article 118). The doctrine indicates that although this provision provides the constitutional position of Judicial Advisors, the explanation of this is legally confusing. Nothing has been said about the status of a Judicial Advisors and why Judicial Advisors are participant in the court proceedings. It is not clear why are Judicial Advisors and jury in the same provision, when it comes to clerks who have a completely different role in the procedure and, furthermore, perform different tasks that are defined by completely different laws.[31] Furthermore, by its decision from 13th December 2016, the Constitutional Court did not accept the proposal to initiate proceedings for review the constitutionality of Article 13 of Civil Procedure Act because it concluded that that the disputed article does not give the Judicial Advisors the power to take a decision or, as the proposer wrongly stated, the power to adjudicate. Furthermore, Constitutional Court stated that decision-making must be independent process no matter if it is conducted by a judge or Judicial Advisor performing a duty of and for a judge.[32] Also, there is another case where the Constitutional Court has decided on the constitutionality of the participation of a Judicial Advisor in the enforcement procedure, concluding correctly that the adoption of the constitutional complaint in the present case would open Pandora's box of constitutionality of all decisions made in the procedures conducted by the Judicial Advisors.[33] Civil proceedings are the basic system of providing legal protection in civil court proceedings, which is generally applied, whenever there is no non-litigious procedure based on the

[29] *Buscarini v San Marino* ECHR, (dec.) (2000)

[30] Official Gazette, No 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

[31] Maganić, A., Hraste, L., *Različiti oblici rasterećenja pravosuđa u Republici Hrvatskoj - trebaju li Hrvatskoj Rechtspflegeri?,* Pravnik, vol. *46*, 2013., No. 1, p. 36-37

[32] Constitutional Court of Croatia, decision, no. U-I-2191/2005, 13th December 2016

[33] Constitutional Court of Croatia, decision, no. U-III/998/2009, from 19th March 2009

explicit legal regulation. In the pre-bankruptcy, bankruptcy and enforcement procedures, the rules of civil procedure are applied (Article 10 BA, Article 21 EA). However, the bankruptcy and enforcement proceedings are *sui generis* non-litigious procedures. In addition, Civil Procedure Act[34] states in Article 13(1) that Judicial Advisors are authorized in the first instance to conduct civil proceedings, to assess the evidence and to establish the facts. The Judicial Advisor shall submit to the judge, who is authorized by the president of the court, a written proposal based on which the judge shall render a decision. In the introduction of the decision it shall be stated that the decision was rendered on the proposal by a Judicial Advisor. (2) if the proposal given by the Judicial Advisor is not accepted, the competent judge shall conduct proceedings himself. (3) Judicial Advisors are authorized in civil proceedings to conduct proceedings and propose a decision to the judge in disputes for the payment of monetary claims, if the value of the subject of the dispute does not exceed 50,000.00 HRK, or in commercial disputes if the value of the subject of the dispute does not exceed 500,000.00 HRK. (4) In second instance proceedings and proceedings conducted upon extraordinary legal remedies, Judicial Advisors shall report on the state of the case file and prepare a draft of the decision. Assuming that the number of proceedings in which dissatisfied judges don't accept the drafts of the decision issued by Judicial Advisor and independently conduct the proceedings, is equal to zero or ultimately very low and, that at the same time Judicial Advisors take part in the conducting of a large number of small value dispute proceedings, authors reach the conclusion that the work of Judicial Advisors in reality is fully in line with the work and powers of judges, although their position in the judiciary system is fundamentally different from the position of a judge.[35] Nevertheless, from the legislator`s point of view this is a legitimate way of ensuring efficient use of judicial potential, while the regularity of a such procedure is guaranteed, in the proceedings conducted by the supervisory of the competent judge.[36] An interesting situation is when person who did not have the status of a judge took part in the rendering of the judgment (Art. 354(2)(1)). The court of second instance is paying attention to the substantial violations of civil procedure rules within the limits of the grounds specified in the appeal of the party (Art. 365(2)). In Croatia's procedural legal doctrine, in the situation where in decision making process is participating a person who is not a

[34] Official Gazette, No 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14 hereinafter: CPA

[35] See, Jelinić, Z., *O nedostacima i održivosti postojećih pravila o vrijednosti predmeta spora u hrvatskom građanskom procesnom pravu, Zbornik Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravno teorijska i praktična dostignuća*, Pravni fakultet, Split, 2017, p. 225

[36] Explanation of the Final Proposal of the Law on Amendments to the Civil Procedure Act,2013, [http://www.sabor.hr, PZ_216.pdf] Accessed 12.02.2019, p. 24

judge (e.g. Judicial Advisor) that decision is *de facto* non-existent. However, the CPA does not contain provisions on a non-existent judgement, which contributes to the formation of various legal arguments about what act might be submitted under the theoretical notion of a non-existent judgement. In addition, Dika noticed different situations, which accordingly could have different consequences. He also points out the situation where a Judicial Advisor participated in the decision-making process, while distinguishing the situations when the Judicial Advisor rendered a decision and signed it in this capacity (so the parties would be familiar with that circumstance) and, if a Judicial Advisor signed his decision by declaring himself as the judge. As to the first type of decision, parties could lodge a complaint, revision or a motion for a retrial. When there is no more possibility of lodging of such remedies (*exempli causa*, because of the expiration of deadlines for submitting a legal remedy) this decision still can be treated as being non-existent, or as one that can never be legally effective. With regard to the second situation, when the Judicial Advisor rendered a decision as a judge or declaring himself as a judge signing the decision, then that is a forgery, an act that should be treated equally as other out-of-court forgeries.[37] In this context, the issue of legal certainty for the parties is raised in terms of providing quality legal protection against the acts that claim to be judicial decisions, and *de facto* are not. Nevertheless, the Croatian Supreme Court has decided even before the Amendments to the CPA in 2003 that the Croatian proceeding system doesn´t have theoretical constructions of the non-existent decision and that participation in the proceedings of a person who doesn´t have the capacity of a judge means the substantive violation of civil procedure.[38] Failure to prescribe a notion of a non-existent decision and a failure by the party under the positive law regulations to fail a complaint because of the substantive violation of civil procedure, would have the effect of the finality of the decision and thus granting legal effect to the decision rendered by a person that is not a judge or where such person has conducted the proceedings contrary to the Constitution and laws of state.[39] The provisions of LC, that have entered into force at the beginning of the year, states, as mentioned above, introduced into the existing system of Judicial Advisors, Judicial Advisors - specialists. The reason for the introduction of new type of Judicial Advisors lies in the effort to separate the

[37] See, Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2004, p. 134-137; Triva, S.; Belajec, V.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 1986, p. 564-565

[38] Supreme Court of the Republic of Croatia, Gž 1738/79 – PSP 16/197 a case conducted by an associate. Source: Tironi, I.; Tironi, Z., *Bitne povrede odredaba zakona o parničnom postupku i nacrt novele iz 2018.*, Zbornik radova s IV. međunarodnog savjetovanja Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, Pravni fakultet, Split, 2018, p. 351-355

[39] Triva; Dika, *op. cit.,* note 35, p. 690-691

powers of Judicial Advisors and to create a special system of the promotion of these officials, who under the Constitution of the Republic of Croatia, participate in the proceedings. Article 109(3)(4) of LC, that is not in force, stated that function of Judicial Advisors can also perform state attorney's adviser who has not been, until recently, covered by these provisions. It also prescribes powers of Judicial Advisors, Senior Judicial Advisors and Senior Judicial Advisors - specialists, by enabling the possibilities for their independent undertaking of certain actions in court proceedings according to their complexity, types of proceedings or the value of the subject matter of the dispute. The position of Judicial Advisors is thus strengthened by the expansion of their existing powers. However, the provision of Article 110(5), which is disputable, explicitly stipulates that Judicial Advisors and Senior Judicial Advisors are authorized to conduct the proceedings and render the decisions in specific proceedings when it is prescribed by special laws, e.g. EA (draft) of CBA.

From the perspective of European law, accepting the fact that case law of the ECHR affirms the principle of precedent and thus the case law as a formal source of law, authors point out the importance of judgment of *Ezgeta v Croatia*.[40] The applicant complained that the judgement in the civil proceedings violates Article 6, because it was rendered by Judicial Advisor who had not been authorised to do so under the relevant domestic law. The ECHR found a violation of the right to a fair trial, stating that the composition of the court in each case should be in accordance with the law. Considering that Judicial Advisors, according to the positive laws of the Republic of Croatia, were not authorized to conduct the procedure, ECHR found a violation of Article 6, because the judgment in the domestic proceedings was not rendered by a court established by law. Furthermore, as there are no EU directives and regulations on the issue, the relevant standards are based on various acts adopted by the United Nations and relevant Council of Europe bodies, such as the Council of Ministers and the Council of Europe Judges (CCJE), as well as the Venice Commission. The Venice Commission has concluded that the standards in this area are outnumbered. This guarantee should be understood as a system that ensures a balance between the state authorities and prevents misreading and / or misuse of the concept of judicial independence.

Furthermore, if a comparative legal method is a necessary for mutual dialogue and harmonization of national systems we must also consider case law of other EU member states. *Exempli causa*, the Supreme Court of Iceland found unconstitutional and contrary to the Convention case on participation of Icelandic Judicial Advisors, who were co-operating with the judges in preparing for a future career

[40] ECHR, Case no. 40562/12 (2017)

as judges, but in practice began to do the same work as judges, in spite of the fact that they are not independent as judges and that they are under the jurisdiction of the Ministry of Justice that may indirectly or directly influence their action. Such practice, which is very similar to the current Croatian practice, was found to be a violation of the right to a fair trial.[41]

## 6. CONCLUSION REMARKS

The issues of the enforcement procedure and the consumer bankruptcy procedure in the Croatian legal system are complex from both theoretical and legal point of view. It is also a complex decision-making process of the most important rights and legally recognized interests of the persons involved. However, according to nomothetic rules and certain legislative solutions, authors point out a legally questionable solution according to the Constitution and ECHR that authorize Judicial Advisors to conduct enforcement procedure and simplified consumer bankruptcy procedure. So, deciding whether Judicial Advisors are authorised or not to conduct enforcement procedure and simplified consumer bankruptcy procedure, is problematic, because the coexistence of these two standpoints is not possible and one would have to replace the other. In principle, in Croatian legal system such regulation is justified, but the authors will, nevertheless, support the thesis that Judicial Advisors do not have, from the perspective of constitutional and convention laws, the right to independently conduct the proceedings and to render decisions. Bearing in mind the complexity of this thesis and accepting the fact that there are arguments *pro et contra,* we conclude that ultimately the decision depends on the "weights" attributed to one or the other group of arguments, and that ″weight″ could also be questionable. Deciding on this matter could be explained through the following argumentation. Consumer bankruptcy does not have a long legal tradition, so at the institutional level it is necessary that the courts (judges) resolve the legal conflicts. Moreover, the EA from 1996 has been changed almost every two years, so it is also difficult for experienced judges to determine which rules are applied in each and particular case. However, judges by their interpretation and application of the rights to a particular case contribute to the shaping of new views on these complex legal instruments. With such extension of the rights of Judicial Advisors, independence of the judiciary becomes improperly interpreted. So, a dissemination of judicial independence to the position of Judicial Advisors, that is by its own very nature and its role different from the judiciary, results in a sort

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41 Uzelac, A., *Pravo na pravično suđenje u građanskim stvarima: nova praksa Europskog suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 60, No. 1, 2010, p. 24

of judicial corporatization with predominantly quantitative instead of qualitative decision-making process.

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# COLLECTIVE REDRESS IN THE EUROPEAN UNION – CURRENT ISSUES AND FUTURE OUTLOOK

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***ABSTRACT***

*The recent initiative of the European Commission (hereinafter: EC) to empower consumer organisations to seek compensation on behalf of a group of consumers that have been harmed by an illegal commercial practice by way of introducing a Proposal of a Directive on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC (hereinafter: the Directive Proposal), if successful, should mark a new era of collective redress at EU level. In the light of these developments, the paper will first present the background of the Proposal, the present state of EU collective redress mechanisms. It will focus on current issues, such as cross-border collective redress litigation in the context of Brussels I (Recast) Regulation. Namely, after the 'Dieselgate' scandal providing for efficient cross-border collective redress mechanisms at EU level has been recognized as one of the main regulatory challenges. Although at this point the outcome of the EC's initiative is uncertain, the central part of the paper will evaluate the crucial aspects of the Proposal. The conclusion will address key findings and emphasize possible effects of the proposed changes on the future redress opportunities for EU consumers.*

***Keywords:*** *Collective redress, Brussels I (Recast) Regulation, representative action, compensation, the Directive Proposal*

## 1. INTRODUCTION

Reasons to modernise and replace Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer's interests[1] (hereinafter: Injunctions Directive) with an advanced piece of legislation are to be found in difficulties in obtaining protection of collective interests in both national and cross-border context. National systems either lack mechanisms for protection of collective interests of consumers and where such mechanisms are in place, they are usually ineffective, undeveloped or infrequently

[1] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer's interests, OJ L 110, 1.5.2009

used.[2] Even if the national mechanism in place has potential to provide for effective and efficient procedure, it is often tailored in such a manner that it hampers its practical use.[3] Regardless of the importance of providing for an adequate mechanisms for stopping cross-border infringements of collective consumer interests (such as in *Dieselgate*[4] and *Verein für Konsumenteninformation v Amazon EU Sàrl* [5] and *Henkel KGaA* [6] case), the Injunctions Directive's potential in this regard has not been fully exploited. A part of the problem can be traced to the diversity and incompatibility of the national provisions, while another part can be attributed to the complexity and particularity of providing cross-border protection of consumer interests and issues attached to it. Rules providing for cross-border protection pertain to the field of private law while collective redress can be placed between the field of private and public law, especially considering the fact that enforcing rights collectively encompasses public interest.[7] Certain specific characteristics of collective redress also hinder application of EU instruments in the area of judicial cooperation in civil matters created for obtaining cross—border protection in individual disputes. More specifically, Regulation (EU) 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[8] (hereinafter: Brussels I bis Regulation) contains rules on jurisdiction, recognition and enforcement of individual judgments and as such its application in regard to the position of the members of the group as plaintiffs, jurisdiction, applicable law, types of measures, decisions delivered in collective redress proceedings (judgments

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2 See Hodges, C., *Collective Redress: A Breakthrough or a Damp Sqibb?* Journal of Consumer Policy, *Vol.* 34, 2014, p. 67–89

3 See Croatian injunctions procedure in *Franak* case. Judgment of the Commercial court in Zagreb, no. 26.P -1401/2012 from 4 July 2013; Judgment of the High Commercial court, no. 43.Pž-7129/13-4; Judgment of the Supreme court of the Republic of Croatia no. Rev 300/13-2 from 17 June 2015. For a detailed explanation of the Croatian injunctions procedure and *Franak* case see Study on the State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation, JUST72016/JCOO/FW/CIVI/0099, 2017 (hereinafter: Study on the State of Collective Redress in the EU)
Available at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847] Accessed 01.03.2019

4 Dieselgate case, consumer organisation Test Aankoop/Test Achats introduced a class action against VW before the Brussels Court in 2017

5 CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612

6 CJEU, Case C-218/01, Henkel KGaA, 12 February 2004, ECLI:EU:C:2004:88

7 For a broader discussion on the balance between public and private enforcement of collective consumer interests see Hodges, C., *Collective Redress in Europe: The New Model*, Civil Justice Quarterly, *Vol.* 29, No. 3, 2010, p. 370.

8 Regulation (EU) 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 December 2012.**

and settlements), the *res judicata* effect of the judgments and its recognition and enforcement in other Member States. Due to the complexity and wideness of issues, recognition and enforcement of judgments delivered in third countries in Member States will not be discussed in the paper.

In the light of the above, the paper will analyze novelties introduced by the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[9] (hereinafter: Directive Proposal). The potential of the Directive Proposal in eliminating obstacles to the effective cross-border protection of collective interests of consumers, especially in regard to the issues such as position of the plaintiff (members of the group), jurisdiction and recognition and enforcement of judgments delivered in other Member States will be discussed. It will conclude with the evaluation of the legislative approach chosen by the European Commission (hereinafter: EC) which failed to address issues of international jurisdiction, applicable law and recognition and enforcement of judgments in other Member States[10], which already provoked resistance and criticism.[11] The significance of providing for such rules was emphasized by the Advocate General Bobek (hereinafter: AG Bobek) in case *Maximilian Schrems v Facebook Ireland Limited*[12], when he indirectly called for clarifications from the policymaker on this aspect and highlighted that 'the issue is too delicate and complex. It is in need of comprehensive legislation, not an isolated judicial intervention within a related but somewhat remote legislative instrument that is clearly unfit for that purpose'.[13] The question whether providing for key procedural elements of the future representative action for injunctive and compensatory relief while leaving much leeway to the national legislator to shape final procedural solutions[14] will result in the intended effect will also be elaborated in detail. The 'procedural autonomy' of the Member States warrants such legislative approach since the authority of the EU to introduce procedural measures stays at the borders of the Mem-

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9 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final, 11.4.2018.

10 Recital 9 of the Preamble Directive Proposal

11 However, the draft Directive once again fails to clearly solve the issue of private international law rules applicable for the resolution of mass cases, in particular rules concerning jurisdiction, recognition and enforcement of judgements and applicable law. Biard, A., *Collective redress in the EU: a rainbow behind the clouds?* ERA Forum, *Vol.* 19, Issue 2, 2018, p. 189–204, pp. 201

12 CJEU, C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37

13 Opinion of Advocate General Bobek in case C-498/16 Schrems v Facebook Ireland Ltd, 14 November 2016, EU:C:2017:863, para. 123

14 Directive Proposal, Context of the proposal, pp. 4

ber States autonomy to independently shape their procedural law.[15] The Directive Proposal is based on Art 114 TFEU (Lisbon) and is intended to contribute to the establishment and functioning of the single European market by providing for a high level of consumer protection. Since the Proposal is delivered as a Directive and at the same time should provide for national and cross-border dispute resolution schemes[16], the legitimacy and the limits of the authority of the EU can be questioned.[17] Under presumption that it is a minimum harmonisation directive[18], allowing Member States to make the procedure more favourable to consumers and to maintain their own systems, some critics warn that this might lead to significant variation in how the representative action operates in different national systems and at cross-border level.[19] In this sense, attention should be given to concerns that the heterogeneity of national solutions might reduce efficiency of the future Directive in providing protection of collective interests, in both national and cross-border context.[20]

## 2. THE POSITION OF THE PLAINTIFF

Regulating the position of the plaintiff in collective redress proceedings is complex due to the search for the adequate representative of the interests of the members of the group. The barriers for initiating individual proceedings which cause rational apathy, such as the duration, costs and fear of unequal treatment of the plaintiff were all taken into account by national legislators in designating qualified entities for initiating collective redress proceedings. Along with the open issues attached to the designation of qualified entities in collective redress proceedings, it is neces-

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15 See Poretti, P., *Postulati prava EU u građanskom parničnom postupku – Očekivanja nasuprot realnosti*, Yearbook of the Croatian Academy of Legal Sciences (to be published), pp. 1-2

16 See Recital 8 of the Preamble Directive Proposal

17 See Krans, B., *EU Law and National Civil Procedure*, European Review of Private Law, *Vol.* 4, 2015, p. 567–588, pp. 569-571.; van Duin, A., *Metamorphosis? The role of Article 47 of the EU Charter of Fundamental Rights in cases concerning national remedies and procedures under Directive 93/13/EC*, Amsterdam Law School Legal Studies Research Paper No. 2017-37; p. 1-16; Kruger, T., *The Disorderly Infiltration of EU Law in Civil Procedure*, Neth Int Law Rev, *Vol.* 63, 2016, p. 1–22

18 See wording of Art 1/2 Directive Proposal

19 Class and Group Actions 2019|EU Developments in Relation to Collective Redress [ttps://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/eu-developments-in-relation-to-collective-redressg Accessed 04.03.2019. (hereinafter: Class and Group Actions 2019)

20 See The European Consumer Association for instance views it as 'only a first step but not a fully-fledged collective redress scheme across the EU'. In particular, it feared that 'Member States will be given too much discretion to decide which cases are fit for a collective redress procedure and which are not'. BEUC, New deal for consumers—clear improvement but not the needed quantum leap, 11 April 2018 [http://www.beuc.eu/publications/%E2%80%98new-deal-consumers%E2%80%99-%E2%80%93-clear-improvement-not-needed-quantum-leap/html] Accessed 06.03.2019

sary to also consider the possibilities which such regulation creates for providing adequate protection of collective interests of consumers. The established differentiation of the group and representative action provides for a division between individual plaintiffs (natural persons) who are joined in order to obtain protection of their individual interests and consumer organisations or other entities qualified to represent interests of members of a group of consumers. This is especially obvious in legal system where a redress order is available in collective consumer redress procedures. A group action is brought by an individual plaintiff who represents his own interests as well as interests of the members of the group. In such a case, the plaintiff is identified without difficulty. When a representative action is brought, a qualified entity such as a consumer organization or an independent entity represents interests of members of the group, without their active participation in proceedings. These discrepancies in the rules in collective redress proceedings of different Member States create obstacles in regard to the recognition and enforcement of judgments in the Brussels I bis regime. Alongside relevant legal theory, this view was also confirmed by the CJEU in *Schrems case*.[21] The EC first attempted to resolve these issues by introducing the Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[22] (hereinafter: EC Recommendation). As the Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[23] has shown, Member States failed to make efforts and follow the EC Recommendation regarding removal of the existing obstacles to effective national and cross-border collective redress outside the existing legislation for implementation of the Injunctions Directive. In the context of cross-border or even EU-wide infringements, this could lead to different results depending on the Member State where judgments will be rendered. This situation could incentivise forum shopping, where, in a case of a clear cross-border nature, potential claimants will address their claim where the possibility for success seems higher. In

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21 Fairgrieve, D., *The impact of the Brussels I enforcement and recognition rules on collective actions*, in: Fairgrieve, D.; Lein, E. (eds.), Extraterritoriality and Collective Redress, Oxford University Press, 2012, p. 171-189

22 Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the member States concerning violations of rights granted under Union Law, OJ L 201/60, 26 July 2013

23 Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, COM(2018) 40 final

addition, other risks were identified, such as the risk of double compensation or, indeed, of conflicting decisions.[24]

It is argued that the Directive Proposal seems to be able to improve the ruling of the legal standing, as it includes *public bodies* and *ad hoc organisations* which are not entitled to bring forth an action in some Member States, like France. [25] The validity of the argument can best be evaluated if provisions of the Proposal are compared to the rules on standing as provided under EC Recommendation and in the national legal systems of Member States. Along with the general requirement that legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities, under the EC Recommendation, the representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner (arg ex Recital 18 of the Preamble). Point 4 of the EC Recommendation specifies that the conditions should include at least the following requirements: (a) the entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

Would introduction of additional criteria such as the organizational capacities of qualified entities or a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought insure a higher level of representativeness of the qualified entities? The results of the research into national legal systems show that in the majority of Member States the only criteria applied are the legitimate interest and the non-profit character of qualified entities (organizations and entities).[26] As it follows from the position of the Member States, the standard of

[24] Finally, two respondents from AT expressed concern that the protective consumer jurisdiction rule of the Brussels I bis Regulation do not apply to representative entities. *Ibid*, p. 11

[25] Collective redress in the Member States of the European Union, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union PE 608.829, 2018, p. 81. (hereinafter: Collective redress in the Member States of the EU)

[26] In some cases, namely in the Austrian model of group litigation, there are no specific provisions or restrictions as to standing. Hence, the Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the entity and the rights granted under Union law, sufficient capacities) are currently not met. In some other States, legal standing is restricted to a slate of legal persons. Among these, Belgium offers legal standing to private legal persons (such as consumer organisations and associations with a corporate purpose directed at collective damages) and public

representativeness should not be tightened. Namely, none of the Member States decided to introduce in the course of EC Recommendation implementation process. It seems that the EC was guided by the Member States' approach and introduced solely the standards of proper establishment, non-profit character and a legitimate interest in ensuring compliance with the relevant EU law (arg ex Art 4/1 Directive Proposal). Also, concerns have been raised that regardless of the requirement that Member States, on the regular basis, assess whether the qualified entity continues to comply with the minimum criteria, the Directive Proposal is not clear on the implications of a qualified entity losing its designated status during ongoing litigation.[27] If one takes into account that the implications of a party losing its status are usually provided under the civil procedural laws of Member States, it does not seem crucial to include similar provisions in the Directive Proposal.

However, the freedom left to Member States to set rules specifying which qualified entities may seek all of the measures (both injunctive and compensatory redress) and which qualified entities may seek only one or more of these measures might lead to potential problems (arg. *ex* Art 4/4 Directive Proposal). Again, depending on the limits set by the national legislator to certain qualified entities, this might lead to differences in the potential for development of the jurisprudence in Member States. Which qualified entities will be designated to represent collective consumer interests, in which type of procedure and to which extent will depend on the choices of the national legislator. For Croatia, a clarification that Member States should empower public authorities to bring representative actions, in addition, or as an alternative, as provided under EC Recommendation, would be welcome (arg. *ex* p. 7 EC Recommendation). Currently, under the Croatian Consumer Protection Act[28] (hereinafter: CPA) in relation to the Decision on entities and persons entitled to initiate proceedings for collective protection of consumer

persons (the Federal Ombudsman), whereas France limits the legal standing to certified associations, except for health group actions where an *ad hoc* certification can be conferred, and unions amongst other persons having standing to sue, according to the subject-matter. Between the two systems, Bulgaria, in coherence with the horizontal approach recognises standing to any harmed person or organisation established with purpose to defend the interests allegedly infringed. Croatia offers legal standing to (legal) entities and persons with justified interest in consumer collective redress, such as consumer organisations and public authorities (arg. *ex* 107/1 CPA). See Study on the State of Collective Redress in the EU, *op.cit.,* note 3., p. 11-13

27 Class and Group Actions 2019, *op. cit.,* note 19. In comparison, the Directive Proposal in p. 5 sets out a request that the Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met

28 Consumer Protection Act, Official Gazette No. 41/14, 110/15, 14/19

interests[29] (hereinafter: Decision) several ministries (as state bodies) are qualified to initiate consumer collective redress proceedings. In contrast, only two consumer organisation alliances were considered eligible to represent collective consumer interests (arg. ex Art.107/3 CPA). The inaction of ministries as qualified entities, and the questionable level of their independency are often repeated arguments in the discussion on the (in)adequacy of Croatian legislation on collective redress.[30] In this sense, implementation of the EC Recommendation would have brought the desired 'hierarchy' between consumer organisations and ministries as qualified entities, and possibly, even amendments to the current provisions. The Directive Proposal fails to uphold this idea, and requires Member States only to ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entities (arg. ex Art 4/3 Directive Proposal).

Provision of Art 4/3 Directive Proposal is considered as capable of strengthening cross-border protection, as it provides that international consumer organisations are eligible to be qualified by the Member States.[31] Under Croatian law, the availability of cross-border consumer collective redress exists only under provisions of CPA (arg ex Art 107/3-7 CPA). However, there is no record of cross-border collective redress proceedings against traders with a seat in Croatia.[32] The fact that the legal drafting of provisions on cross-border collective redress in the CPA is imperfect and imprecise should be taken into account in the discussion on the possible reasons for the lack of relevant case law.[33] Although the possibility for the Member States to designate consumer organisations that represent members from more

[29] Decision on entities and persons entitled to initiate proceedings for collective protection of consumer interests, Official Gazette No. 105/14 (Odluka o određivanju tijela i osoba ovlaštenih za pokretanje postupaka za zaštitu kolektivnih interesa potrošača), 29 August, 2014

[30] Uzelac A. *Why no Class Actions in Europe? A View from the Side of Dysfunctional Legal Systems,* in: Harsági, V.; van Rhee, C.H. (eds.), Multi-Party Redress Mechanisms in Europe: Squeking Mice? Cambridge - Antwerp – Portland, Intersentia, 2014, p. 53-74, pp. 59. Study on the State of Collective Redress in the EU, *op. cit.* note 3, p. 472

[31] Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 81

[32] European Commission, Evaluation Study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, JUST/2014/RCON/PR/CIVI/0082, European Union, 2017, p. 461(hereinafter: the Evaluation Study of EU consumer law)

[33] The provision of Art 107/5 CPA is in accordance with the rules on jurisdiction (Art 4, the domicile of the defendant) of the Brussels I bis Regulation, and provides for a possibility for the consumer organisations from other Member States to initiate proceedings against traders in Croatia (as provided in Art 106/1 CPA). At the same time, the possibility provided under Art 107/6 CPA for the proceedings provided under Art 5 to be initiated against a trader with the seat outside Croatia and whose actions infringe Acts provided in Art 106/1 CPA, is not clear. The former provision contains no regulation of proceedings. Additionally, it is uncertain whether the said proceedings could be initiated against a foreign or Croatian trader with a seat outside Croatia and who would be entitled to initiate it

than one Member State as qualified entities is seen as progress towards effective cross-border collective redress, its effect will depend on the will of Member States to include it in their national legislation. This solution has certain resemblance to the BEUC's proposal for strengthening cross-border consumer collective redress according to which 'a further group of associations that have standing in all cases within the European Union could be established. Such associations could be registered at EU level under certain uniform requirements. For example, one could use the three requirements with a view to their EU-wide application:

The Commission shall provide a list of EU-qualified entities that have standing to bring actions in all Member States within the scope of this [Directive/Regulation] if there is sufficient relationship between the alleged violation and the objectives of the entity. Any legal person may apply to the Commission for inclusion in this list and will be included if it has legal personality under the laws of a Member State, and has a non-profit making character.'[34] This proposal provides a more detailed approach in ensuring an EU wide enforcement layer that would guarantee at least the possibility of an intervention by such EU-wide entities, if the national systems do not provide sufficient enforcement in a particular case.[35] It can only be speculated where the EC's reason for not considering this proposal lie and whether its non-acceptance signals that it goes beyond the limits of the EU's authority to impose solutions in the field of procedural law.[36]

## 3. JURISDICTION

The jurisdiction issue in the context of collective cross-border litigation has been widely discussed in the legal literature.[37] The general view seems to be that the current instruments do not provide for adequate solutions. Although the Injunctions

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34 Rott, P.; Halfmeier, A., *Reform of the Injunctions Directive and compensation for consumers*, Study commissioned by BEUC, Ref: BEUC-X-2018-022 – March 2018, p. 12

35 *Ibid*.

36 A similar view is already expressed in a Study assessing the current state of play of collective redress commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs that procedural law is such a delicate issue, and because it is sphere of competence which Member States are not ready to share with the EU, the instrument should not detail the course of the proceedings. The details of the proceedings should be left for Member States to determine. Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 69

37 See Lein, E., *Cross-border collective redress and jurisdiction under Brussels I: A mismatch*, in: Fairgrieve, D.; Lein, E. (eds.), Extraterritoriality and Collective Redress, Oxford University Press, 2012, p. 129-142; Stadler, A., *Die grenzüberschreitende Durchsetzbarkeit von Gruppenklagen*, in: Casper, M. *et al.* (eds.), Auf dem Weg zu einer europäischen Sammelklage?, Sellier, 2019, pp. 149-168; Stuyck, J., *Class Actions in Europe? To Opt-in or to Opt-out that is the question?*, European Business Law Review, *Vol.* 20, Issue 4, 2009, pp. 483–505

Directive was supposed to enable qualified entities to seek an injunction in front of the court of another Member State, in reality it was applied seldom.[38] Provisions of consumer collective cross-border litigation, which were created in the process of implementation of Injunctions Directive, follow the approach of the most Member States, which do not provide specific provisions on jurisdiction.[39] A sort of an attempt was made by the Croatian legislator to introduce provisions on jurisdiction in collective cross-border litigation (arg. ex Art 110/3 CPA). In consumer collective redress proceedings initiated against a person which does not have general territorial jurisdiction in Croatia, commercial court at the place where provisions of Article 106/1 CPA have been or might have been infringed, that is, commercial court at the place where harmful consequences or damages have occurred has territorial jurisdiction (arg. ex Art 110/3 CPA). This is a problematic provision. There is no general territorial jurisdiction *of a person* under Croatian law, and hence, this is a mistake. Instead of general territorial jurisdiction *of a person* it should be set out that 'in cases in which under the ordinary rules on jurisdiction there is no general territorial jurisdiction *of a Croatian court* over a person'. Croatian legislator departed from the general *actor sequitur forum rei* rule and provided a special jurisdiction ground which not only allows for a possibility of a legally allowed 'forum shopping' but at the same time determines both 'international' and 'territorial' jurisdiction.[40] Namely, as the CJEU concluded in relation to provision 7/2 Brussels I bis Regulation (which corresponds to the provision of Art 110/3 CPA) it is either the place where the harmful event giving rise to the damage occurred or the place where the actual damage occurred[41], and the plaintiff is free to decide between the options. The fact that it aims at establishing jurisdiction of a court which has a particularly close connecting factor or link between the dispute and the court called upon to hear and determine the case[42], can be offered as an argument in favour of the rule. However, the provision of Art 7/2 Brussels I bis Regulation which also gives an option to sue the defendant in the courts for the place where the harmful event occurred, was criticised for its potential to prompt parallel proceedings. Multiple victims with damages in different Member States

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[38] Proposal for a Directive on Representative Action, BEUC position paper, Ref: BEUC-X-2018-09423/10/2018, p. 10, [https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf] Accessed 03.03.2019 (hereinafter: BEUC position paper)

[39] An exception is the German Capital Market Model Case Act of 2005 which provides for exclusive jurisdiction at the seat of the issuer who disseminated misleading information (§ 32b ZPO). Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 94

[40] Dickinson, A.; Lein, E., *The Brussels I Regulation Recast*, Oxford University Press, 2015, p. 132

[41] CJEU, C-21/76, *Handelskwekerij G.J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166, 30 November 1976

[42] Recital 16 of the Preamble Brussels I bis Regulation. See Bosters, T., *Collective Redress and Private International Law in the EU*, Springer, 2017, p. 229.239.

cannot consolidate their claims before one single court under these provisions. On the contrary, it allows the victims to sue the defendant in parallel proceedings in different Member States and each decision to be rendered will compensate the sole damage suffered locally.[43] As to the place where the harmful event was committed, it coincided in *Mines de potasse d'Alsace* with the defendant's seat, leaving eventually no choice for the plaintiffs. Such an outcome is not exceptional, because in practice the place of the causal event frequently coincides with the domicile of the defendant. Although it allows the consolidation of multiple claims, it does not provide the plaintiffs with any alternative to Art 4.[44] Also, as *eDate Advertising GmbH and Olivier Martinez/Robert Martinez*[45]case revealed, if the criteria of the 'centre of interest' of the group of harmed plaintiffs is invoked, there might be a problem in detecting where this centre lies. The habitual residence of the harmed plaintiffs comes to mind here, but it is questionable whether it would be an optimal choice. As the CJEU underlines, a person may have his centre of interest in the Member States in which he does not habitually reside, in so far as their factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with this State.[46]

Further limitation to initiating collective cross-border proceedings stems from the application of the Brussels I bis Regulation rules on establishing jurisdiction and recognition and enforcement of judgments delivered in Member States. There were certain expectations that in the process of structuring the Recast, specific rules on collective cross-border litigation will be introduced, including rules on jurisdiction. These expectations have not been met.[47] Hence, there is a prevailing view in the legal literature, which is also supported by the research into the relevant case-law, that the application of the rules on jurisdiction of the Brussels I bis Regulation are inadequate and further exacerbate the conduct of these proceedings.[48] The specific characteristics of the collective redress proceedings in which a qualified entity initiates proceedings, representing the interests of the members of the group, allows for limited application of the existing rules of the Brussels I bis Regulation. Upon examination of the applicability of rules provided under Brussels I bis Regulation, it was detected that the general jurisdictional rule

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43 See Danov, M., *The Brussels I Regulation: cross-border collective redress proceedings and judgments,* Journal of Private International Law, *Vol.* 6, 2010, pp. 359-393, p. 368

44 Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 98; Lein, *op. cit.,* note 37, p. 134

45 CJEU, C-509/09 and C-161/10, *eDate Advertising GmbH and Olivier Martinez/Robert Martinez*, ECLI:EU:C:2011:192, 29 March 2011

46 C-509/09 i C-161/10, *eDate Advertising GmbH and Olivier Martinez/Robert Martinez,* p. 49

47 Bosters, *op. cit.,* note 42, p. 3

48 *Ibid.*, p. 235-239; Lein, *op. cit.,* note 37, p. 141; Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 97

(domicile of the defendant) laid out in Art 4 Brussels I bis Regulation is still the most appropriate ground for jurisdiction in collective cross-border proceedings. It enables persons domiciled in a Member State, regardless of their nationality, to sue before courts of that particular Member State. Besides the obvious advantage for the defendant, who is considered as a weaker party in individual proceedings, to access court without difficulty, there are certain disadvantages for the consumers as plaintiffs, as actual weaker parties in collective cross-border litigation.[49] Proceedings in a foreign country induce additional costs and risks and can therefore have a deterrent effect on plaintiffs.[50] Due to the existing divergences in the functionality of the national systems, this rule will be adequately applied only in Member States which do provide for effective collective redress mechanisms.[51] Given the above, the fact that the Directive Proposal makes no attempt to introduce specialized solutions of the jurisdictional issue is criticised.[52] It is therefore important to examine the possibilities to bring a representative action in collective cross-border proceedings set out in the Directive Proposal in the jurisdiction established under Brussels I bis Regulation, as provided under Art 2/3 Directive Proposal.

The Directive Proposal might not set out jurisdictional rules, but it does aim at providing for more coherence between the mechanisms of collective redress. In this sense, the concern that the application of Art 4 Brussels I bis Regulation provides a safe-haven in Member States which do not provide for effective collective redress mechanisms might be mitigated if not eliminated completely.[53] Although the provision according to which Member States with the option to designate as qualified entities consumer organisations which represent members from more than one Member State (arg ex Art 4/3 Directive Proposal) was interpreted as an attempt to facilitate cross-border collective redress[54], without eliminating the obstacles created by the application of Brussels I bis Regulation, a significant change cannot be accomplished. The theoretical discussions so far ruled out the possibility to rely on jurisdiction ground other than as provided under Art 4 and 7/2 Brussels I bis Regulation. This was also confirmed by the CJEU. So, in the light of the possibility provided under Proposal Directive for a qualified entity to bring a representative action seeking injunction and/or compensatory redress it is interesting

[49] Usually, the defendant of a collective action is in an economically strong position. Lein, *op. cit.,* note 37, p. 133. See Danov, *op. cit.*, note 43, p. 365

[50] Collective redress in the Member States of the EU, *op. cit.,* note 25, 97

[51] See Nuyts, A., *The Consolidation of Collective Claims Under Brussels I,* in: Nuyts; Hatzimihail (eds.), Cross-Border Class Actions. The European Way, Selp, 2014, p. 69 f. (72)

[52] BEUC position paper, *op. cit.,* note 38, p. 10

[53] Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 97; Stadler, *op. cit.,* note 37, p.159

[54] BEUC position paper, *op. cit.,* note 38, p. 10

to analyse a potential application of Art 18 Brussels I bis Regulation under which the court of the domicile of the consumer has jurisdiction in the matter. There are advantages to this rule, which gives the option to the consumer to either sue in the State in which a defendant is domiciled or in the courts for the place of his own domicile (arg. ex Art 18/1 Brussels I bis Regulation). It ensures *access to justice* for consumers by providing an accessible *forum* to bring proceedings in disputes of (usually) low value, with limited resources. As some authors emphasize, there will probably be no difficulties in recognition and enforcement of the decision reached in the consumer's domicile in the Member State of the trader's domicile. An additional advantage can be seen in the fact that the court of the consumer's domicile will often be in the position to decide the case on the basis of the law of the forum.[55]

However, in its jurisprudence CJEU confirmed that jurisdiction ground provided in Art 16/1 Brussels Regulation (now Art 18/1 Brussels I bis Regulation) cannot be applied in collective redress or injunctive relief proceedings due to the fact that a consumer association or a legal person who acts as an assignee of the right of a consumer cannot be regarded as consumer within the meaning of the Brussels regime. This ground is unavailable even in cases where the consumer organization seeks injunction *in abstracto* (without acting on behalf of identified group of consumers). Hence, it is safe to conclude that in proceedings pursuant to Directive Proposal, where a consumer organization or entity is entitled to initiate proceedings, consumer's domicile would not be an available head of jurisdiction. Even if it were made available, it could not provide a viable solution in situations where claims are non-contractual in nature.

Often, the initiative for the introduction of the Directive Proposal under the *New deal for consumers* package is associated to the ambition of the EC to provide for an effective mechanisms for resolving mass damages cases such as *Dieselgate*[56]. The conducted analysis, however, has shown that in regard to producing an adequate solution for establishing jurisdiction in collective cross-border litigation the (potentially) new piece of legislation will not be able to provide improvement, if in parallel, there is no support for the necessary amendments to the Brussels I bis Regulation.

55 Dickinson; Lein, *op. cit,* note 40, p. 231

56 For instance, in the *Dieselgate* case, if the consumers bringing an action against the German manufacturer of the defective product purchased their car from an intermediary seller, their claim against the manufacturer is non-contractual. It can only fall under Art 7(2) combined with Art 4 Brussels I bis Regulation (see *Jakob Handte* decision of the CJEU)

## 4. TYPES OF LEGAL PROTECTION

Although in its first part, in setting out the representative action on injunctions the Directive Proposal relied on the solutions under the Injunctions Directive, it also provides for some novel solutions in regard to the types of legal protection that may be sought. Qualified entities are entitled to seek injunction order establishing that the practice constitutes an infringement of law, and if necessary, stopping the practice, or, if the practice has not yet been carried out, but is imminent, prohibiting the practice (arg ex Art 5/2b). They are also entitled to seek interim measures for stopping the practice, or prohibiting such imminent practice (arg. ex Art 5/2a Directive Proposal). However, qualified entities may also bring representative actions seeking redress order on the basis of any final decision establishing that a practice constitutes an infringement of Union law harming collective interests of consumers, including a final injunction order (arg. ex Art 5/3). By introducing the possibility of seeking a redress order, the Proposal goes beyond merely providing for abstract protection (which is preventive in nature) and ensures the repair of the harm done to individual consumer interests. By way of the redress order consumers may obtain compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (arg ex Art 6/1 Directive Proposal). It is not completely clear how this type of legal protection should be obtained. If in order to seek compensation a qualified entity should submit a final judgment to the court, establishing that a practice constitutes an infringement of Union law, it seems that it will take years before the redress proceedings could be initiated. From the perspective of the desired efficiency of the redress mechanisms provided under the Directive Proposal, it is unclear why the EC opted for this solution. Namely, under Croatian procedural law, when deciding on a (condemnatory judgment) order, the court also issues a declaratory preamble in which it establishes that the rights in respect of which the action is brought have been violated. Hence, there is no need for a separate declaratory judgment establishing violation of the rights. It seems that in the course of the regulatory activity, efforts have been made in order to mitigate the inadequacy of the provided text, and an additional provision has been introduced which allows qualified entities to seek injunction and redress order in a single representative action (arg ex Art 5/4 Directive Proposal). Given that the possibility to seek injunction and compensatory redress in the same proceedings was introduced, it remains to be seen to which extent the previously shaped provisions allowing qualified entities to bring successive actions will be applied.

It is necessary to mention that some authors are of the opinion that the introduction of compensatory redress through a court based model of awarding damages is a completely wrong approach and it might result in even more ineffective collective redress procedures. Instead, regulatory redress and consumer ombudsmen as

ADR entities are suggested as more preferable choices. Although some empirical evidence was offered in support of these ideas, it seems that the EC did not find them convincing.[57]

A possibility for a court or administrative authority to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law, in cases where the quantification of individual redress would prove to be complex (arg. ex Art 6/2) is problematic. This provision seems to suggest that a kind of a fallback was sought, in order for the EC not to have to rely solely on provisions which set out a mechanism for compensatory redress in regard to which there is still no agreement among Member States. Politically, this comes as no surprise, if one takes into account the persistent resistance of some Member States against introduction of an EU-wide compensatory collective redress mechanism. Also, complexity of providing a mechanism which would reconcile differing characteristics pertaining to national mechanisms of Member States and offer an efficient mechanism for compensatory redress should not be disregarded. Legally, the shift made by the EC is unclear. It not only derogates the significance of other novel solutions provided under the Directive Proposal, but it also allows Member States to keep their existing solutions providing only for an action seeking  injunction redress and a follow-on individual action seeking compensation, which did not prove to be efficient in the past.[58]  Under such solutions, in a proceedings initiated by a follow-on action consumers have to prove both their individual damage and the link between the illegal behaviour and the damage. Both of those elements are likely to require expensive legal, technical or expert opinions, which are be huge barriers for individuals.[59]

The argumentation of critics who question the complexity referred to in Art 6/2 Directive Proposal seems convincing. It is true that complexity of damage calculation is a regular element of lawsuits, especially in collective redress cases. Also, under this provision an entire range of redress cases, and in particular the ones where collective redress is most needed, such as for instance *Dieselgate*, mis-selling of various financial services or product liability cases would be excluded. Hence, it is possible to agree that the availability of derogation in those cases impedes the entire idea of collective redress.[60] However, due to its (probable) political back-

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[57] See Hodges, H.; Voet, S., *Delivering collective redress: Response to the European Commission's Inception Impact Assessment 'A New Deal for Consumers – revision of the Injunctions Directive' Ares(2017)5324969 – 31/10/2017*, [https://www.law.ox.ac.uk/sites/files/oxlaw/1710_policy_on_collective_redress_3.pdf] Accessed 10.03.2019

[58] See Study on the State of Collective Redress in the EU, Report Croatia, *op. cit.*, note 3, p. 458-494

[59] BEUC, position paper, *op. cit.*, note 38, p. 4

[60] *Ibid.*

ground, it seems unlikely that requests for its removal from the Directive Proposal would find approval.[61] A further novelty under the Directive Proposal enables redress in cases of small damages so that where consumers suffered a small amount of loss and it would be disproportionate to distribute the redress to them, the redress sought is directed to a public purpose serving the collective interests of consumers (arg ex Art 6/3b). There is strong support for the introduction of such a possibility in the legal literature (including Croatian)[62], and some Member States already posses similar mechanisms.[63] This probably motivated the EC to include a mechanism enabling qualified entities to claim damages even in a situation of a rational apathy of harmed consumers and to provide for penalisation of the infringer in such a manner.[64] The only objection is that the Directive Proposal is silent on the distribution of the acquired damages, so addressing the issue will be left to Member States.[65]

Some authors call for a more detailed approach which would clarify that this would be an available route in small amount cases only after there was an investigation into whether there is a possibility to direct the redress to individual consumers, while collective redress is a mechanism first and foremost for compensating consumers. In situations where it is too disproportionate or impossible to directly compensate consumers, the judge or the authority should be allowed to estimate the aggregated amount of the compensation/amount of profit from the infringement, as the exact calculation will not always be possible. It should be very clearly defined where to the collected funds go and for what purpose. Even if this type of action should not require a prior mandate from consumers, the court or the authority should nevertheless ensure that there is sufficient information and time for consumers to 'opt out', if they feel they do not want their part of compensation to go to a public purpose or are thinking of pursuing their rights via an individual action.[66] However, such a detailed approach seems to go against the standard approach in the EU legal drafting. So, any issues or legal voids steming from the lack of detailed legal drafting should probably be left for the jurisprudence to resolve.

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61 *Ibid*.

62 See Poretti, P., *Kolektivna pravna zaštita u parničnom postupku*, doctoral thesis, Zagreb, 2014, p. 613

63 See Study on the State of Collective Redress in the EU, for Croatia, *op. cit*., note 3, p. 598-609

64 These situations are known as "low-value cases" or "negative expected value-suits" in the class action's jargon, where consumers have suffered such a *minimal loss* and as such, it would be *disproportionate* to distribute the redress back to them. Collective redress in the Member States of the EU, *op. cit.,* note 25, p.73

65 However, as mass harm situations prevail in B2C litigation, it would, without a doubt, have been preferable to be more explicit when it comes to detailing the options given to the courts when the damages awarded cannot be distributed directly to individual class members. *Ibid*., p. 74

66 BEUC, position paper, *op. cit*., note 38, p. 5

## 5. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

In regard to efficiency of collective redress proceedings in providing legal protection of the collective interests of consumers, addressing difficulties connected to recognition and enforcement of a judgment in another Member State is equally important for plaintiffs and defendants.[67] The finality (*res judicata*) of the judgment establishing that a practice constitutes an infringement of EU law as well as trader's liability towards the consumers harmed by an infringement for the plaintiff enables the plaintiff to require recognition and enforcement in another Member State. It also guarantees legal certainty to the defendant that an action will not be brought against him in the same matter. Regardless of the expectations that a separate head will be provided for recognition and enforcement[68] of judgments brought in a collective cross-border redress proceedings, under current legislation Art 36 Brussels I bis Regulation applies, which provides for automatic recognition, without any special procedure being required.[69] If grounds for refusal of the recognition of the judgments are satisfied under Art 45, the courts of the Member States will refuse to recognize (or enforce) a Brussels I bis judgment delivered in collective redress proceedings. Two possible grounds for non-recognition have been repeatedly emphasized in the legal literature, the public policy (*ordre public*) ground (arg. ex Art 45/1a) and the default of appearance, but of the plaintiff (*opt-out*), instead of the defendant, which is typical for individual proceedings (arg. ex Art 45/1b).[70] In regard to the public policy, which is to be determined under the law of the Member State within which recognition is sought imposes a very high standard for non-recognition. Thus, recourse to public policy exception is rarely

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[67] The issue of recognition and enforcement of judgements rendered in third countries will not be considered. There are no harmonized rules at EU level for recognition and enforcement of judgments given in third States, so each Member State applies its national rules. The judgment given in a third State has to meet the specific (more or less liberal) requirements of all the States in which recognition is sought. This is a major concern especially for US class actions involving claimants from different Member States. Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 104

[68] The essential issue is that of recognition rather than enforcement in collective redress proceedings, as the recognition of a judgment confers on it the authority and effectiveness which is possessed in its state of origin. Fairgrieve, *op. cit.,* note 21, p. 172

[69] Due to the large differences of collective redress mechanisms in Member States, exequatur was supposed to be retained for judgments in proceedings brought by a group of claimants, a representative entity or a body acting in the public interest and which concern the compensation of harm caused by unlawful business practices to a multitude of claimants. Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final, p. 7

[70] Fairgrieve, *op. cit.,* note 21, p. 176-178. Ervo, L., *Opt-In and Opt-Out is In: Dimensions Based on Nordic Options and the Commission's Recommendation,* in: Hess., B.; Bergström, M.; Storskrubb, E. (eds.), EU Civil Justice, Current Issues and Future Outlook, Oxford and Portland, Oregon, 2016, p. 185

successful. As to collective redress proceedings, the prevailing position is that the due process issues (notification, publication) as well as quantification of individual redress are reasons for refusal to recognize foreign judgments based on the public policy ground.[71] As to the procedural guarantee to a fair hearing of the defendant (arg ex Art 45/1b), as confirmed by the CJEU, it ensures that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seized.[72] The provision of Art 45/1b cannot be directly applied to the position of the members of the group as plaintiffs in collective redress proceedings. However, it remains open whether the fact that the members were not participating in the group but might be encompassed automatically (opt-out), could provide a ground for non-recognition.[73] A possible solution, which would allow for such judgments to be recognized in other Member States, can be found in the *Maronier*[74] approach. It would be based on a strong presumption of the recognising court 'that the procedures of other signatories of the Human Rights Convention are compliant with Article 6'.[75]

In the whole, if these obstacles to recognition and enforcement are not adequately addressed, the State of origin may hesitate to certify as members of the group claimants from States in which recognition of the future judgment would be denied.[76]

It seems that legal theorists agree that the Directive on representative action should not contain separate provisions on cross-border issues in collective redress proceedings. This is all the more reason why it should be examined whether the judgment delivered in collective proceedings provided under the Directive Proposal could be recognized and enforced in the current Brussels I bis regime.

In regard to the public policy ground, the most obvious seems to be the objection of non-participation of members of the group as plaintiffs. Here, a differentiation should be made between a representative action seeking protection *in abstracto* (arg ex Art 5/2) and a representative action seeking a redress order (arg ex Art 6/1). In the first case, there should be no obstacles to recognition, since Art 5/2 sets out that a qualified entity shall not have to obtain the mandate of the indi-

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71 Fairgrieve, *op. cit.,* note 21, p. 185; Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 104

72 Case C-78/95, Hendrikman and Feyen v Magenta Druck & Verlag GmbH [1996] ECR-I-04943, para 15

73 Collective redress in the Member States of the EU, *op. cit.,* note 25, p.105

74 *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB [27]

75 Danov, *op. cit.*, note 43, p. 391

76 *Ibid.*

vidual consumers concerned, since it only seeks injunction of the practice which constitutes an infringement of law. In the second case, it is left to the disposition of a Member State whether it will require the mandate of the individual consumer concerned (arg ex Art 6/1 in relation to Art 5/3). Additionally, Art 6/1.2 sets out the obligation of qualified entities to provide sufficient information (as required under national law) to support the action, including the description of the consumers concerned by the action and the questions of fact and law. This is comparable to the far more detailed and direct provisions of the EC Recommendation on the *opt-in* system, which required the claimant party to be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle) (arg ex p 21 EC Recommendation). It might seem as that the Directive Proposal left narrow space for the critics of collective redress which were in a habit of justifying their disapproval merely on the fact that *opt-out* principle, which is common in the American - style class action does not satisfy due process requirements and is contrary to public policy of Member States. This would also mean that there is an open path to recognition of foreign judgments brought in collective cross-border redress proceedings. But, since the EC decided to allow Member States to chose whether there will be an obligation for the qualified entities to require the mandate of individual consumers concerned in compensatory collective redress proceedings, again there is a risk of different interpretation in Member States. Since the Directive Proposal also allows for Member States to withdraw from providing compensatory redress order by way of derogation from Art 6/1 Directive Proposal under certain conditions, it may be argued that a very large margin of appreciation is left to Member States in estimating which type of mechanisms it deems appropriate to introduce. The obligation of Member States to provide for compensatory redress is only set out in situations where consumers are identifiable and have suffered comparable harm or the consumers suffered a small amount of loss (but then the redress is directed to public purpose)(arg ex Art 6/3a and b).

An infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before the national court (arg ex Art 10/1). A final decision taken in another Member State is considered by their national court or administrative authorities as a rebuttable presumption that an infringement has occurred. This might seem to suggest an asymmetry in regard to the acceptance of the effect of a national and a foreign judgment. Upon close examination it becomes obvious that this solution is reconciled with Art 45 Brussels

I bis Regulation in that it allows non-recognition of a foreign judgment if either of the requirements under the provision is satisfied.

Directive Proposal also removes doubts to what extent settlements obtained in collective proceedings can be regarded as judgments and thus circulate under the same conditions. As Art 8/1 Directive Proposal provides, if a settlement forms part of a court-supervised procedure and is court-approved, it should be considered as a judgment and circulate as such, at least where the court exercised a judicial function beyond the mere certification of a private compromise. Although Member States are free to choose whether they will provide for such a possibility in their national legislation, it does not seem likely that there will be any resistance from the Member States (arg ex Art 8/1). In the light of the ambition to smoothen the recognition of a foreign judgment rendered in collective cross-border redress proceedings, it should be hoped for that this assumption was accurate.

## 6. CONCLUDING REMARKS

The undertaken analysis of the efforts made in order to resolve issues which affect effective and efficient protection of collective interests of consumers in national and cross-border cases through a modernised legal framework for collective redress, once again demonstrated all of the difficulties of the task undertaken by the EC. There are some promising solutions, which suggest that the EC finally made a choice in regard to the terminology (collective redress, representative action, injunction and compensatory collective redress), qualified entities (consumer organisation, independent public bodies), types of legal protection (protective measures, injunction order, redress order (compensation)) and cross-border collective redress. Although this might not seem as a significant step forward, it will help in harmonising different mechanisms available under the current national law of Member States and providing a more unified approach to collective redress for EU consumers. Namely, the implementation of the Injunctions Directive resulted in various attempts of Member States to provide mechanisms for collective redress, which due to their inconsistency and divergence do not ensure an equal level of protection of collective interest of consumers at national level and hinder cross-border redress.

Still, there is room for further improvements of some solutions provided under the Directive Proposal. Although there was criticism of the term 'representative action' on the account of this expression being reserved for the 'injunctive collective redress' in Members States (that is to say, one of two sorts of collective redress or collective actions), this should not limit its potential.[77] The 'represen-

[77] For the criticism see Collective redress in the Member States of the EU, *op. cit.,* note 25, p. 70

tative action' as introduced under Directive Proposal should be understood and implemented consistently by Member States and its meaning should be interpreted independently of national preconceptions. At the same, providing for a representative action which allows only consumer organisations or independent public bodies to act as qualified entities dissociates collective redress at EU level from the American mechanism of class action. Namely, opponents of introducing a mechanism embracing both types of collective redress often argued that due process requirements are not satisfied under the rules on standing in class action. The most important novelty introduced under the Directive Proposal is allowing for both types of redress, injunctive collective redress and the compensatory collective redress. However, the redaction of these provisions still leaves leeway to Member States to undermine the idea of providing for effective compensatory collective redress. By establishing a link between an injunction and redress order, that is, a final injunction order as a precondition for initiating compensatory proceedings, the Directive Proposal leaves a possibility for postponment of a compensatory redress procedure for several years. There is also an option which allows for Member States to derogate from the collective redress procedures if individual redress is difficult to quantify. Althought there are requirements under which its use would be possible, still the fact that derogation is available under the Directive Proposal will affect its uselfulness. Under no condition can it be argued that the individual redress is more efficient than collective redress, regardless of the complexity of the case. Hence, the underlying reason will have more to do with the fact that the EC wanted to provide at least some flexibility in regard to the obligation of Member States to introduce compensatory collective redress. This was probably necessary in order to ensure a broad consensus among Member States on the issue of compensatory redress. The mechanism which resembles the skimming-off procedure, and is available under the Directive Proposal when the individual damage is to small for the consumer to initiate individual proceedings, is in principle, a welcome novelty. Yet, without a detailed approach, there is room for different interpretation and also implementation of these provisions. More specifically, it is left for the Member States to decide whether there will be a general fund for awarded funds, or they will be addressed to the state budget or a specific purpose (financing of collective redress proceedings). Obviously, depending on the regulatory choices made, it is left to the Member States to encourage or discourage the development of this mechanism in practice.

Finally, it seems that the long-awaited opportunity to address the issues hindering cross-border collective redress has been missed. The only improvements are the possibility of a mutual recognition of the legal standing of qualified entities in one Member State to seek representative action in another Member State and the clari-

fication that the final decision establishing infringement will constitute a rebuttable presumption that the infringement has occurred in a Member State where an action seeking redress is brought. So, without the necessary amendments to the Brussels I bis Regulation and the introduction of specific rules on jurisdiction and recognition and enforcement in collective cross-border redress proceedings, the opportunities for adequate cross-border protection will remain, at best, limited.

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# PRIVATE INTERNATIONAL LEGAL EDUCATION AND ITS RELEVANCE IN A EUROPEAN CONTEXT

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***ABSTRACT***

*At the request of the European Parliament's Committee on Legal Affairs (JURI Committee), the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs issued a study titled "Building Competence in Commercial Law in the Member States"*[1]*, aimed at shedding light on cross-border commercial contracts and their operation in theory and practice, mainly within European Union Member States.*

*Most of the measures analysed and proposed for building competence in commercial law, despite the title of the study not being explicit in the matter, are cross-border measures, and thus of private international law. The last proposal of the study is the improvement of legal education in the field of private international law.*

*The present paper aims to assess the level of the Romanian legal system and its compatibility with the measures proposed in the above-mentioned study, while focusing, throughout, on the role of legal education. Is improving private international legal education the final (least important) measure to be taken? Can legal education in the member states be improved on a E.U. level, and if so, how? These are just some of the issues that the present paper looks to tackle.*

***Keywords:*** *private international law, legal education, building competence, commercial law, Romanian legal system*

## 1. FOREWORD

A research conducted upon the request of the European Parliament titled "Building Competence in Commercial Law in the Member States" was first published in September 2018. The debate was initiated by the Parliament starting from several empirical findings that Swiss and English law, as well as Swiss and English courts are chosen significantly more often than those of other Member States, and aims

[1] Rühl, G., *Building Competence in Commercial Law in the Member States* (Legal and Parliamentary Affairs), Study for the JURI Committee, PE 604.980, September 2018 (hereinafter referred to as "The Study"). [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf] Accessed 11.03.2019

to increase commercial law competence in the EU by looking at cross-border commercial contracts and their operation in theory and practice.

Despite the title of the Study, its focus is not on commercial substantive law, as it might suggest, but mostly on cross-border matters, such as applicable law and international jurisdiction, choice of law and choice of forum, all of these of private international law (herein referred to as PIL). One of the many measures analysed and proposed by the Study is the improvement of legal education in the field. Before moving on to the analysis of what the study commissioned by the European Parliament reveals on building competence in commercial law, a succinct mention on terminology is in order. The present paper focuses on "Private International Legal Education", in the sense of legal education on private international law (herein referred to as "PIL education").

The point of the paper is to underline the fact that, despite its marginal situation and mention, the improvement of PIL education is probably the most important measure to be taken, as it is the only one upon which all others are inherently reliant, and without which they are unlikely to succeed.

After a general overview of the Study and of its proposed measures, I will attempt to underline the place and relevance of PIL education in relation to every one of its recommendations. From the perspective of the Romanian angle, the paper aims to provide an overview of the Romanian court system and legal education system in general, before an analysis of Romanian PIL education and its challenges, concluding with suggestions on how the Romanian system can improve, and how the European Union can contribute to an increase of the quality of PIL education .

## 2. BUILDING COMPETENCE IN COMMERCIAL LAW IN THE MEMBER STATES – BRIEF OVERVIEW

While the purpose of the paper is not to provide an analysis the proposed measures, an overview of all of them is essential in light of two of the main points that I intend to outline: firstly, that building competence in commercial law is almost synonymous, in the view of the Study, with building competence in Private International Law in commercial matters, and secondly, that all of the proposed measures are very much dependent, at least from the Romanian perspective, on the improvement of PIL education.

## 2.1. Context

According to the Study's executive summary[2], general heading, "Cross border commercial contracts are subject to a patchwork of legal rules and regulations. To overcome or at least mitigate the resulting uncertainty, commercial parties, internationally and within in the EU, frequently choose the applicable law and the competent court. When they do, English and Swiss law as well as English and Swiss courts turn out to be particularly popular: according to a number of empirical studies, the laws and the courts of both countries are more often chosen than the laws and the courts of other countries, notably other Member States. The European Parliament has, therefore, called for a debate about how commercial law competence in the EU can be increased. Commissioned by the Committee on Legal Affairs of the European Parliament, the following study seeks to contribute to this debate by taking a closer look at cross-border commercial contracts and their operation in theory and practice. It describes the applicable legal framework and analyses commercial practice as regards choice of law and choice of forum clauses. In addition, it discusses some of the implications that follow from the uneven distribution of commercial law competence across the EU. Finally, it makes a number of suggestions designed to make the settlement of international commercial disputes in the EU more attractive."

The Study is organized in four parts[3]: the first part analyses the current legal landscape in which cross-border commercial contracts operate, shedding light on existing instruments relating to substantive commercial law as well as instruments that regulate choice of law and dispute resolution. The second part explores current commercial practices as regards choice of law and choice of forum clauses, analysing which laws and which courts are most frequently chosen by commercial parties including the reasons for parties' choices. The third part discusses some implications that follow from the current legal landscape and practice, including the implications of Brexit, while the fourth part submits a number of recommendations that will improve the framework for the settlement of international disputes both at the level of the Member States and at the level of the EU. This final part is the main focus of the present paper.

## 2.2. Purpose of the Study

According to some of the findings found under the heading with the same name[4], the fact that uneven distribution across the EU of commercial law competence, as

2 *Ibid.,* p. 7

3 *Ibid*, p. 11

4 *Ibid*, p. 7

well as the popularity of certain laws and courts in relation to others, is not problematic by itself, but becomes an issue when not all parties can actually choose the law or the courts that are commonly perceived to be the best due to, for example, excessive costs.

The intended outcome of the Study is underlined under the "Outlook" heading of the executive summary[5], and consists in fundamentally changing and improving the dispute resolution landscape in the EU, looking to ensure that "commercial parties have access to high-quality courts and procedures in all Member States irrespective of their size and their resources. As a consequence, they will be able to trust that they can enforce their claims across borders no matter where their contracting partner comes from and no matter whether they have agreed on a choice of forum. In addition, the EU as such will develop into an attractive place for the settlement of cross-border commercial disputes. It will be able to compete with some of the leading dispute settlement centres of the world which, in turn, should enhance the EU's attractiveness as a place for doing business".

To summarise, the objective of building competence in commercial law in fact consists of measures looking to improve the international side of commercial law, especially international jurisdiction and applicable law. When it comes to choice of law and of jurisdiction, the preferred fora and legislations for parties residing in Member States are the UK and Switzerland, leading to the conclusion that these states provide better performance in the field. By improving the level of competence in the other Member States, the parties will have a broader range for their choices without diminishing the quality of the legal act, and the possible impact of Brexit on the enforcement and recognition of UK judgements in the European Union will be mitigated. Thus, international dispute settlement in the Member States will become more attractive, and this seems to be the concrete purpose of the Study: to encourage parties to choose the court systems of EU Member States for the settlement of their litigations[6].

### 2.3. Measures proposed

The measures analysed by the Study under Chapter 4, Recommendations[7], are grouped under four categories: to the unification or harmonization of *substantive commercial law*; measures pertaining to the rule of *choice of law*; measures relat-

[5] *Ibid*, p. 9

[6] It is interesting to note that, while the concrete measures proposed do aim at increasing competence in commercial law in its substance, the apparent goal underlined within the Study is to increase the *perceived* competence of the Member States' institutions in cross-border commercial matters

[7] Rühl, *op. cit.* note 1, p. 46 *et seq.*

ing to t*he settlement of international disputes at the level of the Member States*; and finally, improving *the settlement of international disputes at the level of the EU*, by establishing a European Commercial Court. I will attempt to provide a brief description of every recommendation in the Study, grouped under "hard" measures – measures with an impact on legislation, national or EU, versus "soft" measures – which affect processes and ideas which, despite looking to improve the legal process, do not have a direct effect on legislation.

#### 2.3.1. *"Hard" measures*

Regarding the unification of *substantive commercial law*, while it remains a desideration, given the outcome of previous attempts in that direction, the author of the Study concedes that it should remain only as a long-term option.

*Choice of law* is treated in more detail, and three concrete recommendations are made concerning the Rome I[8] and Rome II[9] Regulations:

- the adaptation of art. 3 of the Rome I Regulation to allow for the choice of a non-state law, such as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT PICC) or the Principles of European Contract Law (PECL);
- the removal of any restriction in art. 3 of the parties' choice of law: while, according to the Study, the American approach of restricting choice of law is in no way recommendable, the parties should not even be restricted by mandatory provisions, in the sense that commercial parties should be allowed the choice of any law they want even if the contract is a purely domestic or a purely European one;
- the corresponding adaptation of art. 14 of the Rome II Regulation concerning choice of law in non-contractual matters, including the removal of the "freely negotiated" requirement, which is absent even from the current version of art. 3 of Rome I.

Probably the most impactful "hard" measures proposed are in the matter of *dispute settlement in the European Union,* both *at the level of the Member States* and *at the level of the EU*.

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8 Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 2008, L 177/6 (The Rome I Regulation)

9 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007on the law applicable to non-contractual obligations (Rome II), OJ EU 2007, L 199/40 (The Rome II Regulation)

At *Member State level*, two major reforms are recommended:

- introducing special procedures for cross-border commercial cases, looking to improve the speed and efficiency, fairness and predictability of judicial proceedings; the best approach envisaged is, however, not at Member State level, as the structure would suggest, but the establishment of an expedited procedure for cross-border commercial cases, identical across all the Member States, aimed to provide commercial parties with a fast and cost-saving option to settle their disputes;
- organising, at the level of every Member State, a specialised court or chamber for cross-border commercial cases, which would provide, in English, the application of the expedited procedure by competent professionals.

Another measure with a major impact is the establishment of a European Commercial Court, as a measure of improving dispute settlement at *EU level*, the details of which exceed the scope of the present paper.[10]

### 2.3.2. *"Soft" measures*

The Study recommends three "soft" measures, aimed at the general *improvement of dispute settlement in the European Union*, therefore as accessories to the three "hard" measures mentioned above. These are:

- improved training of judges and lawyers, especially in fields relevant for cross-border commercial cases, notably European private international law and international civil procedure, as well as proficiency in legal English;
- better access to European and foreign law, by establishing a centralised database with cases relating to European private international law and international civil procedure, as well as introducing a preliminary reference procedure between Member States;
- "finally", better legal education.

## 2.4. The role of legal education within the Study

Under the heading 4.3.3.3., as a sub sub-heading within the one generally dedicated to improving dispute settlement in the Member states, within "Further ac-

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[10] For a comprehensive analysis of the pros and especially cons of such a measure, see Rammeloo, S., *Cross-border Commercial Litigation – Do We need a Permanent European Commercial Court?* Analele UVT – Seria Drept, no. 1, 2019 (forthcoming)

tions", the Study mentions[11]: "Finally, the European legislature should also adopt measures relating to legal education in the field of cross-border commercial matters. As things stand at the moment, Member States approach the teaching of relevant subjects, notably private international law and international civil procedure but also comparative law in many different ways. While these subjects are mandatory in some Member States, they are not part of legal education at all in others. To ensure that judges across all Member States have a sufficient – minimum – understanding of the applicable rules and regulations, the European legislature should take actions to make sure that European private international law, European international civil procedure as well as comparative law play a much more prominent role in the education of future lawyers and judges. This may, for example, include the introduction of a provision that makes the basic core of these fields mandatory for all law students across the EU".

This is the only mention of legal education within the Study, a "soft" measure at the outskirts, under a general heading subordinated to improving dispute settlement in the European Union. It almost seems as though the Study mentions legal education out of an abstract obligation to do so, without substantially acknowledging its importance.

However, most (if not all) of the "hard" measures proposed are reliant upon improved legal education in the field, specifically in PIL commercial maters.

Even the recommended changes in the phrasing of art. 3 Rome I and art. 14 Rome II, despite apparently not directly connected to the improvement of PIL education (a connection not considered by the Study, given its structure) would have the desired effect only in the context of professionals properly understanding the consequences and implications of these changes, a result which is achievable only by and after significant improvements in legal education.

The relevance of PIL education for the procedural "hard" measures is recognised within the Study itself, be it indirectly. Within the analysis of introducing special procedures for cross-border commercial cases, the Study acknowledges that "An insufficient number of judges and a lack of qualified judges may just as well be driving forces as a lack of resources, a lack of IT-infrastructure or inefficient rules of civil procedure. Against this background it remains an open question whether a European expedited procedure, as plausible as its introduction might appear, will actually tackle the real sources for lengthy proceedings. Chances are that inefficient and ineffective procedures are only one factor that impede speedy dispute settlement". "(…) the best procedure is of no use if the court and the judges

[11] Rühl, *op. cit.* note 1, p. 7 and 9

do not have the competence, expertise and experience to deal with cross-border commercial cases (…). In addition, the best procedure does not help if it is not frequently applied in practice". While not expressly stated, these aspects are undoubtedly relevant for the establishment of the European Commercial Court as well. [12]

Not least, improvement of legal education is the groundwork for the other proposed "soft" measures, despite being the last one mentioned. Adequate preparation of judges, lawyers and other practitioners in the matter is difficult to achieve through career trainings if there is no proper foundation on which to build, a foundation which may only be created during the higher education years. Moreover, building an adequate database of PIL cases and international civil procedure of the Member States requires significant background knowledge of the legal science involved on all levels, and for similar reasons as those stated above, would only be effective if judges, lawyers and other practitioners are sufficiently proficient in private international law to make proper use of the information therein.

To conclude, I argue that there is a large disparity between the marginal mention of legal education within the context of the Study and its actual importance, even for the other proposed measures.

## 3. THE ROLE OF THE EUROPEAN UNION IN PRIVATE INTERNATIONAL LEGAL EDUCATION

### 3.1. The EU and higher education – general remarks

According to art. 165 (1) TFEU (formerly art. 149 TEC, introduced as a principle for the first time by The Treaty on European Union, signed in Maastricht in 1992), "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity". It was after the Lisbon Council Meeting of 2000[13] that education was referred to as a key policy field, which opened up the way for a degree of EU intervention in national education of unprecedented intensity[14].

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12 *Ibid.,* p. 7

13 Lisbon European Council 23 and 24 March 2000 - Presidency Conclusions [http://www.europarl.europa.eu/summits/lis1_en.htm] Accessed 11.03.2019

14 Alexiadou, N., *The Europeanisation of Education Policy: researching changing governance and 'new' modes of coordination*, Research in Comparative and International Education, *Vol.* 2, No. 2, 2007, p. 102

The principles of subsidiarity, limited powers and proportionality[15], restricting the power of the EU's intervention in the policy of the Member States, remain particularly strong in the content or

organisation of their individual education systems[16]. As art. 165 (1) TFEU specifies, the EU can only encourage cooperation between Member States; direct reference to the cultural diversity and the concrete measures mentioned in art. 165 (2) TFEU[17] strengthens the clear restrictions found in paragraph 4 of the same normative text: "In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,- the Council, on a proposal from the Commission, shall adopt recommendations".

Despite this restriction in the matter of "hard" measures, the EU has been successfully active in promoting education in Europe in general, and higher education, in particular. In 1999, the Bologna Process began to advance the idea of a regional approach to higher education reforms and to meet the demands of the "knowledge economy", following the 1997 report of the European Commission "Towards a Europe of Knowledge". [18] The Bologna Process is an intergovernmental cooperation of 48 European countries in the field of higher education. It guides the collective effort of public authorities, universities, teachers, and students, together with stakeholder associations, employers, quality assurance agencies, international

15 Bercea, R., *Drept comunitar. Principii*, C.H. Beck, Bucharest, 2007, pp. 327-348

16 Alexiadou, *op. cit.* note 14, p. 103

17 "- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States, - encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, - promoting co-operation between educational establishments, - developing exchanges of information and experience on issues common to the education systems of the Member States, - encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe, - encouraging the development of distance education, - developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

18 Barett, B., *Globalization and Change in Higher Education: The Political Economy of Policy Reform in Europe*, Palgrave Macmillan (Springer), Cham, Switzerland, 2017, p. 2

organisations, and institutions, including the European Commission, on how to improve the internationalisation of higher education[19].

As a result of the Bologna process, The European Higher Education Area (EHEA) was established, a unique international collaboration on higher education implementing a common set of commitments: structural reforms and shared tools. The aim is for countries, institutions and stakeholders of the European area to continuously adapt their higher education systems making them more compatible and strengthening their quality assurance mechanisms, thus increasing staff and students' mobility and facilitating employability [20], by establishing, among others, the European Credit Transfer and Accumulation System (ECTS) and the mutual recognition of diplomas.

The Erasmus and Erasmus+[21] programmes started as a precursor to the Bologna process, its success later increased by the other EU initiatives in higher education. Other more recent initiatives such as the EU Youth Strategy[22] are the result of the directions outlined in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a renewed EU agenda for higher education[23].

### 3.2. What measures could the EU take to improve private international legal education?

To begin an analysis of the measures that the EU may undertake in order to improve PIL education, I will begin with the only concrete recommendation found within the Study: "(…) take actions to make sure that European private international law, European international civil procedure as well as comparative law play a much more prominent role in the education of future lawyers and judges. This may, for example, include the introduction of a provision that makes the basic core of these fields mandatory for all law students across the EU".

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19 [https://ec.europa.eu/education/policies/higher-education/bologna-process-and-european-higher-education-area_en] Accessed 11.03.2019

20 [http://www.ehea.info/] Accessed 11.03.2019

21 [https://ec.europa.eu/programmes/erasmus-plus/about_en] Accessed 11.03.2019

22 The EU Youth Strategy is the framework for EU youth policy cooperation for 2019-2027, based on the Council Resolution of 26 November 2018. EU youth cooperation shall make the most of youth policy's potential. It fosters youth participation in democratic life; it also supports social and civic engagement and aims to ensure that all young people have the necessary resources to take part in society. [https://ec.europa.eu/youth/policy/youth-strategy_en] Accessed 11.03.2019

23 [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1496304694958&uri=COM:2017:247:FIN] Accessed 11.03.2019

In essence, the only proposal in the Study is to make the basic core of PIL commercial law and procedural law a compulsory discipline for all law students studying in the EHEA. It is unclear what the author of the Study understands by "provision"; despite the term implying a possible legislative initiative, it must be analysed in the context of the express exclusion of harmonisation measures for Member States, and therefore may only relate to the so-called "soft" measures.

The question remains: can and should the EU do more than it is doing in general in order to promote PIL higher education? Despite the fact that the Study offers little concerning the means by which the EU should go about increasing the quality of PIL education, its merit consists of the fact that, be it marginally, it does raise the issue of improving the quality of legal education in cross-border commercial matters.

It is therefore my opinion that the EU can contribute to the improvement of PIL education in Member States, by focusing on the cross-border elements in its recommendations and other secondary legislation. Having the basics of PIL as a compulsory discipline in undergraduate studies could be a start, however not sufficient, as I will attempt to argue below. Increased focus on the cross-border elements should accompany all of the later trainings of legal professionals, and the allocation of funding for research and innovation in law should increasingly target the cross-border elements, if the purpose within the Study is to be achieved[24].

## 4. THE ROMANIAN EXPERIENCE

### 4.1. Short description of the Romanian court system

The Romanian ordinary court private law system[25] is a 3 tier pyramidal system, above which is the High Court of Cassation and Justice.[26] The lower tier is made out of 176 district courts (Romanian *judecătorie*), the middle tier by 42 tribunals, corresponding to the 41 administrative divisions (Romanian *județe*) plus Bucharest, and the upper tier by 15 courts of appeal. Depending on criteria varying from value of the litigation to subject matter, the first two tiers may be courts of first instance. The rule is that judgements given by courts of first instance may be

[24] There certainly are many and more options for the EU to improve the quality of PIL higher legal education, but analysing many of these in detail would exceed the scope of this presentation, which relies mostly on the peculiarities of the Romanian system. For an approach originating from the Polish system, see Czarnota, A.; Paździora, M.; Stambulski, M., *The Hidden Curriculum in Legal Education*, Krytyka Prawa, *tom*. 10, no. 2, 2018, pp. 114–129

[25] [https://e-justice.europa.eu/content_ordinary_courts-18-ro-en.do?init=true&member=1] Accessed 12.03.2019

[26] [http://www.scj.ro/en] Accessed 12.03.2019

appealed with the immediately upper court. The special appeal, or review as the e-justice website uses as a translation for the Romanian *recurs* was, after the changes to the Romanian Civil Procedure Code enacted in 2013, transformed into a proper extraordinary appeal, by the establishment of a threshold under which decisions given in appeal were not reviewable. However, the Constitutional Court[27] changed its initial jurisprudence and recently declared any threshold, regardless of its quantum, to be unconstitutional, which practically transforms the review back into an ordinary remedy, leading to a *de facto* conflict between two of the highest courts in the Romanian judiciary[28].

Specialisation within the Romanian judiciary remains basic. The tendency in Romanian private law after the coming into force of the New Civil Code and the repealing of the former Commercial Code is to unify private law[29], a current susceptible to hinder further specialisation. Despite the fact that the former legislation specifically mentioned the jurisdiction of separate commercial courts, only three were actually established, and are now functioning as specialised tribunals[30], in principle dealing with litigations between professionals. There is only one specialised court in family matters, all other specialisations operating within the courts themselves, by divisions into chambers (Romanian *secții*). The High Court of Cassation and Justice has a basic division in four chambers for ordinary litigations: Civil, 2nd Civil (litigations between professionals), Criminal, and Administrative (including fiscal), while it is up to every court to decide its own division into separate chambers, in principle according to their logistical needs. This leads to large disparities, from no specialisation at all in some of the smaller district courts (in which the same judge deals with every case, from criminal to labour to family, administrative and commercial litigations) to having several chambers for the same legal matter, the highest specialisation being found with the Bucharest courts[31].

### 4.2. Brief overview of the Romanian legal education system

For the academic year of 2016-2017, a total number of 42 accredited law faculties were functioning in Romania, 18 of which were State or public law schools, while the remaining 24 were attached to private universities[32]. According to Law No.

27 [https://www.ccr.ro/en] Accessed 12.03.2019

28 Chis, A., *Curtea Constituțională vs.* Înalta *Curte de Casație* și *Justiție*, Analele UVT – Seria Drept, no. 2, 2018, pp. 210-220

29 Nicolae, M., *Unificarea dreptului obligatiilor civile si comerciale*, Hamangiu, Bucharest, 2015

30 [https://e-justice.europa.eu/content_specialised_courts-19-ro-en.do?member=1] Accessed 12.03.2019

31 [http://www.cab1864.eu/?pag=97] Accessed 12.03.2019

32 Bojin, L., *The Stakeholders in the Romanian Legal Education and their Influence over the Curricula and Teaching Methods*, Oñati Socio-legal Series, *vol.* 7, no. 8, 2017 – Legal Education in Europe. Chal-

1/2011 on National Education[33], in public law schools, only part of the student places are subsidized by the State, the remaining ones functioning in the same way they do in a private university, by paying a yearly tuition fee.

After the transition years in the 90's[34], legal education was, as the entire higher education system, the object of reforms in the 2000's as a result of the commitment to implement the Bologna process. Consequently, all accredited law schools adopted the 4+1 or 4+2 system (i.e. four years of undergraduate studies and one or two years of postgraduate studies, followed by three years for PhD studies) and the system of transferable credits[35]. During the same process, the curricula of the law schools was unified, with a number of disciplines that are mandatory in all law schools (the so-called "common trunk", which includes civil law, commercial law, labour law, criminal law, constitutional law, administrative law, civil and criminal procedure, public and private international law, EU institutional law, general legal theory), while the others can be chosen by each of the law schools, in the name of universities' autonomy[36].

The undergraduate legal education period is four years. Upon graduation from law school, students are allowed to access the legal professions. The criteria differ, but neither of these professions requires post-graduate studies to be accomplished. The mainstream legal professions are[37]: lawyer, judge or prosecutor (whose organisation is unified under the umbrella-category of magistrates), notary, registrar in court, in-house legal counsellor (need not to be member of the bar), civil servant. Besides these, there is a specific professional category called legal advisers, organ-

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lenges and Prospects, p. 1613. The list of accredited private higher education institutions and their domains is updated yearly by Government Decision (Romanian *Hot*ărâre). The present data, resulting from Decision no. 695/2018, does not present any significant variations. For an updated list of all accredited universities in Romania, see the official website of the Ministry of Education: [https://www.edu.ro/institutii%20de%20inv_superior%20particulare%20acreditate] Accessed 12.03.2019

33 Published in the Official Monitor of Romania No. 18 of 10 January 2011, last updated on 16 March 2018

34 In the first decade after the fall of communism, the higher education system underwent a number of important transformations: the number of universities (both public and private) increased significantly, new programmes emerged, disciplines that used to be marginalized in the older regime, such as law or economics were now reinvigorated and the number of students raised exponentially: Curaj, A.; Deca, L.; Polak, E.E; Salmi, J., *Higher Education Reforms in Romania. Between the Bologna Process and National Challenges,* Springer, Cham, 2015, pp. 2-3; for another approach on the transition period, see Birzea, C., *Back to Europe and the Second transition in Central Eastern Europe*, Orbis Scholae, *Vol.* 2, No. 2, 2008, pp. 105–113

35 Bojin, *op. cit.* note 32*,* p. 1614

36 Baias, F.A.; Danisor, D.C.; Vasilescu, P., *Standardele de conținut* şi *programul cadru pentru domeniul „Drept"*, Analele Universitatii Titu Maiorescu - Seria Drept, no. 4, 2007, p. 146

37 Bojin, *op. cit.* note 32*,* p. 1616

ised in a professional order, just like the lawyers, the main difference being that only the latter can represent natural persons in court. From a functional point of view, it is quite difficult to distinguish them from lawyers[38].

Historically, the Romanian legal system and, implicitly, Romanian legal academia lies on at least two layers, the foundational French legal tradition and the more recent communist heritage, with both playing a major role in today's law schools' configuration and their vision of academic freedom[39]. In terms of pedagogy, the Romanian legal education system has inherited from the French tradition the "cours magistral" (Romanian *curs*) where a professor presents, uninterrupted by the students, "the truth" about a specific legal institution and the "travaux dirigés" (Romanian *seminarii*), where a teaching assistant, usually a disciple, a PhD student who has not already been given the right to entry in the community by its gatekeepers, reiterates, in a more or less interactive way, the words of the professor[40].

Admission to the professions of magistrate, notary and lawyer is subject to difficult exams[41], while for the other professions no further exam is required after graduation. If the students want to follow a career as magistrates (judges or prosecutors), they have to be admitted to the National Institute of Magistracy (Romanian *Institutul Superior al Magistraturii* – INM), while if they want to become lawyers, they have to pass the Bar admission exam. Those entering the INM follow further training for 2 years, after which they may practice as judges or prosecutors, starting with a three-year period as trainees (Romainan *stagiari*). The lawyers must undergo two years of apprenticeship under the supervision of a lawyer and of the National Institute for the Professional Training of Lawyers (Romanian Institutul National pentru Pregatirea si Perfectionarea Avocatilor – INPPA) and afterwards they have to pass another exam after which they can freely practice the profession of lawyer, either in an independent office or as de facto employees of one of the larger law firms.[42]

Starting with the second half of the years 2000, the population enrolled in higher education has been constantly decreasing: demographics indicate a strong decline in birth rates while many young people leave the country in search for a better education or better paid jobs within the European Union. Romania continues to

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38 *Ibid.*

39 Mercescu, A., *Law Schools between Autonomy and Democracy. The Case of Romanian Legal Academia*, The 9th CEE Forum (forthcoming)

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

have one of the smallest number of graduates in the European Union, according to Eurostat 2015, while the market is still oversaturated with professionals holding a diploma from the "golden age" of the academic "industry".[43]

### 4.3. Private International Law in the Romanian legal landscape

The Romanian legal system is relatively self-sufficient, and from that a self-sustainability of legal education and research arises. Consequently, the legal education system is also focused on deepening the knowledge of national law, which also negatively impacts international legal research[44]. Accession to legal practice (magistrates, lawyers, notaries, executors, legal advisors) is predominantly dependent on in-depth knowledge of national legislation, only some general basic knowledge in EU law and the European Convention of Human Rights (ECHR) being required. Further training of lawyers and magistrates have no specific focus on private international law, the curricula for both the INPPA[45] and the INM[46] having a very small international dimension, consisting of basic focus on EU institutional law and the ECHR.

As seen above, PIL is a compulsory discipline in all of the relevant Romanian law schools' curricula. Since it is a subject that requires a lot of interdisciplinary[47] knowledge[48], it is usually programmed in the final semester (8th out of 8) of the undergraduate studies. While this placement is justified by the required background knowledge, it has the disadvantage of being situated in close proximity to

43 *Ibid.*

44 An underdeveloped international dimension is common to most of the largest legal education institutions in Romania, and reflects in relatively poor h-indexes and very few Romanian contributions to publications indexed in the Web of Science, Scopus or ERIH in the legal field

45 Curricula for the INPPA: [ http://www.inppacentral.ro/programele-de-studiu/] Accessed 14.03.2019. The only mention of PIL is as one of 21 directions of continual professional preparation of lawyers

46 Curricula for the INM: [http://www.inm-lex.ro/displaypage.php?p=45&d=2457] Accessed 14.03.2019. No mention of PIL

47 For thorough approaches on interdisciplinarity as an element of legal education, see Mercescu, A., *Interdisciplinarity as Resilience in Legal Education*, The Second World Congress on Resilience: From Person to Society, Medimond International Proceedings, Bologna, 2014, pp. 879-884; Bercea, R., *Legal Culturalism as Resilience*, The Second World Congress on Resilience: From Person to Society, Medimond International Proceedings, Bologna, 2014, pp. 847-852

48 For one to understand the cross-border peculiarities of civil and commercial law, family law, successions, etc., one must master the basics of all these disciplines of substantive law. This reality also affects research: there is an extremely small number of Romanian researchers whose main object of focus is private international law: most are specialists in their main field (e.g. family, law, successions, civil procedure), who later deviated towards some of the cross-border elements of their discipline. I myself started my research career in commercial law, and later (unlike most other researchers), became predominantly focused on PIL

the admission exams in the legal professions, none of which require knowledge in international law in general, let alone in PIL.

After Romania's accession to the EU, in 2007, the reform of the judicial system accelerated and the fight against corruption intensified, which put legal professionals under the spotlight[49]. As a consequence, the professions felt a lot of pressure to improve on their admission standards. This has triggered a professionalising effect on law schools whose main objective now resides in having as many successful graduates as possible in the national exams[50], therefore leading to a marginalisation of private international law.

These shortcomings: the general self-sustainability of the Romanian legal education system, resulting in a marginal (almost formal) approach on (private) international law, and the specific disadvantage of placing PIL in the final semester of undergraduate studies, when the students' main focus is on preparing for the license examination (where there is absolutely no requirement of PIL knowledge) and on the later profession admission exams (which also do not require even the most basic commandment of private international law), are merely the tip of the iceberg. Going deeper, we find that legal higher education in Romania is, as a rule, only exceptionally based on problem solving, and relies almost entirely on memorisation, which is a further hindrance for PIL, a discipline with very concrete purposes, where deductive reasoning is of paramount importance. This issue originates, however, at the bottom of the iceberg: despite several reforms, education in

[49] As described in Maci, M., *Anatomia unei imposturi. O* școală *incapabilă să* învețe. Trei, Bucharest, 2016, p. 58, p.137, paraphrased by Mercescu, in *op.cit.,* note 39, rural young people felt encouraged to move to the city where they could pursue academic studies. Equally encouraged to enroll in higher education were those already living in the city who would have wanted to graduate from university but could not enter higher education prior to 1989 because the system was very rigid, based on a limited number of places imposed by the centre. Thus, there was a strong demand for the increase of the number of students both from the bottom but also from above, since the state needed qualified personnel able to work in the new emergent administration. However, the older universities, constantly under-subsidized – even today Romania's higher education sector occupies only about 3 % of GDP – did not have the capacity to sustain such a growth and soon private institutions appeared that granted diplomas without much consideration for quality. As a result, the established universities felt threatened by what seemed to be a flourishing industry and implemented a system that made available a number of supplementary places based on fees. The quality of education declined steadily. Since faculties wanted students who pay taxes, everyone was allowed to both enter and exit the system in a period of time as short as possible. This led to an inflation of graduates poorly equipped for an equally poorly developed job market. The kind of training received did not involve a serious reflection on the systemic transformation of the Romanian society. The emergency of producing new students, new programmes adapted to the market economy, new professors and new elites precluded a thorough examination of the country's possibilities and future directions and encouraged superficiality, mimetic and uncritical thinking

[50] Mercescu, *op.cit.* note 39.

Romania in general is only exceptionally base on problem-solving: in Romanian, studying is almost synonymous to memorising. Going even deeper, one needs to address the issue of motivation: the Romanian educational system has no method to discover, let alone to cultivate the pupils' specific skills, leading to very few cases where students choose their higher education based on what they enjoy doing or on what they are naturally inclined to. This is particularly true for legal education[51], where there is very little variation in the optional curricula, and the profession admission exams are the same, as candidates will need to prove proficiency in both private and criminal law (with some focus on family law and successions for notaries) regardless of what they intend to later focus their profession on.

It is my view that this complex of circumstances has led to an overall relatively poor performance of Romanian PIL education, and consequently on private international law on all levels: practice, jurisprudence and research.

It is because of inadequate PIL basic training that parties and lawyers are not well acquainted with PIL on an elementary level[52], meaning that the issues of international jurisdiction and applicable law are rarely raised in front of Romanian courts; if Romanian courts do claim international jurisdiction, they will apply foreign law only exceptionally. This leads to comparatively few cases of PIL jurisprudence, and these not of the best quality.

### 4.4. Possible improvement measures

In section 2.3 above I argued that improvement of PIL education lies at the foreground of all of the proposed measures in the European Parliament Study. I also hold that insufficient focus in Romanian legal education on private international

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[51] My conclusion is drawn not based on empirical studies, but rather on constant interactions with students in formal and informal environments. I do not recall interacting final year law students who genuinely enjoyed "studying" law, or who were eagerly awaiting to start their practice out of love for the profession. The main motivations encountered are either financial (legal professions are still perceived to be very lucrative) or based on social status (lawyers and magistrates are very highly regarded in society in general). Not necessarily unexpected in a society still based on the nuclear family, even in urban centres, family pressure came up over and over again as the main motivator for trying to graduate from law school. I have encountered many former students who, after fulfilling this "duty" to their family and got their degree, followed professions with absolutely no connection with their higher education

[52] Some of the shortcomings encountered during my legal practice and research: *exequatur* requested and granted in the matter of maintenance obligations; a reputed practitioner looking for the answer on jurisdiction in the Rome III Regulation; pervasive lack of awareness of The Hague Choice of Court Convention of 2005; etc. For normative inadequacies in the matter of insolvency, see Popovici, S., *Cross-Border Insolvency in the New Insolvency Code of Romania*, The Second World Congress on Resilience: From Person to Society, Medimond International Proceedings, Bologna, 2014, pp. 907-910

law is the main reason for relatively poor performances of Romanian practitioners and researchers in cross-border matters in general.

I do not believe any of the "hard" measures recommended in the Study would genuinely help improve competence in cross-border commercial law in Romania, not because of their inherent shortcomings[53], but mainly because their application would require a level of expertise in private international law which I believe at the moment Romania is lacking. Specialisation within the court system is relatively low as it is, so establishing courts or chambers dealing only with cross-border cases is simply not feasible in the current judicial context. A specific uniform procedure for commercial cases with a foreign element may help, however not significantly, in my opinion, given the relative low success in Romania of existent uniform procedures, such as the European Order of Payment[54]. While the establishment of a permanent European Commercial Court is certainly a very intriguing prospect, I believe it would do little to improve the quality of the Romanian judiciary in cross-border commercial matters.

Having PIL as a compulsory discipline is simply not enough if there is no additional support. While discussing substantial reforms of the Romanian education system itself surpasses the scope of this paper, there are some measures that I believe could help a short-term increase of Romanian competence in cross-border commercial matters. The most obvious of these would be to include the basics of PIL as a requirement for accession to the legal professions, a first element which would compel the law schools to focus more on cross-border aspects. Further on, initial preparation of magistrates and lawyers should also focus on PIL. These initial measures have the potential to generate increased jurisprudence of better quality in cross-border (not only) commercial cases, and therefore to an increase in the quality of PIL research, all of which would then contribute to the improvement of PIL education.

To conclude, if not in other Member States, in order to build competence in private international commercial law, the focus for Romania should be predominantly on improving PIL education. Since the Romanian legal system is relatively self-sufficient, as stated above, it is unlikely that a national endeavour will emerge in that direction, so any initiative from the EU underlining the need to improve PIL education would help raise awareness of this necessity. EU intervention in the curricula of law schools or in the content of the admission exams into the legal professions, closer to a "hard" measure than a "soft" one, is probably not

[53] Rammeloo, *op. cit.,* note 10

[54] When taking into account the legal English element, the issue becomes even more problematic

to be expected in the near future. However, the European higher education programmes have proven to be a success, and their focus (if not the establishment of a separate direction with its main preoccupation on cross-border aspects) could lead to national measures susceptible of improving Romanian performance in private international commercial law.

These measures, however, only come to serve as a short-term solution to what I mentioned above as being the "tip of the iceberg". Making private international law (at least its basics) compulsory for admission to the legal professions would compel law schools to focus more on the legal relationships with a foreign element, and would also significantly build on the students' motivation to study PIL. Introducing cross-border elements as compulsory in the initial training of magistrates and lawyers would also lead to the increase of the practitioners' PIL knowledge. Working to remove this "tip" would, however, only serve to bring PIL closer to the level of proficiency in national law, which would definitely be a good short-term solution.

European funding for improvement of PIL would work to the same end. As it is now, it is focused on cross-border collaborations between institutions, where the deficit in Romania makes it very difficult to access research and development funding on private international law. Even if focused on domestic improvement alone, EU intervention would at best help improve PIL knowledge to a level comparable with that of national law. Substantial improvement, however, is only possible long-term, and only with a gradual reform of the entire educational system from the focus on memorisation to that on problem solving and aptitude learning, which is, however, far outside the scope of this paper.

## 5. CONCLUSIONS

Building competence in commercial law in the member states, in the view of the European Parliament, is almost synonymous with building competence in private international law in commercial matters. In the Study commissioned in order to reach this goal, a varied set of "hard" and "soft" measures have been recommended. While these are, in principle, hard to argue with, practically and logistically they would be difficult to enact.

Improvement of legal education is mentioned as a marginal "soft" measure as a subdivision of the recommendations given to improve the attractiveness of dispute settlement in the EU; it is my view, however, that this should be the prime measure, since without it, all of the others (hard and soft) would lack an adequate foundation and therefore would probably not have the desired effect.

Making PIL compulsory in law schools, the only recommendation in the Study for improvement of legal education, while potentially useful, has proven its limits in the Romanian legal landscape. In the short term, concrete measures such as introducing PIL as a compulsory discipline in the admission exams to the legal professions, while also improving the curricula of the institutions empowered with the initial and continuous training of lawyers, magistrates and the other professions in order to include elements of private international law, could contribute to the desired effect: building competence in cross-border commercial law in Romania. Given the relative self-sustainability of the Romanian legal system, initiatives from the EU, even in the form of "soft" measures, could prove especially valuable.

In the long term, however, genuine improvement of competence in cross-border commercial law requires an overhaul of the education system in general, with less focus on memorisation and increased focus on problem-solving and aptitude learning. It is not inconceivable, in my view, for the EU to assess national educational systems and to encourage departure from the very rigid systems of (almost purely) theoretical learning, such as the Romanian one; an analysis of the measures that the EU could take, however, would far exceed the scope of this paper.

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# IMPLICATIONS OF THE NEW 2019 HAGUE CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ON THE NATIONAL LEGAL SYSTEMS OF COUNTRIES IN SOUTH EASTERN EUROPE

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***ABSTRACT***

*The diplomatic session of the Hague Conference on Private International Law (Hague Conference) regarding the "Judgments Project" will be held between 18 June – 02 July 2019 in the Hague when it is expected that the long awaited Hague Convention on Recognition and Enforcement of Foreign Judgments (new 2019 Hague Convention) will be adopted. This Convention comes as a result of 27 years of work that has been done in the course of this project of the Hague Conference and it can be said that is one of the most awaited developments in Private International Law. The success of the convention cannot be predicted at this point because large number of factors impact the outcome of the convention. However benefits from having an international agreement dealing with cross border recognition and enforcement of foreign judgments is self-evident. More than ever there is a need of a single instrument that will contain unified conditions for recognition and enforcement and ease the cross border circulation of judgments. Only a brief look at the New York Convention on recognition and enforcement of foreign arbitral awards (New York Convention) provides for glimpse of the benefits from having such instrument. So what will this mean for the countries of South Eastern Europe? What will be the interest of the countries to be part of this Convention? How much are the national legal systems compatible with the rules provided in the Hague convention?*

*This article will try to answer these questions, together with the implications that the Hague Convention will have on the South Eastern Europe region. Moreover this is of huge importance since most of the countries of South Eastern Europe region are part of the European Union or are candidate countries. So has the time come for a structural change of the national recognition and enforcement systems and how far reaching will be the consequences on the national legal systems?*

***Keywords*: *Hague Convention on Recognition and Enforcement of Foreign Judgments; Recognition and Enforcement; South Eastern Europe; civil and commercial matters; indirect jurisdiction; right of defense; public policy, irreconcilable judgments.***

## 1. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ACCORDING TO THE NEW 2019 HAGUE CONVENTION

Recognition and enforcement of foreign judgments represents one of three basic components of private international law[1] and therefore it is a very important part of the Hague Conference.[2] However if we compare the international conventions adopted by the Hague Conference we can see the dominance of those which cover the conflict of law aspects[3] and those regarding cross border cooperation[4] over the other aspects of private international law (jurisdiction and exequatur).[5] Such position is not a coincidence, because countries are more found in adopting rules which refer to the substantive law issues and are more resistant in adopting rules regarding procedural law issues. Moreover, in the case of recognition and enforcement this aspect goes further, because the exequatur represents last "defense" that legal systems possess regarding the incorporation of foreign judicial decisions in their domestic legal order.

On the other hand, transnational cooperation influenced by the globalization and the interconnection of the economic systems, asks for faster responsiveness of the legal systems and predictability of the legal outcome manifested by the judicial decisions. In other words there is a bias between sovereignty of the countries manifested in the rules for recognition and enforcement of judgments and the need for prompt cross border cooperation. Such antagonistic position had influenced the increased popularity of arbitration as an adjudicative system of "distribution of justice". The success that the New York Convention, created a "rivalry" between these two segments of the distribution of justice. The response of the judicial distribution of justice is the Hague Convention of recognition and enforcement of foreign judgments. The answer to the question whether this international convention will have

1 Together with conflict of law and international jurisdiction. See Fawcett J.; Carruthers J.; Cheshire, North & Fawcett, *Private International Law*, Oxford University Press 14th ed., 2008, p. 7

2 On the structure of the Hague Conference see Droz L.A.G., *A Comment On The Role Of the Hague Conference On Private International Law, Law and Contemporary Problems*, 1994, Dyer A, *The Hague Convention: Its Successes and Failures - Parts I and II*; Australian Family Lawyer, June 1994, *Vol.* 9, and September 1994, Dyer A., *To Celebrate a Score of Years!*; New York University Journal of International Law and Politics, *Vol.* 33, Issue 1, 2000, Lipstein K., *One Hundred Years of Hague Conferences on Private International Law*, International and Comparative Law Quaterly, 1993, van Loon, J J.H.A., *The Hague conference on private international law: an introduction*', in: van Krieken, P.J.;McKay, M. (eds.), *The Hague: Legal Capital of the World,* The Hague, TMC Asser Press, 2005, van Loon, H.; Schulz, A., *'The European Community and the Hague Conference on Private International Law',* in: Martenczuk, B.; van Thiel, S. (eds.), Justice, Liberty, Security: New Challenges for EU External Relations, Brussels University Press, 2008

3 17 Conventions

4 10 Conventions

5 10 Conventions

success is complex and ambiguous, having in mind all of the economic and political developments in the world and the paste of the dynamics in today's economic environment. Lesson must be learned from the 1971 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters that the future of the new 2019 Hague Convention depends on the practicality of the adopted solutions and whether such rules are of interests to the countries.

### 1.1. Scope of application of the new 2019 Hague Convention

The scope of application of the new 2019 Hague Convention goes from general to specific, firstly determining the lager legal field of civil and commercial matters and then going to specific areas which are excluded from the scope of application. Article 1 of the new 2019 Hague Convention states that it applies to civil and commercial matters and then excludes the more specific areas such as tax, custom and administrative decisions from the scope of application. Article 2 goes into further specifics, containing *claususlus numerus* of the other areas which are excluded from the scope of application.[6] Moreover, Article 2 of the new 2019 Hague Convention excludes the arbitral and other alternative dispute resolution decisions from the scope of application. Very important aspect of the new 2019 Hague Convention is that the convention is applicable towards civil and commercial judicial decisions in which one of the parties is a state, government, governmental institution or a person acting in the name of the state, but excluding the aspects regarding the immunity and the privileges of the states and international organizations.

### 1.2. Recognition and enforcement of foreign judgments according to the new 2019 Hague Convention

The new 2019 Hague Convention is intended to provide an effective system for recognition and enforcement of foreign judgments in civil and commercial mat-

[6] The matters excluded from the new 2019 Hague Convention are: (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; (h) liability for nuclear damage; (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; [(l) privacy[, except where the proceedings were brought for breach of contract between the parties];] [(m) intellectual property [and analogous matters];] [(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;] [(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties;] [(p) anti-trust (competition) matters]

ters and provide for circulation of judgments in circumstances that are largely considered to be uncontroversial.[7] The mechanism established with the new 2019 Hague Convention provides that a judgment given by a court of a contracting state, shall be recognized and enforced in other Contracting state in accordance with the provisions provided in Chapter II of the new 2019 Hague Convention.[8] Also this convention provides for the general principles according to which the for recognition and enforcement will be conducted, that there will be no revision au found[9] and the condition that the judgment has effect and is enforceable in the country of origin.[10]

The system created by this convention is a simple one: if the judgment regarding civil and commercial matters is rendered in a country which satisfies the indirect jurisdictional grounds provided in Article 5 and if the grounds for refusal of recognition in Article 7 are not met, then the judgment can be recognized and enforced in a requested country. However, foreign judgments can be recognized and enforced under national law or other international convention, but with consideration to the exclusive bases given in Article 6 (which refer to exclusive bases of jurisdiction for registered intellectual property rights, rights *in rem* over immoveable property and tenancies of immoveable property).

The first criteria for circulation of judgments are provided in Article 5, which sets out the bases for recognition and enforcement of a judgment in the form of indirect jurisdictional grounds against which the judgment from the state of origin is to be assessed by the State where recognition and enforcement is sought.[11] These grounds can be divided in three traditional jurisdictional categories: jurisdiction based on connection with the defendant, jurisdiction based on consent and jurisdiction based on connections between the claim and the state of origin.[12] More specifically, this list contains jurisdictional bases such as: persons habitual residence is in the state of origin,[13] natural persons had their principal place of business in the state of origin,[14] person against whom recognition is sought is the person that brought the claim,[15] defendant maintained a branch, agency or other

[7] Garciamartin F, Saumier G., Preliminary document No 10 of May 2018 Judgments Convention: Revised Preliminary Explanatory Report, December, 2018, par. 16

[8] Article 4 of the new 2019 Hague Convention

[9] Article 4(2) of the new 2019 Hague Convention

[10] Article 4(3) of the new 2019 Hague Convention

[11] Garciamartin; Saumier, *op. cit.,* note 7, p. 5, par 17

[12] Garciamartin; Saumier, *op. cit.,* note 7, p. 34, par. 146

[13] Article 5(1)(a) of the new 2019 Hague Convention

[14] Article 5(1)(b) of the new 2019 Hague Convention

[15] Article 5(1)(c) of the new 2019 Hague Convention

establishment without separate legal personality in the state of origin and the claim arose out of the activities of these entities,[16] defendant expressively[17] or tacitly[18] consented to the jurisdiction of the court of origin, the judgment was given on contractual obligations and it was given in the State in which performance of that obligation took place according to the law that the parties choose or it was determined according to the conflict of law rules in that state (in absence of an agreed place of performance),[19] the judgment is regarding a tenancy of immoveable property and it was given by a state where the property is situated,[20] the judgment is regarding contractual obligation secured by a right *in rem* in immoveable property located in the state of origin,[21] the act or omission directly causing harm occurred in the state of origin and a judgment on a non-contractual obligation was rendered in the state of origin,[22] bases concerning trusts,[23] counterclaims[24] and choice of court agreements.[25] Most of these grounds can be found in the national legal systems, but they are formulated more precisely or narrowly in the new 2019 Hague Convention.[26] Moreover, there is no hierarchy between these grounds and satisfaction of a single ground can fulfill this condition.[27]

These grounds are limited by the exclusive jurisdictional rules listed in Article 6 (registered intellectual property rights, rights *in rem* over immoveable property and long term tenancies of immoveable property). In the cases where the judgments fulfills the requirements provided in Article 4, 5 and 6 the only grounds for refusal to recognize and enforce the decision are provided in Article 7. This list refers to grounds as: right of defense,[28] the judgment was obtained by fraud,[29] public policy,[30] violation of choice of court agreement,[31] inconsistency with a judgment

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16 Article 5(1)(d) of the new 2019 Hague Convention

17 Article 5(1)(e) of the new 2019 Hague Convention

18 Article 5(1)(f) of the new 2019 Hague Convention

19 Article 5(1)(g) of the new 2019 Hague Convention

20 Article 5(1)(h) of the new 2019 Hague Convention

21 Article 5(1)(i) of the new 2019 Hague Convention

22 Article 5(1)(j) of the new 2019 Hague Convention

23 Article 5(1)(k)(i) and (ii) of the new 2019 Hague Convention

24 Article 5(1)(l) of the new 2019 Hague Convention

25 Article 5(1)(m) of the new 2019 Hague Convention

26 Garciamartin; Saumier, *op. cit.,* note 7, p. 34, par. 146

27 *ibid*.

28 Article 7 (1)(a) of the new 2019 Hague Convention

29 Article 7 (1)(b) of the new 2019 Hague Convention

30 Article 7 (1)(c) of the new 2019 Hague Convention

31 Article 7 (1)(d) of the new 2019 Hague Convention

given in the requested state[32] and inconsistency with a judgment given in another state.[33][34]

Another rule provided in this article is given in Article 7(2) of the new 2019 Hague Convention, which establishes priority of the decisions which need to be recognized and enforced. In private international law legal theory[35] in situation where there are conflicting proceedings the *lis pendens* rule applies. However, in the new 2019 Hague Convention there are no rules for direct jurisdiction and thus does not include a rule on *lis pendens*.[36] The system developed in the new 2019 Hague Convention regarding parallel proceedings relies on Article 7(1)(e) and Article 7(1)(f) which deal with situations of inconsistency of the judgments given in the requested or given in another state and Article 7(2) which refers to situations when proceedings are still pending in the requested state and when recognition and enforcement of a judgment given in another state is sought.[37] However, refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.[38]

Finally, the new 2019 Hague Convention introduces a *favor recognitions* principle according to which if judgment cannot be recognized and enforced on the basis of the new 2019 Hague Convention but it could be recognized and enforced according to the national legal rules then the requested state can recognize and enforce a foreign judgment based on national law.[39] The only limitation of Article 16 of the new 2019 Hague Convention is that it does not apply to the three situations referred in Article 6 of the new 2019 Hague Convention (exclusive jurisdictional grounds). With such position it can be said that the intention of the new 2019 Hague Convention is to set out minimum standard for mutual recognition or enforcement of judgments.[40]

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32 Article 7 (1)(e) of the new 2019 Hague Convention

33 Article 7 (1)(f) of the new 2019 Hague Convention

34 Another optional ground is the examination of the law applied by the court of origin in intellectual property matters is provided in Article 7 (1)(g). See more Garciamartin; Saumier, *op. cit.,* note 7, p. 67-69, par. 303-312

35 Marongiu Buonaiuti, F., *Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within the European Judicial Area*, Yearbook of Private International Law, *vol.*11, 2009, p. 513

36 Garciamartin; Saumier, *op. cit.,* note 7, p. 68, par. 309

37 *Ibid.*

38 Article 7(2) of the new 2019 Hague Convention

39 Article 16 of the new 2019 Hague Convention

40 Garciamartin; Saumier, *op. cit.,* note 7, p. 5 82, par. 367

### 1.3. Other provisions in the proposal of the Hague Convention on recognition and enforcement of foreign judgments

The new 2019 Hague Convention contains other provisions that are in context of the system for recognition and enforcement. These aspect refer to questions such as: recognition and enforcement of preliminary questions,[41] recognition and enforcement of a severable part of a judgment,[42] recognition and enforcement of damages including punitive damages[43] and judicial settlements.[44] Moreover the new 2019 Hague Convention contains rules that address procedural matters that facilitate access to the mechanism of new 2019 Hague Convention such as: documents that need to be produced,[45] procedure[46] and cost of proceedings.[47]

## 2. IMPLICATION OF THE NEW 2019 HAGUE CONVENTION ON THE NATIONAL LEGAL SYSTEMS OF COUNTRIES IN SOUTH EASTERN EUROPE

The system determined by the new 2019 Hague Convention for recognition and enforcement of foreign judgments is in three stages: first, if the judgment falls under the scope of application of the convention, secondly, if it satisfies one of the indirect jurisdictional bases and lastly, if it does not violate the grounds for refusal of the judgment than it can be recognized and enforced by the requested court. But this mechanism must be seen together with Article 16 of the new 2019 Hague Convention (*favor recognitionis* principle) which broadens the modalities upon which a foreign judgment can be incorporated in the domestic legal system by allowing implementation of national legal rules regarding recognition and enforcement if the decision cannot be recognized and enforced upon the new 2019 Hague Convention.

The first threshold that a foreign judgment needs to fulfill is that it has proper connections with the country of origin manifested in the form of the indirect jurisdictional grounds provided in Article 5 of the new 2019 Hague Convention. What is important for the national legal system is that these indirect jurisdictional grounds are irrelevant to the national direct jurisdictional rules.[48] In the assess-

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41 Article 8 of the new 2019 Hague Convention

42 Article 9 of the new 2019 Hague Convention

43 Article 10 of the new 2019 Hague Convention

44 Article 12 of the new 2019 Hague Convention

45 Article 13 of the new 2019 Hague Convention

46 Article 14 of the new 2019 Hague Convention

47 Article 15 of the new 2019 Hague Convention

48 Garciamartin; Saumier, *op. cit.,* note 7, p. 34, par. 144

ment of these indirect grounds the court of the requested state is not bound by the determination of the direct jurisdiction of the court of origin. For example, if the direct jurisdiction was determined by the N. Macedonian court on the bases of the domicile of the defendant[49], the assessment whether the judgment of the N. Macedonian court fulfills the indirect jurisdictional requirements for recognition and enforcement according to the new 2019 Hague Convention can be determined according to the ground that the person against whom recognition is sought[50] was habitually resident in the state of origin at the time that person became a party to the proceedings in the court of origin.[51] On the other hand if the person has domicile in N. Macedonia, but is habitually resident in another country, the judgment will has to fulfill other requirements provided in Article 5(1) of the new 2019 Hague Convention. Such relation between the direct and indirect jurisdiction of the country of origin and the requested country can produce an unsynchronized outcome. In this respect two possible approaches can be taken. Firstly, in short term, the application of Article 16 of the new 2019 Hague Convention which allows application of the national rules for recognition and enforcement provides for safe alternative. Secondly, on long term, this "passive" approach taken by the new 2019 Hague Convention, can influence the countries to synchronize the direct jurisdictional criteria with the criteria provided in the Article 5 of the new 2019 Hague Convention, which will have as an outcome easier circulation of judgments.[52] For example, if the direct jurisdiction in N. Macedonia for legal person was determined on the ground that the principle place of business of the legal person was in N. Macedonia, this ground would correspond with the indirect jurisdictional criterion in Article 5(1)(a) of the new 2019 Hague Convention[53] and if the other conditions of the convention are met the judgment would be recognized and enforced according to the new 2019 Hague Convention.

The new 2019 Hague Convention contains a specific provisions which expand the reach of the new 2019 Hague Convention on national law in three situations.

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[49] Article 51 of PILA of N. Macedonia. Private International Law Act of N. Macedonia (Закон за меѓународно приватно право на Република С. Македонија) (Official Gazette of the Republic of N.Macedonia (Службен Весник на РСМ) no. 87/2007, 156/2010)

[50] The phrase "person against whom recognition is sought" in Article 5(1)(a) of the new 2019 Hague Convention is intended to have broad number of persons against whom recognition and enforcement can be sought (e.g. claimant) and not to limit sub-paragraph (a) to one party (defendant). Garciamartin; Saumier, *op. cit.,* note 7, p. 34, par. 149

[51] Article 5(1)(a) of the new 2019 Hague Convention

[52] Garciamartin; Saumier, *op. cit.,* note 7, p. 34, par. 144

[53] Article 3(2) of the new 2019 Hague Convention provides for a definition of habitual residence for entity or person other than natural person based on these criteria: statutory seat; formation or incorporation by law; central administration and principal place of business

These situations are specified in Article 6 of the new 2019 Hague Convention and are given as exclusive bases for recognition with two effects: positive and negative.[54] The positive effect provides for judgments that meet the bases of jurisdiction given in Article 6 can be recognized and enforced, while the negative effect provides for those which do not fulfill these criteria would not to be recognized and enforced under the new 2019 Hague Convention and under national law.[55] The first situation refers to exclusive basis of jurisdiction for the recognition and enforcement of judgments on the (registration or) validity of intellectual property rights required to be granted or registered.[56] These judgments shall be recognized if and only if the State of origin is the state in which grant or registration of the right concerned has taken place, or, under the terms of an international agreement or regional instrument, is deemed to have taken place.[57] The second situation establishes an exclusive basis for recognition and enforcement of judgments that refer to rights *in rem* in immovable property. These judgments shall be recognized if and only if they were given by the courts where the immovable property is situated.[58] The third situation provides for exclusive jurisdiction for long term tenancies (longer than six months) but only if the law of the state where the immovable property is situated establishes such exclusive jurisdiction.[59] All of these judgments must refer to these issues as the main object of the proceedings, while for preliminary or incidental issues there is another provision.[60]

Most of the national legal systems are familiar with these principles and provide for exclusive jurisdiction for these cases. The PILA of N. Macedonia in Article 67 provides for exclusive jurisdiction of the courts of N. Macedonia for registration and validity of industrial property rights if the application was filed in N. Macedonia.[61] In addition to this, the court of N. Macedonia has exclusive jurisdiction over disputes relating to property rights on immovable property if the immovable

54 Garciamartin; Saumier, *op. cit.,* note 7, p. 57, par. 256

55 *ibid*.

56 Article 6(a) of the new 2019 Hague Convention

57 Garciamartin; Saumier, *op. cit.,* note 7, p. 57, par. 258. Difference must be made with Article 5(3)(a) of the new 2019 Hague Convention, where the nature of the dispute regarding these rights is different, namely Article 6(a) refers to registration or validity of these rights and Article 5(3)(a) refers to infringement of these rights

58 Article 6(b) of the new 2019 Hague Convention

59 Article 6(c) of the new 2019 Hague Convention

60 See Article 8 of the new 2019 Hague Convention

61 Article 67 of the PILA of N. Macedonia

property is situated in the territory of N. Macedonia.[62] Similar provisions are present in Bulgaria,[63] Croatia,[64] Montenegro,[65] Slovenia,[66] and Turkey[67].

The second threshold of the new 2019 Hague Convention is that the recognition and enforcement can be refused if the foreign judgment doesn't fulfill the conditions laid down in Article 7(1) of the new 2019 Hague Convention. These seven conditions can lead to refusal of recognition or enforcement of a judgment in requested state but their application is not mandatory. The intention of the drafters was to create a minimum standards for refusal, however states may make adaptation of these conditions.[68] Most of these conditions are not novelty and they can be found in the national legal systems.

The first condition refers to infringement of the right of defense in the state of origin.[69] This condition specifically refers to the lack of proper notification to the defendant, which constitutes a ground for refusal of recognition and enforcement.[70] In comparison with the PILA of N. Macedonia the rule provided in the new 2019 Hague Convention is more specific, providing for two distinct scenarios: first, that the document which instituted the proceedings or equivalent document, including a statement of the essential elements of the claim was not notified to

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62 Article 69 of the PILA of N. Macedonia

63 Article 12 and 13(2) of the PILA of Bulgaria. Bulgarian Private International Law Act (Кодекс На Международното Частно Право, Обн. ДВ. бр.42 от 17 Май 2005г., изм. ДВ. бр.59 от 20 Юли 2007г., изм. ДВ. бр.47 от 23 Юни 2009г). English translation [http://solicitorbulgaria.com/index.php/bulgarian-private-international-law-code] Accessed 12.05.2015

64 Article 46 of the PILA of Croatia regarding jurisdictional issues in civil and commercial matters refers to application of the 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 in which in Article 24 an exclusive jurisdiction of the Croatian courts is provided if the immovable is located in Croatia. Zakon o međunarodnom privatnom pravu (Nar. nov., br. 101/17)

65 Article 119 and 122 of the PILA of Montenegro. Private International Law Code Montenegro (Zakon o međunarodnom privatnom pravu) (Official Gazette of the Republic of Montenegro, No 1/2014)

66 Article 62 and 64 of the PILPA of Slovenia. Private International Law and Procedure Act (Zakon o mednarodnem zasebnem pravu in postopku), Official Gazette RS, no. 56/99

67 Article 12 Code of Civil Procedure (Law No.6100 of 12 January 2011), Official Gazette, 4 February 2011, No.27836. However the Turkish national legal system does not have an explicit rule regarding exclusive jurisdiction regarding registration and validity of industrial property rights. See, Beaumount P., Yüksel B., *Turkish and EU Private International Law : A Comparison*, Istanbul: XII Levha, 2014, p.42

68 Garciamartin; Saumier, *op. cit.,* note 7, p. 60-61, par. 273-275. According to this revised draft explanatory report, States may: (i) adopt domestic legislation that does not provide for refusal in some of these circumstances or provide for refusal in all these circumstances; (ii)require recognition and enforcement in some of these circumstances, or (iii) specify additional criteria that are relevant to the exercise of the discretion

69 Article 7(1)(a) of the new 2019 Hague Convention

70 Garciamartin; Saumier, *op. cit.,* note 7, p. 61, par. 276

the defendant in sufficient time and in such way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;[71] or second scenario, that the document which instituted the proceedings or equivalent document, including a statement of the essential elements of the claim was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested state concerning service of documents.[72] The PILA of N. Macedonia contains more general rule that refers to the violation of the right of defense as an obstacle for recognition and enforcement. This rule provides that the court of Republic of N. Macedonia shall refuse recognition of a foreign judgment, if one of the parties proves that: 1. due to irregularities in the proceedings he had no opportunity to participate therein: or 2. the summons, the document or the ruling instituting the proceedings were not served upon him in a way provided by the law on procedure of the State in which the judgment was rendered, or if such service was not even tried, except when the party pleaded to the merits of the plaintiff's claim in the procedure of first instance.[73]

The wording of both of these rules is different, however several overlapping issues can be detected. First, both of these rules refer to the question of service of documents. The N. Macedonian rule starts from more general position to more specific, from existing irregularities in the proceedings which as consequence had prevented the party from participating, to the more specific aspect of service of documents. The new 2019 Hague Convention rule refers only to the question of service of documents. However, this rule must be read in conjunction with Article 7(1)(c) which refers to the public policy defense, but with specific reference of the *"…fundamental principles of procedural fairness…"* which on general level covers the issues such as right of the party to be heard, equity of arms and etc.[74] Secondly, the standard upon which the service of documents is weight in the N. Macedonian PILA is the *"… law on procedure of the State in which the judgment is rendered…"*[75]. The approach taken in the new 2019 Hague Convention is different, in the first scenario there is no specific reference to the standard and whether the document instituting the proceedings was duly served on a defendant must be determined in the light of the provisions of the new 2019 Hague Convention and several modalities can be provided such as service to the employee of the

[71] Article 7(1)(a)(i) of the new 2019 Hague Convention

[72] Article 7(1)(a)(ii) of the new 2019 Hague Convention

[73] Article 103 of the PILA of N. Macedonia

[74] Garciamartin; Saumier, *op. cit.,* note 7, p. 61, par. 279

[75] Article 103 of the PILA of N. Macedonia

defendant or public notice.[76] However the right to be heard is not violated if the requested court is satisfied that all investigations required by the principle of diligence and good faith have been undertaken to trace the defendant without success.[77] In the second scenario which is intended to protect the requested state, the issue is whether the defendant was notified in a manner that is incompatible with fundamental principles of the requested state concerning service of documents.[78] Thirdly, in both rules the behavior of the defendant in the State of origin dictates its outcome, namely if the defendant entered in appearance and presented his case in the court of origin without contesting notification, the defense based on improper notification will not be available in the requested State.[79]

The legal obstacle provided in Article 96 of the Slovenian PILP act against the recognition and enforcement of a foreign judicial decision represents a negative condition and the Court examines it upon objection by the party.[80] The second paragraph represents a presumption according to which the decision which was rendered in a process that consists of a violation of the rights of defense of the party against whom the recognition and enforcement is sought. Article 96(2) consists several *in concreto* 'scenarios' that have to exist in case a defense based on this provision is raised. The first type of scenarios refer to specific situations where the summons, the document or the ruling instituting the proceedings, was not served upon the person against whom enforcement is sought. The second type of scenarios is regarding the situations where service *in personam* was not even tried.[81] However, from the second sentence of the same paragraph it can be concluded that this presumption is rebuttable.[82] In this case the burden of proof that the person has entertained proceedings on the merits in first instance shifts to the person who applied for recognition and enforcement.[83] The Montenegrin PIL act contains a very similar rule, but it differs slightly by specifically referring to the scenario where the right of the defense was obstructed or denied to the party by

76 Garciamartin; Saumier, *op. cit.,* note 7, p. 61, par. 280

77 *ibid.*

78 Article 7(1)(a)(ii) of the new 2019 Hague Convention

79 Garciamartin; Saumier, *op. cit.,* note 7, p. 61, par. 279

80 Wedam Lukić D., *Priznanje in izvršitev tujih sodnih odločb v Republiki Sloveniji,* Pravni letopis, Inštitut za primerjalno pravo, Ljubljana, 2011, p. 135-136

81 In the PILA of N. Macedonia, the Slovenian approach was followed. However the *in concreto* scenarios were broadened with other scenarios such as *'…if service in person was not even tried…'* aspect, but with difference in respect to the reference to the law according to which the service needs to be conducted ('…in a way provided by the law on procedure of the State in which the decision was rendered…), Article 103(2) of the PILA of N. Macedonia

82 Dika M.; Knežević G.;Stojanović S., *Komentar zakona o međunarodnom privatnom i procesnom pravu,* Nomos, 1991, p. 291

83 *ibid.*

not producing enough time for the preparation for the proceedings.[84] The Bulgarian PIL act contains a more general rule where as a requirement for the protection of the right of defense, the defendant needs to be served with a copy of the statement of action, the parties need to be duly summoned and the fundamental principles of Bulgarian law related to defense of the parties must not be compromised.[85] However, the defendant in the proceedings for recognition and enforcement of foreign judicial decision cannot invoke this violation if he could have raised it before the foreign court.[86] The Croatian PIL act contains a more general rule and doesn't go in specific, simply stating that upon objection by the party, the Croatian court would refuse to recognize and enforce a foreign judgment if the party's right of participation in the proceedings was breached.[87] The Turkish PILA in Article 54(d) also provides for this condition for recognition and enforcement of a foreign judgment.

The second condition in the new 2019 Hague Convention refers to fraud as ground for refusal of recognition and enforcement.[88] This condition can be seen together with the third condition of the new 2019 Hague Convention which refers to public policy defense.[89] Public policy has very broad meaning and its interpretation varies according to the national legal systems. Its scope and contents depend on the manner in which an individual state values its interests.[90] This means that public policy or *ordre public* in Private International Law and Procedure can be understood as the sum of the values on which the legal, social and cultural order of a particular country depend and which must also be complied with in the so-called relationships with an international element.[91]

Slovenia in its PILP act does not contain a definition of public policy, but it states that the effect of the law (or the decision) must not be contrary to the Slovenian public policy.[92] The position of Article 100 of PILP act of Slovenia accepts *Lagarde's* understanding that the legal norm of the foreign law does not by itself confront the domestic legal order itself, but only in correlation with concrete aspects of the do-

84 Article 143 (2) of the PIL act of Montenegro

85 Article 117 (2) of the PILA of Bulgaria

86 Article 120 (2) of the PILA of Bulgaria

87 Article 68 of the PILA of Croatia

88 Article 7(1)(b) of the new 2019 Hague Convention

89 Article 7(1)(c) of the new 2019 Hague Convention

90 Case II Ips 462/2009 of the Supreme Court of Republic of Slovenia, p.6-7, par. 9

91 Kramberger Škerl J., *Evropeizacija javnega reda v mednarodnem zasebnem pravu*, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljani, 2009, p. 349

92 See Articles 5 and 100 of the PILPA of Slovenia

mestic legal order[93]. This means that the goal of the public policy is to 'remove the incoherency' in the interconnection of the foreign and domestic legal orders.[94] Such an understanding of the public policy exception provides that the infringement must be in the context that the foreign legal norm by itself does not violate the public policy but only the effect of the foreign decision that it creates in context.[95]

Although the public policy has its own national characteristics regarding the structure of the rule, the PILA of N. Macedonia uses the same wording as the rule provided in the PILP act of Slovenia.[96] The Bulgarian PIL act contains a simple rule regarding the public policy criterion.[97] It just insists that the recognition and enforcement should not be contrary to Bulgarian public policy. Similar rule is contained in the Croatian PIL act[98] and the Turkish PIL act.[99] The Montenegrin PIL act has provided for a similar rule as the Slovenian PILP act where the requirement is that the foreign judicial decision will not be recognized in Montenegro if the effects of its recognition would be contrary to Montenegrin public policy.[100] It is considered that this rule purpose is to establish substantive and procedural public policy in connection with effects with the forum.[101]

The forth condition refers to a judgment rendered by a Court that assumed the jurisdiction although there was a choice of court agreement which designated other Court than the court of origin.[102] This conditions tends to uphold the *prorogation iurisdicitonis* and to respect the party autonomy. Article 7(1)(d) of the new 2019 Hague Convention needs to be seen together with the indirect jurisdictional bases given in Article 5 and it presents a last defense against a judgment that was rendered by a court that determined the jurisdiction on other bases, while a

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93 Kramberger Škerl J., *Javni red pri priznanju in izvršitvi tujih sodnih odločb (s poudarkom na procesnih vprašanjih)*, Zbornik znanstvenih razprav – LXV. Letnik, 2005, p. 260

94 Lagarde P., *Recherches sur l'ordre public en droit international privé*, Paris, 1959, p. 174-188 (as cited by Varadi T. *et al.*, *Međunaodno privatno pravo*, deseto izdanje, JP „Službeni Glasnik', Beograd, 2008, p. 158

95 Varadi *et al., ibid.,* p. 159.

96 Article 107 of the PIL act of Macedonia

97 Article 117 (5) of the PILA of Bulgaria

98 Article 71 of the PILA of Croatia

99 Article 54(c) of the PILA of Turkey. Private International and Procedural Law Act of Republic of Turkey (Act No. 5718) (5718 sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun) (Official Gazette in Turkey on 12 December 2007)

100 Article 147 of the PIL act of Montenegro

101 Kostić Mandić M., Recognition and enforcement of foreign court decisions in the new private international law of Montenegro, Collected papers, Association of Montenegro Lawyers, nos. 1-2/2015, p. 10

102 Article 7(1)(d)

choice of court agreement was present in the case.[103] The PILA of N. Macedonia also contains a condition for recognition and enforcement which refers to the infringement of a *prorogation iurisdictions* however, this rule is more limited and can be determined upon request by the parties against whom the foreign judgment was rendered and only in the case when the Court of N. Macedonia was designated with the agreement on jurisdiction.[104] Article 98(2) of the Slovenian PILP act represents a safeguard of the parties' autonomy manifested in the jurisdictional agreement of jurisdiction of Slovenian courts. With this provision the Court, upon objection of a person against whom a foreign judicial decision was rendered, will refuse to recognize the foreign decision in the cases when the court rendering the decision failed to observe the agreement on jurisdiction of Slovenian courts. This condition is not considered *ex officio,* but on objection on the parties, namely the party against whom the recognition is sought. However, Bulgarian and Montenegrin PIL acts have not provided for this specific rule. Instead the Montenegrin PIL act has taken an indirect approach by providing that the choice-of-court-agreements have an exclusive jurisdictional character (if not otherwise determined by the parties)[105]and that the foreign judgments will not be recognized if  the Court of recognition has exclusive jurisdiction.[106] The Bulgarian PIL act gives an exclusive jurisdictional character to the choice-of-court-agreements,[107] but fails to refer to exclusive jurisdiction as a condition for recognition. Instead it only provides for the 'mirror principle' rule as a condition for the recognition and enforcement of foreign decisions, stating that the judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

> [t]he foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seized was the only ground for the foreign jurisdiction over disputes in rem.[108]

The effect of both approaches, the one taken in the Slovenian and the Macedonian PIL acts, and the other in the Bulgarian, Montenegrin PIL acts act, is the same-foreign judgments are not recognized if they violate the allowed and rightful parties' choice-of-court-agreement.

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103 Garciamartin F, Saumier G., (n 7), p. 66, par. 297-298

104 Article 105(2) of the PILA of N. Macedonia

105 See Article 104 of the PIL act of Montenegro

106 See Article 144 of the PIL act of Montenegro

107 Article 23 and 24 of the PILA of Bulgaria

108 Article 117 (1) of the PILA of Bulgaria

The fifth and the sixth conditions refer to two similar situations which resolve the problem of parallel proceedings.[109] First, where the competing judgment was given by a court in the requested state, second where the competing judgment was given in another state (other than the court of origin).[110]In the first case, the judgment from the country of origin is inconsistent with a judgment given in the requested state in a dispute between the same parties.[111] The rule provided in this article is the same as the one in 2005 Hague Choice of Court Agreement Convention[112] and has two conditions: inconsistency between the judgments and dispute between the same parties. It does not require a temporal hierarchy and same cause of action.[113] The second case applies where the judgment is inconsistent with an earlier judgment given another state between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested state.[114] This rule is more specific than the last and contains more requirements to be applied. First, the judgment from the third state must have been given prior to the judgment from the state of origin, irrespective of which court was first seized.[115] Secondly, both judgments need to be on the same subject matter. Thirdly, the earlier judgment must be eligible for recognition and enforcement in the requested state, whether or not that recognition or enforcement has been sought yet.[116]

Article 106 of the PILA of N. Macedonia refers to the question of irreconcilable judgments. These rules are modeled to protect the national legal system against irreconcilable judgments rendered in other legal systems on same subject matter (between same parties). As was the case with the other legal obstacles for recognition and enforcement in the PILA of N. Macedonia, Article 106 is also given as a negative one, meaning that a foreign judicial decision shall not be recognized if the court or another authority in N. Macedonia rendered a final decision on the same matter or if another foreign judicial decision rendered on the same matter was recognized in N. Macedonia.[117] The court shall stay recognition of a foreign judicial decision in the cases when, before a N. Macedonian court, proceedings in the same legal matter and between the same parties, which were instituted earlier, are still pending

[109] Article 7(1)(e) and (f) of the new 2019 Hague Convention

[110] Garciamartin; Saumier, *op. cit.,* note 7, p. 66, par. 300

[111] Article 7(1)(e) of the new 2019 Hague Convention

[112] Article 9(f) of the 2005 Hague Choice of Court Agreement Convention

[113] Garciamartin; Saumier, *op. cit.,* note 7, p. 67, par. 301

[114] Article 7(1)(f) of the new 2019 Hague Convention

[115] Garciamartin; Saumier, *op. cit.,* note 7, p. 67, par. 301

[116] *ibid.*

[117] Article 106(1) of the PILA of N. Macedonia

until the judgment in these proceedings become final.[118] The determination of the existence of this legal obstacle is *ex officio*. Such a position of this Article refers to two different procedural situations. The first paragraph is referring to cases where in N. Macedonia the courts have already rendered a final judicial decision regarding the same matter or a foreign judicial decision has already been recognized in N. Macedonia when a request for recognition is made. The second paragraph of the same Article is referring to cases where N. Macedonia courts have seized jurisdiction and proceedings are ongoing when request for recognition is made. The second situation is also covered in the new 2019 Hague Convention in Article 7(2). This rule allows the court of the requested state to postpone or refuse the recognition and enforcement if proceedings between the same parties on the same subject matter are pending before the court of the requested state and two additional criteria are met: first that the requested court was first siesed and second, there is close connection between the dispute and the requested state.[119] Similar approach is taken in the Slovenian PILP act[120] and Montenegrin PIL act[121]. The systematization of this rule in the Bulgarian PIL Act[122] differs slightly. The rule provided in Article 117 (3) of the Bulgarian PIL act regarding the identity of the legal matter is the broadest because it covers not only legal matters between same parties in the same subject matter but also refers to the same facts. Nevertheless, the effect is the same regarding a decision which was rendered by the national court: this decision will have priority over the foreign judicial decision disrespectfully which proceedings were instituted earlier. On the other hand, when in front of the national court (Bulgarian) a foreign judicial decision is irreconcilable with other foreign judicial decisions, then the time plays important role. The Bulgarian rule provides that foreign judicial decisions will be recognized in Bulgaria if no proceedings based on the same facts, involving the same cause of action between the same parties, are brought before Bulgarian Court earlier than a case instituted before the foreign court in the matter of which judgment recognition is sought and the enforcement is applied has been rendered.[123] The Bulgarian PIL act does not refer to the conduct of the Bulgarian Court when the first instituted concurrent proceedings have not been finished in Bulgaria.

The seventh condition in the new 2019 Hague Convention refers to the examination of the law applied by the court of origin in intellectual property matter.[124]

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118 Article 106(2) of the PILA of N. Macedonia

119 Article 7(2) of the new 2019 Hague Convention

120 Article 99 PILP act of Slovenia

121 Article 146 of the PIL act of Montenegro

122 Article 117 (3) and (4) of the PILA of Bulgaria

123 Article 117 (4) of the PILA of Bulgaria

124 Article 7(1)(g) of the new 2019 Hague Convention

This rule is present in the draft text of the new 2019 Hague Convention, but its future is still debatable and its application will depend on the outcome of the diplomatic session. Such rule is not present in PILA of N. Macedonia, Slovenia, Montenegro and Bulgaria.

## 3. CONCLUSION

The new 2019 Hague Convention will represent an important step forward in the circulation of judgments between countries. The cautious approach taken by this latest instrument deployed by the Hague Conference, can have short and long term impact on the countries. On short term it will attract them to sign this international instrument because of the 'minimum standard' approach taken by the new 2019 Hague Convention. More importantly, this Convention can produce long lasting consequences with the possible approximation of the national legal systems with the principles provided in the convention. The fact that the person seeking recognition can opt whether to use the procedure laid down in the convention, or the national legal rules for recognition and enforcement (or both) provides for more "exequatur friendly" legal environment and existence of minimum standards in the countries. This can bring together different legal cultures and have transnational (transcontinental) consequences. Such approach is more than welcomed.

The system presented in the new 2019 Hague Convention is a simple one with several steps which need to be taken. First the scope of the application of the convention is 'sketched' in details and predicted to cover the most crucial aspects of civil and commercial matters which can be viewed as uncontroversial. Moreover the fact that the main obstacle of the "Judgment Project" was solved and the rules for direct jurisdiction were left out of the convention does not represent a step back from the main idea of judicial co-operation, with view the enhancing predictability and justice in cross border legal relations in civil and commercial matters. The indirect jurisdictional rules in the new 2019 Hague Convention do not compete with the national jurisdictional criteria, but in a long run the criteria in the Convention can have an impact on the national direct jurisdictional criteria and with that they can fulfill the main goal of the convention. Very important aspect of the new 2019 Hague Convention are the exclusive basses for jurisdiction, however these grounds should not represent much of a problem since they are present in most of the national legal systems. The grounds for recognition are also flexible, they can be applied in several modalities with the national conditions for recognition and enforcement. The conditions for recognition in the new 2019 Hague Convention are given in more specifics than the national legal rules. This is also an advantage because of the more specific drafting of the condition

for recognition and enforcement in the new 2019 Hague Convention, they can complement the national legal rules on exequatur.

Regarding the implication of the Hague Convention in the region of South East Europe it can be said that the implementation would not cause serious obstacles on the national legal system especially because of the liberal approach taken by the new 2019 Hague Convention regarding the application of national legal rules, other international agreements and EU regulations. Most of the solutions provided in the new 2019 Hague Convection are known in the national legal systems and correspond with the national legal standards. It is very important for these countries to invest in facilitation of this new instrument because as the trade goes further in the west, but more importantly in the east, this instrument can have long lasting consequences for the legal certainty, procedural predictability and in the end for the economy of the region.

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# CIVIL LIABILITY OF ARBITRATORS

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***ABSTRACT***

*The paper aims to determine situations when arbitrators are personally liable for damages caused and when they enjoy immunity because of their judicial role.*

*There is no uniform approach regarding civil liability of arbitrators. The question is closely connected with the dual nature of arbitration that has a judicial mission despite a contractual origin. Arbitrator's power derives from a private contract and they receive payment from the parties in exchange for professional services. However, they act as private judges - they resolve disputes which require a binding decision of an impartial third party. Due to the double role of arbitrators, this paper will separately discuss civil liability for breaches of arbitrator's contractual obligations and breaches of duties regarding their judicial role.*

*Common law countries provide immunity to arbitrators based on equating their function to that of judges. On the other hand, civil law countries emphasize the contractual relationship between the arbitrators and parties and determine liability according to ordinary law of contract. Despite different starting points most jurisdictions accord a certain degree of immunity to arbitrators in the exercise of their judicial role to ensure the finality of arbitral awards and protect the independence and impartiality of arbitrators. Arbitrators are therefore not liable for the procedural or material accuracy of their decisions because in such cases the parties can bring an action against an award. However, almost all legal systems exclude immunity in cases where the arbitrator intentionally violated his judicial duties. The differences between civil and common law countries are greater regarding liability for breaches of the arbitrator's contractual duties. Contractual limitations and exclusions of liability are also mentioned. The article concludes that absolute exclusions of liability are unenforceable in most jurisdictions.*

*The article will determine which law should apply to the issue of civil liability of international arbitral tribunals. In the absence of legislation and jurisprudence in Slovenia the paper suggests that qualified immunity should apply. Arbitrators should enjoy immunity for judicial acts, except in exceptional cases of fraud and deliberate violations of their judicial duties. For breaches of their contractual duties, arbitrators should be liable according to general rules of contract law.*

***Keywords****: arbitration, civil liability of arbitrators*

## 1. INTRODUCTION

What are the consequences if the arbitrator does not fulfil his obligations? To what extent can he be liable for his errors or misconduct? International conventions and the UNCITRAL Model Law on International Arbitration are silent on the matter as the latter viewed this issue too controversial to provide a satisfactory uniform approach.[1] Approaches adopted by national arbitration laws differ. Most common law countries (USA, England, Australia) expressly grant immunity, some civil law countries expressly provide liability (Italy, Austria, Spain) while most do not deal with the subject.[2] Why do the approaches differ?

## 2. DUAL ROLE OF ARBITRATORS

The question of liability relates to the dual nature of arbitration that is contractual by origin but judicial by purpose and procedure.[3] Arbitrators are contractually engaged to perform a service in exchange for renumeration. Unlike judges they are chosen and paid for by the parties directly and may negotiate their terms or refuse to be appointed. Since they are employed by the parties, they are not subject to the same disciplinary control. Although their power stems from individual arbitration agreements, their final decisions have a binding, res judicata effect. As the state ensures the enforcement of the awards it requires that the arbitration proceedings meet certain minimum standards. Arbitrators act as "private judges" and they assume similar responsibilities - they are obliged to independence.[4] Because the nature of the arbitrator's status is of a mixed status (both contractual and

1 Fouchard, P.; Gaillard E.; Goldman B., *Fouchard, Gaillard, Goldman on international commercial arbitration* Kluwer Law International, The Hague, 1999, pp. 592; Franck, S., *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity,* New York Law School Journal of International & Comparative Law, *Vol.* 20, Issue 1, 2000, pp. 3; Holtzmann H; Neuhaus, J., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, The Netherlands, 2015, pp. 1119, 1148; Born, G., *International Commercial Arbitration (Second Edition)*, Kluwer Law International, 2014, pp. 2027

2 For more detail see chapter 3.1. (regarding common law countries) and chapter 3.2 (regarding civil law countries)

3 Fouchard *et. al, op. cit.* note 1, p. 607

4 Smahi, N., *The Arbitrator's Liability and Immunity Under Swiss Law* – Part I, ASA Bulletin, Kluwer Law International, *Vol.* 34 Issue 4, 2016, pp 880-882; Pörnbacher, K.; Knief I., *Liability of Arbitrators - Judicial Immunity versus Contractual Liability: Party Autonomy versus Autonomy of Arbitrators*, Czech and Central European Yearbook of Arbitration, Juris, Huntington, 2012, pp. 212, 223; Mullerat R.; Blanch J., *The Liability of Arbitrators: A Survey of Current Practice*, Dispute Resolution International, *Vol.* 1., Issue 1, International Bar Association, 2007, pp. 100, 101; Lew, J.; Mistelis, L.; Kroll, S., *Comparative International Commercial arbitration*, Kluwer Law International, The Hague, 2003, pp. 255, 276, Hausmaninger, C., *Civil Liability of Arbitrators - Comparative Analysis and Proposals for Reform*, Journal of International Arbitration, *Vol.* 4, Issue 4, 1990, pp. 16

jurisdictional) civil liability of arbitrators in their judicial role and their role as a contractual party will be analysed separately.

## 3. ARBITRATORS AS JUDGES

### 3.1. Common law countries

Common law countries accord a broad immunity to arbitrators comparable to that of judges. As they consider them to be "functional equivalent" of judges the U.S. courts have extended the absolute judicial immunity to arbitrators.[5] Already in 1880 the Court held that arbitrators could not be sued for damages resulting from fraudulent or corrupt conduct.[6] The arbitrator enjoyed immunity even when he conspired with the other party's attorneys to persuade the other arbitrators in rendering an unjust award. The Court held that "there is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge".[7] In the past, U.S. courts provided a broad immunity to arbitrators extending to bad faith, non-disclosure of conflicts of interest, intentional misconduct, and similar malfeasance.[8] Relying on case law, the Revised Uniform Arbitration Act 2000 expressly grants immunity to arbitrators to the same extent as judges. They enjoy immunity even if they fail to disclose a conflict of interest.[9] Some states have also codified common law immunity for arbitrators (i.e. California, Florida, Wisconsin, Karolina, Utah).[10]

English jurisprudence adopted a similar approach and provided arbitrators with broad immunities.[11] The English Arbitration Act 1996 confirmed this position

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5 Le club de jurists: Ad hoc commitee*, Report: The arbitrator's liability*, Paris, 2017, pp. 100, 101; Brown, J., *The Expansion of Arbitral Immunity Is Absolute Immunity a Foregone Conclusion*, Journal of Dispute Resolution, *Vol.* 2009, Issue 1, 2009, pp. 229, 230

6 Jones v. Brown (1880); Hausmaninger, *op. cit*. note 4, p .15; Warwas, B., *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*, T.M.C. Asser press, The Netherlands, 2017, pp. 255

7 Hoosac Tunnel Dock & Elevator Co v. O'Brien (1884); Born*, op. cit.,* note 1, p. 2031: Lew, *et al*, *op. cit.* note 4, p. 294

8 Franck, *op. cit.* note 1, p. 13, 14; Hausmaninger, *op. cit*. note 4, p. 29; Born, G*., International Arbitration: Law and Practice (Second Edition)*, Kluwer Law International, 2016, pp. 144; Hwang M., Chung K., Cheng F., *Claims Against Arbitrators for Breach of Ethical Dutie in Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers, New York, 2007, pp. 239

9 Uniform Arbitration Act, 2000 Section 14(a,c)

10 Warwas, *op. cit.* note 6, p. 270; Truli E., *Lability v. quasi-judicial immunity of the arbitrator: the case against absolute arbitral immunity*, The american review of international arbitration, *Vol.* 7, 2006, pp. 9; Clay, T., *L'arbitre,* Dalloz, Paris, 2001, pp. 455-457, fn. 7

11 Sutcliffe v. Thackrah, (1974) A.C.; 727; Arenson v. Arenson, (1977), A.C. 405; Fouchard *et. al, op. cit.* note 1, p. 593; Smahi, N., *op. cit.* note 4, p. 893, 894

but allowed certain exceptions to immunity. Similar provisions are found in Australia and Kenya where "an arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as arbitrator,"[12] whereas in New Zealand arbitrators are not liable for negligence for acts and omissions in their capacity as arbitrators.[13]

### 3.2. Civil law countries

Civil law countries on the other hand focus on the contractual relationship between the arbitrator and the parties. This could in principle lead to liability according to ordinary law of contract.[14] Some countries have included express provisions on liability. The Spanish law states that arbitrators can be liable for damages caused by bad faith, fraud or recklessness.[15] A similar provision can be found in the Austrian arbitration law. Section 594/4 Zivilprozessordnung, provides that: "an arbitrator who does not or who does not timely fulfil his obligations … shall be liable to the parties for all damage caused by his culpable refusal or delay". This is a mandatory provision which the parties cannot derogate by agreement.[16] Pursuant to article 813-ter of the Italian Code of civil procedure, arbitrators may be held liable for damages for: 1. fraudulent or grossly negligent omission or delay in the procedure (if he was removed) or in issuing the award or for 2. resignation without a proper cause. Romanian law also contains a provision regarding liability.[17]

Express provisions providing for liability are also found in Latin America (Peru, Argentina, Uruguay, Honduras etc.) and certain Arab countries (Lebanon, Tunisia, Indonesia, Saudi Arabia, UAE, etc.).[18]

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12 Article 28. Australian International Arbitration Act 1974; article 39 Commercial Arbitration Act 2017; 16b(1) Kenyan Arbitration Act No. 11 2009; article 13 New Zealand Arbitration Act 1996; Born, *op. cit,* note 1, p. 2032; Clay, *op. cit.* note 10, p. 456; Redfern, A.; Hunter, M.; Blackaby N., Partasides C., *Redfern and Hunter on International Arbitration, Sixth edition*, Oxford University Press, New York, 2014, pp. 323, 324; Viscasillas P., *Civil Liability of Arbitrators and Arbitral Institutions in International Commercial Arbitration: The Development of the Arbitration Laws and Rules in the Last 30 Years*, World Arbitration And Mediation Review, *Vol* 7, Issue 2, 2013, pp. 411, 417

13 Article 25 Singapore Arbitration Act

14 Smahi, *op. cit.* note 4, p. 882-885; Pörnbacher *et. al., op. cit*. note 4, p. 215; Hausmaninger, *op. cit.* note 4, p. 19

15 Ley de Arbitraje, 2003, article 21.1

16 Schwarz, F.; Konrad C., *The New Vienna Rules*, Arbitration International, *Vol* 23, Issue 4, 2007, pp. 619

17 Article 565 of the Romanian Code of civil procedure (Codul de procedură civilă)

18 Franck, *op. cit.* note 1, p. 40-44; Smahi, *op. cit.* note 4, p. 895; Le club de juristes, *op. cit.* note 5, p. 117-121; Truli, *op. cit.* note 10, p. 398; Viscasillas, *op. cit.* note 12, p. 418; Ramadurai R., *Arbitration in Dubai; Immunity of Arbitration Tribunals, Recent Judicial Verdicts, International Conference on Challenges in Domestic and International Arbitration*, Chennai, 2016, pp. 32

The differences that appear considerable at first sight, are in practice not so great. Despite different starting point most legal systems reach similar conclusions regarding arbitrator's liability for judicial acts.[19] Common law countries have restricted the application of judicial immunity, whereas civil law countries limited the broad contractual liability through statutory interpretation based on the similarities of their function to that of a judge.

### 3.3. Immunity of arbitrators

To prevent losing parties from harassing arbitrators, no legal system allows liability for any error of judgment arbitrators may commit.[20]

In the Netherlands for example the Court held that arbitrators are comparable to judges and should be able to judge freely. They are therefore only liable "in the event of intent, wilful misconduct or if they manifestly failed to exercise due care and skill. Thus the arbitrator who incorrectly concluded that the arbitration agreement was valid did not face liability."[21] The Austrian courts have also restricted the contractual liability by applying the doctrine of judicial immunity by analogy to arbitrators.[22] They set out two preconditions for the arbitrator to be held liable (in cases that do not fall within the scope of 594(4) Zivilprozessordnung): 1. the successful challenge of the award and 2. gross negligence on the part of the arbitrator. This means that they could not be liable for errors that are not reasons for which the award can be set aside. This approach has been criticised as too narrow since it could lead to the protection of arbitrators that had acted with criminal intent if the injured party missed the short time period for challenging the award.[23] The Italian law also limits liability claims - they can be filed only after the arbitral award was successfully challenged and only for the reasons for which it was set aside. Outside the expressly envisaged cases arbitrators could therefore only liable when the state could be liable for judicial errors according to Law No. 117 of 13 April 1988 (i.e. not for the wrong interpretation of law or the wrong assessment

[19] Hausmaninger, *op. cit.* note 4, p. 23

[20] Fouchard *et. al, op. cit.* note 1, p. 593

[21] ASB Greenwold v. NAI and arbitrators; Maisner M., *Liability and Independence of the arbitrator,* Czech and Central European Yearbook of Arbitration, Juris, Huntington, 2012 pp. 163, 164

[22] OGH 9 Ob 126/04a (6.6. 2005); 5 Ob 30/16x (22. 3. 2016); Redfern et. al. *op. cit.* note 12, p. 322; Schwarz, *et. al. op. cit.* note 16, p. 619, 620; Maisner, *op. cit.* 21, pp. 163, 164; Grill, A; Lukic S., *Arbitrators' Liability: Austrian Supreme Court Reconfirms Strict Standards*, Kluwer Arbitration Blog, 2016 [http://arbitrationblog.kluwerarbitration.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/] Accessed 27.02.2019

[23] Jens, G., *Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit*, Mohr Siebeck, Tübingen, 2009, pp. 434

of facts and evidence) and after the successful challenge of the award.[24] A comparable approach is found in Germany. It is assumed that the parties have implicitly agreed to a contractual limitation of liability - i.e. to grant arbitrators the same privilege of immunity as German judges (for acts in connection with deciding the dispute). This assumption can only be excluded explicitly. They would therefore be liable only when their acts qualify as a criminal offense. Since liability for intent cannot be excluded in advance, some argue, that arbitrators could be liable for intentional breaches. If the breach is not related to deciding the dispute or is only ancillary to the decision-making (for unjustified resignation, breach of duty of disclosure, breach of duty to deliver a formally correct award, breach of duty to issue an award in time, etc.), arbitrators can be liable according to general principles of contract.[25] Some warn that this approach is not appropriate as it allows parties to agree to an unlimited standard of liability even though a certain degree of immunity is necessary to protect the judicial function (and not the arbitrator as a person).[26] It is worth noting that the German judges' privilege (in terms of state liability for breaches of EU law) is not compatible with EU law (Köbler and Traghetti judgments). The same is true for the Italian approach.[27] The liability of arbitrators in the UAE is also limited to cases of fundamental errors and intent.[28] In Switzerland the doctrine is unanimous that liability should be limited to cases of intent or gross negligence. Controversy remains only regarding the ground for this limitation.[29]

Arbitrators generally enjoy a certain immunity that protects them from liability claims based on accusation that they reached the wrong decision (i.e. for falsely applying the law, for the assessment of facts and evidence or for procedural errors).

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[24] 813-ter Codice di procedura civile; Dittrich, L.; Curatola M., Luca F., Commercial Arbitration: Italy, 2017
[https://globalarbitrationreview.com/jurisdiction/1002557/italy] Accessed 07.03.2019

[25] Franck, *op. cit.* note 1, p. 39; Pörnbacher, *et al, op. cit.* note 4, p. 217-219, 226; Hausmaninger, C., *op. cit.* note 4, p. 36, 37; Jens, G., *op. cit.* note 23, p. 430-432; K. Böckstiegel; S. M. Kröll; P. Nacimiento, *Arbitration in Germany: the model law in practice*, Second Edition, Wolters Kluwer Law & Business, Alphen aan den Rijn, 2014, pp. 31, 152, 153, 750, 751, 783, 784

[26] Jens, G., *op. cit.* note 23, p. 431

[27] Terhechte, J. P., *Judicial Accountability and Public Liability—The German "Judges Privilege" Under the Influence of European and International Law*, German Law Journal, *Vol.* 13, No. 3, 2012, pp. 321-324, 328, 329; Case C-224/01 *Köbler v Austria* (2003) par. 51, 53, 55, 56, 59; Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* (2006) par. 46

[28] Lagarde M., *Liability of Arbitrators in Dubai: Still a Safe Seat of Arbitration,* ASA Bulletin, Kluwer Law International 2015, *Vol.* 33 Issue 4, pp. 787, 804, 806

[29] Smahi, *op. cit.* note 4, p. 876; Le club de juristes, *op. cit.* note 5, p. 132-135; Smahi, N., *The Arbitrator's Liability and Immunity Under Swiss Law* – Part II, ASA Bulletin, Kluwer Law International, *Vol.* 35 Issue 1, 2017, pp. 68-73

This is necessary to ensure their independence and impartiality and guarantees the finality of the award. Parties should generally not be allowed to have the merits of the award reviewed through liability claims since this could lead to contrary decisions on the matter (even if it does not influence the res judicata effect of the award).[30]

### 3.4. Limitations to immunity

However, no legal system accords absolute immunity to arbitrators. In general arbitrators could not avoid liability for intentional breaches of their fundamental judicial duties.[31]

Even in the United States, more recent decisions show that the scope of arbitrator's immunity may be subject to exceptions with some courts denying immunity for failing to issue an award in a timely manner, for failing to act or for fraud or similar misconduct.[32] The English Arbitration Act 1996 provides two situations where arbitrators can be liable: in case of unreasonable resignation and bad faith.[33] The latter means: "(a) malice in the sense of personal spite or a desire to injure for improper reasons; or (b) knowledge of absence of power to make the decision in question."[34] It also covers situations where an arbitrator accepted an appointment despite knowing he does not have the necessary qualifications or that he cannot exercise his function in a timely manner due to other commitments.[35]

In France there are no provisions regarding liability which could lead to the use of ordinary contract law. The courts have limited this liability and held that arbitrators benefit from judicial immunity – they can only be liable for personal fault that amounts to fraud, gross negligence or denial of justice.[36] Claims based on general criticism that the arbitrator reached a wrong decision and for alleged breaches of procedural rules have been dismissed.[37] There have however been a few successful claims before the French courts (once for untimely resignation, twice for lack of independence and twice for exceeding the deadline without asking for

30 Smahi, *op. cit.* note 29, pp 76

31 Fouchard *et. al, op. cit.* note 1, p. 593

32 Born, *op. cit,* note 1, p. 2032; Born, *op. cit.* note 8, p. 144

33 Article 25, 26, 29 English Arbitration Act 1996

34 Le club de juristes, *op. cit.* note 5, p. 111; Sutton D.; Gill J., Gearing, M., *Russell on arbitration*, Sweet & Maxwell, London, 2007, p. 175

35 Lew, *et al*, *op. cit.* note 4, p. 294.

36 Le club de juristes, *op. cit.* note 5, p. 21.-31

37 Fouchard *et. al, op. cit.* note 1, p. 591-593, 598; Pörnbacher et. al., *op. cit.* note 4, p. 217

an extension).[38] In Annahold, the company discovered that the sole arbitrator was a financial consultant to the chairman of the other party and rendered his award despite Annahold requesting his resignation. The award was set aside on the grounds of invalid consent to the arbitration agreement (due to fraud). The court ordered the arbitrator to pay compensation, equal to the amount of fees received with interest from the date of the payment.[39]

The Raoul Duval case is comparable. The chairman of the arbitral tribunal began working for one of the parties on the day after the award had been rendered without disclosing this to the parties. The award was set aside, and Raoul Duval sought to receive compensation. The court found the arbitrator liable on a contractual basis and determined the compensation according to general rules of contract law in the amount of the arbitrator's (and the institution's) fees and additional costs incurred - the costs of the defence.[40]

Finland has a similar approach. The Supreme court has found the chairman of the arbitral tribunal liable for breach of his contractual duty of disclosure but stressed that the arbitrators are liable only in exceptional circumstances to preserve their independence and impartiality.[41]

Arbitrators can therefore be liable in tort or in contract. Damages are determined according to general rules and will generally cover the costs of the arbitration procedure – the fees paid to the arbitrator and institution, the costs incurred in their defence (lawyers' fees and travel expenses) and the costs of the procedure to set aside the award. The plaintiff cannot claim compensation in the amount of the value of the dispute as it does not reflect the damages incurred.[42]

Authors that try to determine situations where arbitrators are not protected by immunity within their judicial role generally agree that they should be liable for intentional fault or fraud. Since they breach their judicial obligation to act fairly and treat the parties equally, they do not deserve protection.[43]

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38 Le club de juristes, *op. cit.* note 5, p. 17

39 Fouchard *et. al, op. cit.* note 1, p. 594, 595

40 Fouchard *et. al, op. cit.* note 1, p. 1092; Lew, *et al*, *op. cit.* note 4, p. 295.2

41 Urho, Sirkka in Juuka Ruola 31. 1. 2005; Maisner, *op. cit.* 21, p. 157-160

42 Fouchard *et. al, op. cit.* 596; Lagarde, *op. cit.* note 28 p. 3; Alessi, D. *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability*, Journal of International Arbitration, *Vol.* 31, Issue 6, 2014, pp. 780; Giraud, P., *Le devoir de l'arbitre de se conformer à sa mission*, Bruylant, Bruxelles, 2017, pp. 121

43 Fouchard *et. al, op. cit.* note 1, p. 598, 599

## 4. ARBITRATORS AS CONTRACTUAL PARTIES

In their judicial capacity arbitrators enjoy immunity which protects them from lawsuits for errors made in reaching their award – for the procedural or material accuracy of their decision. Liability claims must not enable the parties to challenge the content of the award since the parties have other legal remedies. In general, they could only be liable for breaches of their fundamental judicial duties. In some countries they could also be liable for clear, inexcusable negligence (i.e. if he does not give reasons and the award is declared invalid). However, since arbitrators assume their adjudicatory function on a contractual basis (they agree to perform a service in exchange for a fee), a fault committed in conducting the arbitral proceedings constitutes a breach of contract. As paid service providers the arbitrators are liable for serious breaches under ordinary contract law.[44]

> Arbitrators have several contractual duties, that (broadly speaking) fall into four categories. Firstly, arbitrators must conduct the proceedings fairly, independently and impartially (duty of disclosure), treat the parties equally and respect their right to be heard. Secondly, arbitrators must complete their functions within the legal or contractual deadlines. Arbitrators must perform their obligations diligently and in a timely manner. If they fail to request for an extension of a deadline, they may face liability in some countries. Thirdly arbitrators must pursue their function until the award is made and cannot resign without valid grounds. Lastly arbitrators have a duty of confidentiality.[45]

The differences between civil law and common law countries regarding breaches not related to deciding the dispute are greater. The latter offer broader protection to arbitrators as they expressly provide immunity to arbitrators that extends to non-judicial acts (i. e. breaches of their administrative duties, such as breach of confidentiality).[46] Immunity in the USA extends to all acts within the arbitral process unless the arbitrator loses his resemblance to a judge (for failing to act and due to fraud).[47] Similarly in England administrative acts are also protected by immunity (with exception of bad faith and resignation).[48]

Civil law countries adopt a stricter approach. Liability regarding breaches not related to deciding the dispute is determined according to general rules of con-

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44 Fouchard *et. al, op. cit.* note 1, p. 619; Böckstiegel *et al. op. cit.* note 25, p., 30, 31, 153, 783

45 Fouchard *et. al, op. cit.* note 1, p. 609-612

46 Jens, *op. cit.* note 23, p. 431.433

47 Le club de juristes, *op. cit.* note 5, p. 99-103; Born, *op. cit.* note 8, p. 144; Jens, *op. cit.* note 23, p. 431.43

48 Jens, *op. cit.* note 23, p. 431.433.

tract law so that arbitrators may also be liable for simple negligence. To identify situations where arbitrators can incur liability it is helpful to distinguish between best efforts obligations and obligations to achieve a result. Arbitrators that resign without a valid reason or fail to extend the deadline for rendering an award breach the obligation of result. This suffices for their liability. In France for example an arbitrator was liable for rendering the award after the time limit without asking for an extension.[49] Regarding other duties arbitrators are only required to fulfil them with due diligence and (professional) care and they are not obliged to achieve a particular result) since the outcome of the dispute is uncertain. Different authors offer different classifications of these duties.[50] However, they must not breach their fundamental duties.[51] The Spanish Supreme court found two arbitrators liable for committing a serious and inexcusable error when they excluded the co-arbitrator (appointed by the plaintiff) from deliberating and voting on the award thus violating the principle of collegiality and due process. As the award was set aside (for violating public policy) the court ordered them to pay damages in the amount of arbitration fees received (with interest).[52]

In all legal systems arbitrators could incur liability for non-performance (for failing to render an award at all or in a timely manner). In civil law countries they could be liable not only for unjustified resignation and not fulfilling their obligations (at all or in a timely manner) but also for negligence since arbitrators (who are paid professionals) are obliged to perform their contractual duties with due care and skill. They could face liability for breaches of confidentiality or failing to conduct the proceedings according to the party's agreement (for example for issuing the award in the wrong place if it cannot be enforced in the country of the losing party).[53]

In the absence of a choice of law clause by the parties, which law should apply to the arbitrator's contract? The doctrine agrees that the applicable law should be determined by the law of the seat of the arbitral tribunal or institution instead of the law applicable to the party that performs the characteristic performance – i. e. the habitual residence of the arbitrator.[54] The latter criterion would lead to the application of different standards of liability for members of the same panel. On the

[49] Le club de juristes, *op. cit.* note 5, p. 27, 28

[50] Smahi, *op. cit.* note 4, p. 884-888; Alessi, *op. cit.* note 42, p. 664-778; Giraud, *op. cit.,* note 42 p. 120

[51] Fouchard *et. al, op. cit.* note 1, p. 621

[52] Le club de juristes, *op. cit.* note 5, p. 116

[53] Sammartano M. R., International arbitration law and practice, JurisNet, Huntington, 2014, p. 521

[54] Article 4(2) of the EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I); article 20 Zakon o mednarodnem zasebnem pravu in postopku, Ur.l. RS, št. 56/1999

other hand, the law of the seat provides equal treatment for all, is easily identified and generally has the closest connection (as it will often govern the proceedings on a subsidiary basis and is usually the place of the performance of the contract).[55]

## 5. CONTRACTUAL EXCLUSIONS (LIMITATIONS) OF LIABILITY

Even though cases of arbitrators (and institutions) being convicted to pay damages are rare, most institutional arbitration rules provide exclusion clauses.[56] By appointing an arbitrator according to these rules, the exclusion clause is automatically incorporated in the arbitrator's contract.[57] Most arbitration rules exclude both their own liability and the arbitrator's liability for acts and omissions in connection with the arbitration with an exception in cases where the arbitrator or institution acted intentionally.

LCIA (2014) states that arbitrators are not liable for "any act or omission in connection with any arbitration," except for the consequences of "conscious and deliberate wrongdoing."[58] The rules of WIPO (2014)[59] in HKIAC (2018)[60] are comparable. They provide liability only in cases of "deliberate" or "dishonest" wrongdoing.[61] German Institution of Arbitration (DIS) (1998) exonerates the arbitrators from liability "in connection with arbitral proceedings" save for "intentional or grossly negligent breach of duty."[62] Similar provisions are found in the arbitration rules of SCC[63] and Swiss chamber's arbitration institution.[64] Some institutions go further and accord absolute immunity to judges (NAI (2015),[65]

[55] Fouchard *et. al, op. cit.* note 1, p. 558; Franck, *op. cit.* note 1, p. 49-53; Lew, *et al*, *op. cit.* note 4, p. 278; Hausmaninger, *op. cit.* note 4, p. 45; Redfern *et. al. o;. cit.* note 12, p. 332; Jens, *op. cit.* note 23, p. 440; Böckstiegel *et al. op. cit.* note 25, p. 783; Smahi, *op. cit.* note 29, pp 82; Alessi, *op. cit.* note 42, p. 738, 739; Onyema, E., *International Commercial Arbitration and the Arbitrator's Contract*, Routledge Research in International Commercial law, Abingdon, 2010, pp. 35, 165; Karrer, P. A., *Responsibility of Arbitrators and Arbitral Institutions in: The Leading Arbitrators' Guide to International Arbitration*, Third edition, Juris Publishing, Inc., New York, 2014, pp. 168

[56] Hausmaninger, *op. cit.* note 4, p. 43, 44

[57] Franck, *op. cit.* note 1, p. 49; Warwas, *op. cit.* note 6, p. 200

[58] The London Court of International Arbitration Arbitration rules article 31.1

[59] World Intellectual Property Organisation Arbitration rules, article 77

[60] Hong Kong International Arbitration Center Arbitration rules, article 46.1

[61] American arbitration association, Arbitration rules article 35

[62] For acts in connection with deciding a legal matter, arbitrators are only liable for intentional breaches, Deutsche Institution für Schiedsgerichtsbarkeit, section 44

[63] Arbitration Institute of the Stockholm Chamber of Commerce (2017), article 52

[64] Article 45 of the Arbitration rules

[65] Nederlands Arbitrage Instituut, 2015 Arbitration rules article 61

ICC (2017),[66] LAC (2014),[67] VIAC (2018),[68] FAI (2017),[69] ICSID (2006),[70] and AAA (2004))[71] with no exception for intentional breaches.[72]

Are these clauses valid?

The answer depends on the applicable national law. It is unlikely that arbitration rules could confer judicial immunity to arbitrators. In the Delubac case for example the Paris court of appeal held that these provisions only apply to the immunity arbitrators enjoy in the performance of their judicial function. The ICC could be liable for failing to comply with its essential obligation regardless of any liability exclusion clause (SNF v. Citec).[73] Furthermore, no legal system allows unrestricted exclusion clauses. Civil law countries prohibit exonerations for gross negligence and intent in advance (France, Switzerland, Austria). Common law countries limit the effectiveness of exclusion clauses where they are held to be unconscionable (in the US) or when the arbitrator acted in bad faith. In most jurisdictions, the courts will be unwilling to enforce an exclusion clause that has not been negotiated by the parties but imposed as part of the general terms and conditions.[74]

Under Slovenian, German, Austrian and Swiss law absolute exclusion clauses would be considered void. According to the Austrian jurisprudence, liability for intent cannot be excluded in advance, whereas an exclusion of liability for gross negligence would be contrary to public policy under certain circumstances.[75] Similarly, under Swiss law exclusion clauses are void unless they comply with article 100(1) Swiss Code of Obligations according to which liability for unlawful intent or gross negligence cannot be excluded in advance. This is reflected in the SCAI Arbitration rules (2017).[76] German law also prevents exclusions of liability for deliberate wrongdoing.[77] If the courts considered arbitration rules (or parts of it) as the general terms and conditions, clauses that exclude liability of the institution

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66 International Chamber of Commerce Arbitration rules, article 41

67 Ljubljana Arbitration Centre, Arbitration rules article 52

68 Vienna International Arbitral Centre Arbitration rules 2018, article 46

69 Finland Arbitration Institute Arbitration rules 2017, article 51

70 Article 21 International Centre for Settlement of Investment Disputes (ICSID) Convention

71 Article 38 of the American Arbitration Association arbitration rules: International dispute resolution procedures 2014

72 Most arbitration rules (except WIPO, HKIAC, ICSID) add an exception "to the extent such limitation of liability is prohibited by applicable law"

73 Le club de juristes, *op. cit.* note 5, p. 34-36; Warwas, *op. cit.* note 6, p. 249-255; Redfern *et. al. op. cit.* note 12, p. 326; Alessi, *op. cit.* note 42, p. 736

74 Fouchard *et. al, op. cit.* note 1, p. 623

75 Austrian Arbitration Yearbook, str. 121, article 879 ABGB

76 Swiss chamber‘s arbitration institution Arbitration rules, article 45; Smahi, *op. cit.* note 4, p. 890

77 Article 276 (3) of the German Civil Code – Bürgerliches Gesetzbuch (BGB)

(as it is the drafter of its rules) for gross negligence could be nullified as well (article 309 (7) of the German Civil Code). This would also apply to arbitrators when they were so closely connected to the institution that they could be considered as drafters and users of its rules. Even though this provision applies directly only to consumers it could be extended to businessman on a case to case basis. The nullity of a general term would lead to liability under general rules.[78] Slovenian rules also prohibit contractual exclusions of liability for intent and gross negligence which would be null.[79] There is no certainty that the courts would consider that the exclusion of liability for simple negligence (which could otherwise be agreed upon) would survive this invalidity. It seems unlikely that courts would be willing to reduce null exclusion clauses to an admissible level or apply any gap filling mechanism unless the validity of the arbitrator's contract depended on it, especially if it had been imposed upon, rather than negotiated by the parties to the arbitration.[80]

## 6. CONCLUSION - HOW WOULD A SLOVENIAN COURT DECIDE IN A LIABILITY CLAIM?

In general, arbitrators are not liable for any errors in judgement they may commit. They enjoy a certain immunity regarding their judicial acts that protects them from liability claims based on accusations they have reached the wrong decision. However, they could be liable for breaches of their fundamental judicial duties: for non-performance and bad faith. In some civil law countries, they could also face liability for gross negligence and for breaches of their contractual duties (confidentiality).

Arbitrators should be required to compensate the parties for damages caused by serious breaches of their fundamental judicial duties. However, they must also enjoy a certain degree of immunity within their judicial role to ensure their independence, impartiality and the finality of their awards. The threat of liability claims against the arbitrator could challenge these principles. A qualified immunity where arbitrators were only liable in exceptional cases is the appropriate approach and provides a balance between the right to compensation and independence of arbitrators. In their judicial role arbitrators should enjoy immunity, excluded only in cases of fraud and intentional and serious violations of their judicial duties. This immunity regarding simple negligence should be a mandatory minimum standard

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78 Jens, *op. cit.* note 23, p. 437, 438; Böckstiegel *et al. op. cit.* note 25, p., 783, 784

79 Obligacijski zakonik (Uradni list RS, št. 97/07 - uradno prečiščeno besedilo, 64/16 - odl. US, 20/18) article 242 and 86(1); Plavšak N et. al, *Obligacijski zakonik (OZ) s komentarjem (splošni del)*, Volume 2, GV Založba, 2003 pp. 220

80 Fouchard *et. al, op. cit.* note 1, p. 623; Jens, *op. cit.* note 23, p. 437, 438; Böckstiegel *et al. op. cit.* note 25, p., 783, 784

of immunity for reasons of public policy (i. e. the independence of arbitrators). In other cases (not related to deciding the dispute), arbitrators should be liable according to the general rules of contract law. They should act with due diligence or they could be liable for negligence in the performance of their contractual obligations.

There is no legislation nor case law regarding the liability of arbitrators in Slovenia.[81] This could lead to the application of ordinary contract law where the courts would determine the scope of liability depending on the qualification of the breached obligation (whether it is as an obligation of result or an obligation of means, article 619 or 766 of the Slovenian Civil Code).

Considering the similarities and connection of our civil law to the German and Austrian legal system, their solutions could serve as an example in developing our jurisprudence. In Germany arbitrators enjoy immunity (on a contractual basis) for actions within their judicial role ("bei dem Urteil"), except when the acts are intentional. In Austria arbitrators can only be liable if the award was set aside and there is proof of gross negligence on the part of the arbitrator. Which of these solutions should be adopted by Slovenian courts? The contractual basis for arbitral immunity in Germany has faced criticism since it allows parties to expressly agree to unlimited liability. The Austrian approach would therefore seem more appropriate although it can allow arbitrators to avoid liability when the injured party misses the short deadline for setting aside the award. Both countries extend a similar protection enjoyed by their national judges to arbitrators when they are exercising their judicial functions.

The regime regarding civil liability for judicial errors could therefore provide guidance in Slovenia, even if it cannot be applied to the arbitrator directly. The Slovenian courts could extend this approach to arbitrators by analogy that should be based on reasons of public policy (instead of a contractual basis) to ensure a minimum standard of protection to arbitrators that could not be derogated by contract. Judges in Slovenia enjoy material immunity for their opinions when deciding in court (article 134 of the Constitution) and cannot be sued directly (II Ips 111/2009). Only the state is liable for qualified errors: in cases of manifest and gross violations of the law and/or the judge's judicial duties that amount arbitrariness (for examples see II Ips 305/2017, II Ips 220/2017, II Ips 49/2017, II Ips

[81] No national case law handling the question of their liability is to be found on the website: https://www.iusinfo.si and www.sodnapraksa.si. The literature is also scarce. To the author's knowledge only one paper briefly deals with this subject matter: Mežnar Š., *Odgovornost pravnih poklicev - teorija in praksa*, Pravni letopis, 2008, pp. 138, 143. The author concludes that arbitrators' liability should be treated akin to the judges' - they should be liable only in exceptional cases

252/2013, etc.). It is unclear whether the state has a right of recourse when judges acted intentionally or grossly negligent (article 148 (2) of the Civil Code). Even though it seems unlikely that the courts could extend the constitutional immunity and the protection of exclusive state responsibility to arbitrators, they should benefit from the stricter standard of unlawfulness. This would exclude arbitrators' liability for errors made in reaching their arbitral award – they would not be liable for the procedural and material accuracy of their decision. The fact that the arbitral award was set aside, or its enforcement was refused would not render them liable automatically. They could be held liable only in situations when the state is liable for judicial misconduct, such as not applying a clear provision of substantive law or its erroneous interpretation that is incompatible with established case law without motivation (due to bias), gross violations of procedural rules – breach of the right to be heard. If the plaintiff failed to exhaust all legal remedies that could prevent the damage, the arbitrator would not be liable (for examples regarding state liability see III Ips 80/2017-3, II Ips 1014/2007, II Ips 275/2016, etc.). This liability regime would protect diligent arbitrators while at the same time discourage careless behaviour. In other situations (in his role as a contractual party), the arbitrator could be liable for simple negligence – for not performing his contractual duties with due care and skill: for not fulfilling his obligations (and failing to render an arbitral award) at all or in a timely manner, for issuing the award in the wrong place if it could not be enforced in the country of the losing party, for breach of confidentiality, for non-disclosing facts that could influence his independence. This approach would lead to the proposed scope of arbitral liability. It is worth mentioning that if arbitrators in Slovenia were found liable for negligence, it is questionable whether such a judgement could be enforced in countries where arbitrators enjoy broader immunity as part of mandatory law (for example article 29 of the English Arbitration Act 1996).

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# THE EUROPEAN CHARTER FOR EQUALITY OF WOMEN AND MEN IN LOCAL LIFE AS A TOOL FOR INCREASING THE REPRESENTATION OF WOMEN IN THE REPRESENTATIVE BODIES OF LOCAL AND REGIONAL SELF-GOVERNMENT

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***ABSTRACT***

*The European Charter for Equality of Women and Men in Local Life (2006) was first presented at the 6th Council of Europe's European Ministerial Conference and at the meeting of the Committee on Women's Rights and Gender Equality of the European Parliament in 2006 as an extension of the "Cities for Equality" initiative of the Council of European Municipalities and Regions (CEMR). Adoption and active application of the principles and rules of the above-mentioned European Charter are the foundation of the political and social life at a local level. Furthermore, they are of utmost importance for promoting equality of women and encouraging their stronger political engagement in order to achieve true gender equality. By the end of 2018, only 27 local and regional self-government units signed the European Charter in the Republic of Croatia, three of which were municipalities, twelve cities and twelve counties. The representation of women in representative bodies of local and regional government is extremely low in the Republic of Croatia, and the society's lack of interest in any changes aimed at greater participation of women in the political life of the state is evident. This serious state of affairs first and foremost necessitates local and regional self-governments adopting the European Charter, which provides clear guidelines for the implementation of the principles of equality of women and men at the local level, and strengthens the participation of women in the political life of the local community and beyond. Although little has been written about the European Charter in scholarly and professional papers, it is a platform which can be upgraded with a number of positive actions for raising the awareness of the local public, with a view to a more effective implementation of the principle of gender equality in all areas of local community life: political, economic, social and cultural.*

***Keywords****: European Charter for Equality between Women and Men, political rights of women, local and regional self-government, human rights*

## 1. INTRODUCTION

Despite all efforts invested by the United Nations, the European Union, the Council of Europe and other relevant international and regional organizations

as well as specialized agencies, the inequality of women and men is still exists not only in undeveloped democratic states, but also in democratic states or the states in transition to democracy. Inequality of women and men is present in all spheres of social, political, economic and cultural life, and it is particularly evident in political life at all levels of government. As local and regional authorities are in the position to take concrete steps towards achieving equality between women and men, they are the possibility to bring about an increase in political representation of women quickly and easily.

It is the responsibility of local and regional authorities to regulate and manage the affairs within the legal framework and in the interest of the local population, and to develop the best solutions to improve the quality of life. Promoting the right to equality and greater participation of women in the development and implementation of public policies at the local and regional level of government will contribute to the creation of a society founded on equality.

The European Charter for Equality of Women and Men in Local Life (hereinafter: the European Charter) is one of the documents with the purpose to change the low ratio of women compared to men in social life at the local level as well as to raise awareness in the society of the importance of these changes. The Preamble of the European Charter sets forth that local and regional self-government units, as signatories to the Charter, are committed to following the principles of equality between women and men and to fulfilling the obligations in the areas of their responsibility laid down in the European Charter by an adapted action plan for equality, in which every local and regional self-government unit determines its priorities, activities and resources intended for this purpose.[1] By developing an action plan for equality and linking the signatories with relevant institutions at national, European and international level to promote gender equality, it supports the implementation of the European Charter and serve an example to other local and regional self-government units for its adoption.

It is worth noting in the very introduction that the translation of the European Charter into the Croatian language poses a problem, since there are two different "official translations". One translation can be found on the official website of the Government of the Republic of Croatia and the other on the official web pages of CEMR itself. The Section IV of the paper deals with differences in the translation and the problems arising therefrom in more detail.

[1] The European Charter for Equality of Women and Men in Local Life, Council of European Municipalities and Regions, CEMR's General Assembly, Innsbruck, 2006

Gender equality is one of the fundamental principles of international law proclaimed in a series of international treaties and in most national legislations. Nonetheless, in the Republic of Croatia, true equality of women and men in everyday life, including political life, has not been achieved. Section II of this paper briefly and generally describes the position of women in politics. The international and national regulations of Croatian legislation governing the principle of gender equality in the field of political participation are listed in Section III. Section IV is an overview of the European Charter with a more elaborate reference to Article 2, which obliges the signatories to develop the area of a political role through political representation. The results of the research into women representation in representative bodies of local and regional self-government in the Republic of Croatia for the last four electoral districts of the local elections are presented in the next section. The research was conducted with an aim to determine the accomplishment of gender equality principle implementation by providing an overview of women and men representation in local and regional self-government bodies. The results of the above-mentioned election rounds that it is necessary to change the current situation and to increase the number of women in the representative bodies of local and regional self-government are drawn as a conclusion in Section VI.

The underlying hypothesis is that women in the representative bodies of local and regional self-government in the Republic of Croatia are under-represented and that no significant changes have taken place in this respect for the last three electoral rounds. In order to determine the state of representation of women and men in this paper, the method of statistical data analysis has been applied. The results of the data analysis show that the change in the current state of affairs in this respect requires new tools. The author starts from the hypothesis that the low level of representation of women in the representative bodies of local and regional self-government in the Republic of Croatia can be increased by implementation of the European Charter as a platform that can be upgraded by a number of positive actions, which will raise public awareness of the issue. Although there are a number of signatories to the European Charter in the Republic of Croatia, it has not yet fully developed into practice and additional efforts are needed to recognize and implement it as an effective tool for achieving gender equality.

## 2. POSITION OF WOMEN IN POLITICS WITH SPECIAL REFERENCE TO THE REPUBLIC OF CROATIA

In spite of adoption of new laws and policies in many countries, examples of good practice and support measures, underrepresentation of women in public and political life has still remained a critical issue undermining the full functioning

of democratic institutions and processes.[2] Political activity and public decision-making are areas with male predominance.[3] Thus, during the 20th century, efforts were made to correct this “pyramidal rule”, and especially optimistic expectations aroused in the initial phase of democratic changes in transition countries and in the Republic of Croatia, as well.[4] In contemporary developed democracies, the issue of gender equality is slowly coming to the focus of attention, and it may be said that underrepresentation of women in politics has been gradually recognized as a feature of an unhealthy democracy and a deep crisis of political representation.[5] The unfavourable position of women in political representation is considered injustice that must be corrected by diverse measures, anti-discrimination laws and positive actions.[6] In order to achieve equal opportunities for all, without barriers to economic, social and political participation based on gender, women need a certain means of protection as one of the measures of positive discrimination, which can be provided in the form of quotas.[7]

Electoral quotas are measures of equal opportunities requiring that the election-nominating bodies, which in most political systems are allocated to political parties, recruit, nominate or elect more women to political functions, and are, therefore, considered as a fast track towards achieving equal representation of women and men in politics.[8] Today, parliamentary democracies are obviously committed to equality of women and men in political decision-making as a prerequisite to true democracy; however, this proves not to be easily accomplished, even in cases where there is a social consensus on this.[9]

The reasons for under-representation of women in politics are numerous. Most authors divide the factors not favouring female political participation into three

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2 Gender Equality Strategy 2018-2023, [https://www.coe.int/en/web/genderequality/gender-equality-strategy/] Accessed 15.04.2019

3 *Ibid.*

4 Leinert Novosel, S., Žena na pragu 21. stoljeća – između majčinstva i profesije, TOD and EDAC, Zagreb, 1999

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8 Dahlerup, D., *Women, Quotas and Politics*, Routledge research in comparative politics, Routledge, London and New York, 2006

9 Leinert Novosel, S., *Politika ravnopravnosti spolova: kako do „kritične mase“* žena *u parlamentima?*, Politička misao, *Vol.* XLIV, 2007, No 3, pp. 85-102

groups: political, socio-economic and socio-cultural.[10] Main reasons listed in contemporary literature are electoral systems, the way in which political parties operate, gender stereotypes, roles and values transferred by some family models, as well as a social and private division of work leaving little room for participation of women in public and political life.[11] The above-listed reasons intertwine; however, one reason stands out in the context of this paper, and that is *the way* in which the political parties operate. Namely, the process of nominating a candidate may be different in political parties, it may be conducted in specific circumstances depending on how centralised the process itself is and how important the objective or subjective attributes of the aspirant(s) are; but the final result always remains the same – the candidate nomination procedure is controlled exclusively by political parties.[12] As the general issue of underrepresentation of women in politics is an extensive topic reaching beyond the scope of this paper, due to the length limitation of the paper, the reader is referred to consult a wealth of additional scholarly and professional sources.[13]

The issue of underrepresentation of women in politics has certainly been related to the Republic of Croatia since its independence at all levels of political decision-making, as well.[14] Since 1945 women in the Republic of Croatia have active and

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[10] Šinko, M. Žene *u parlamentima – globalna perspektiva*, Politička misao, *Vol.* XLIV, No 2, 2007, pp. 71-92

[11] See: Shvedova, N. *Obstacles to Women's Participation in Parliament,* in Women in Parliament: Beyond Numbers, International IDEA, Stockholm, 2005, p. 44; Norris, P., *Passages to Power: Legislative Recruitment in Advanced Democracies*, Introduction; Theories of recruitment, Cambridge University Press, Cambridge, 1997; Kenworthy, L., Malami, M., *Gender Inequality in Political Representation: A Worldwide Comparative Analysis*, The University of North Carolina Press, Social Forces, September 1999, *Vol.* 78, No. 1, pp. 235-269; Lovenduski, J., *State Feminism and Political Representation*, Cambridge University Press, 2005

[12] Kunovich, S., Paxton, P., *Pathways to Power: The Role of Political Parties in Women's National Political Representation*, American Journal of Sociology, *Vol.* 111, No 2, 2005, pp. 505-552

[13] Tremblay, M., *Women and Legislative Representation: Electoral Systems, Political Parties and Sex Quotas*, Palgrave Macmillan, 2012; Sawer, M., Tremblay, M., Trimble, L., *Representing Women in Parliament: A Comparative Study*; Diaz, M.M., *Representing Women?: Female Legislators in West European Parliaments*, ECPR Press, 2005; Ortenblad, A., Marling, R., Vasiljevic, S., *Gender Equality in a Global Perspective*, Routledge, 2017; Hayes, D., Lawless, J.L., *Women on the Run: Gender, Media, and Political Campaigns in a Polarized Era*, Cambridge University Press, 2016; Norris, P., *Electoral Engineering, Voting, Rules and Political Behaviour*, Cambridge, Cambridge University Press, 2004; Freedman, J., *Women in the European Parliament*, in: Women, Politics and Change, Oxford University Press, New York, 2002; Hughes, M.M., *Intersectionality, Quotas and Minority Women's Political Representation Worldwide*, The American Political Science Review, *Vol.* 105, 2011, pp. 604-620; Paxton, P., Hughes, M.M., Painter, M.A.II., *Growth in Women's Political Representation: A Longitudinal Exploration of Democracy, Electoral System and Gender Quotas*, Center for the Study of Democracy, UC Irvine, 2009; Mansbridge, J., *Quota Problems: Combating the Dangers of Essentialism*, in: Politics & Gender 1, No 4, 2005, pp. 369-398

[14] Leinert Novosel, S., *Percepcija, iskustvo i stavovi o rodnoj (ne)ravnopravnosti u politici*, in: Rodna ravnopravnost i diskriminacija u Hrvatskoj, Istraživanje "Percepcija, iskustva i stavovi o rodnoj diskriminaci-

passive voting rights, that is, they can vote for and be elected in all political bodies, but even today their actual representation in political life is persistently, with slight exceptions, very weak. The statistical data published by the Central Bureau of Statistics on the topic Women and Men in Croatia indicate this.[15] The statistical indicators show the position of women and men in the Republic of Croatia in the areas of population, health, education, employment and wages, pension insurance, judiciary and political authorities based on the annual survey conducted by the Central Bureau of Statistics.[16] Statistical data indicating that women make up 51.5% of the total population in the Republic of Croatia and that they are underrepresented in politics and economy, which means that they are rarely employed and professionally advancing has been used as a starting point for drafting the bill of the first Gender Equality Act in the Republic of Croatia.[17] Although institutional regulations in the Republic of Croatia, as analysed later on in the paper, allow women to engage in politics, most political parties have no genuine strategy for involving women in their political work. In such conditions, women can hardly obtain a passing position at electoral slates, and they remain marginalized and politically underrepresented.

In recent Croatian political practice, most parties that are not guided by the principle of gender equality, position women on the bottom of electoral slates. These positions are not transitory, and, consequently, women could not be elected to the representative bodies of local and regional self-government. This leads to the conclusion that the implementation of the meaning and purpose of the balanced gender participation principle to be applied on electoral slates, as laid down by the law, has been evaded. If political parties really want to achieve a balanced representation of both sexes in representative bodies and thus achieve the full purpose of rules governing gender equality issue, then, they should ensure that positive measures are implemented, which will then result in equal representation of both sexes in representative bodies. This could be achieved by applying the alternate male and female candidates' position on electoral slates, the so-called *zipper system*.[18] In addition, political inequality may be avoided by regularly raising public

ji u Republici Hrvatskoj", Zagreb, Biblioteka ONA, 2011, pp. 185-209

15 The publication Žene i muškarci u Hrvatskoj has been published as a yearbook since 2006 by the Central Bureau of Statistics. It contains important consolidated and updated statistical data on status of women and men in the Republic of Croatia

16 See in: Leinert Novosel, S., *Rodni stereotipi, predrasude i diskriminacija žena u politici*, Ljudska prava žena, Institut društvenih znanosti Ivo Pilar, Zagreb, 2011, pp. 113-126

17 Rodin, S.; Vasiljević, S., *Zakon o ravnopravnosti spolova*, Revija za socijalnu politiku, *Vol.* 10, No. 3, 2003, pp. 397-402

18 The definition of *zipper system* was given by: Vandenbeld, A., *International Trends in Women's Political Participation*, The Oxford Handbook of Transnational Feminist Movements, Oxford University Press,

awareness about equality between women and men, as well as by encouraging political parties to put women to winning positions in election slates, i.e. at the top of the slate.

## 3. LEGISLATIVE PROVISIONS AND POLICIES AS REGARDS EQUALITY OF WOMEN AND MEN IN THE FIELD OF POLITICAL ACTIVITIES IN THE REPUBLIC OF CROATIA

This section gives an overview of existing international, European and national legal regulations and policies related to political equality of women and men. General legal act with the highest legal status in the Republic of Croatia – the Constitution of the Republic of Croatia[19], guarantees the principle of equality in its two basic forms: equality before the law and as a ban on discrimination against certain characteristics, the list of which is not exhausted.[20] Article 14 of the Constitution of the Republic of Croatia in Chapter III stipulates the general clause of equality before the law defining the protection of human rights and fundamental freedoms. Thus, every person in the Republic of Croatia is granted enjoyment of rights and freedoms regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other features. These normative guarantees should be distinguished from moral requirement for the achievement of fundamental values, as in Art. 3 of the Constitution of the Republic of Croatia, which identifies gender equality as one of the fundamental values of the constitutional order, defines it in a substantive sense, sets the regulatory goal of exercising equality, and forms a constitutional basis for application of the principle of equal opportunities as an exception to the principle of formal equality in Art. 14 of the Constitution of the Republic of Croatia.[21] International treaties are regulations constituent to the internal legal order of the Republic of Croatia. Referring to their importance, Article 141 of the Constitution of the Republic of Croatia stipulates as follows: "International treaties concluded and ratified in accordance with the Constitution of the Republic of Croatia, and made public, and which are in force shall be part of the internal legal order of the Republic of Croatia and shall be above legislation in terms of legal effects." There-

2015, p. 231; Sledzinska-Simon, A., *Genders Quotas and Women Solidarity as a Challenge to the Gender Regime in Poland*, in: Lepinard, E.; Rubio-Marin, R. (eds.), Transforming Gender Citizenship, Cambridge University Press 2018, p. 262

19 Constitution of the Republic of Croatia, Official Gazette 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014

20 Gardašević, Đ., *Ljudska prava i temeljne slobode u Ustavu RH*, in: Ljudska prava, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2014, pp. 51-61

21 Rodin, S., *Jednakost muškarca i žene*, Pravo i politika u EU i Hrvatskoj, Institut za međunarodne odnose – IMO, Zagreb, 2003, p. 5

fore, all international treaties that are ratified by the Republic of Croatia and in force are in terms of legal value above the national legislation.

There is a whole range of international instruments referring to women's rights, and the Republic of Croatia is a party to these instruments. In addition to the Charter of the United Nations (1979)[22], there are some other important instruments regarding women's political rights. Firstly, there is the Convention on the Political Rights of Women (1952)[23], International Covenant on Civil and Political Rights (1966)[24], International Covenant on Economic, Social and Cultural Rights (1966)[25], Declaration on the Elimination of Discrimination against Women (1967)[26], Convention on the Elimination of All Forms of Discrimination Against Women (1979)[27], Declaration on the Elimination of Violence Against Women (1993)[28], Beijing Declaration and Platform for Action (1995)[29], Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)[30], Millennium Declaration (2000)[31], and the 2030 Agenda for Sustainable Development (2015).[32]

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22 Povelja Ujedinjenih naroda, Official Gazette – International Agreements No 15/1993 and 7/1994

23 Konvencija o političkim pravima žena, Službeni list FNRJ, Međunarodni ugovori i drugi sporazumi, No 7/1954; the Republic of Croatia is a party to this Convention according to the Decision on publishing of multilateral treaties that the Republic of Croatia is a signatory to based on the succession notification, Official Gazette – International Agreements, No 12/1993

24 Međunarodni pakt o građanskim i političkim pravima, Službeni list SFRJ, No 7/1971; the Republic of Croatia is a party to this Covenant according to the Decision on publishing of multilateral treaties that the Republic of Croatia is a signatory to based on the succession notification, Official Gazette – International Agreements, No 12/1993

25 Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima, Službeni list SFRJ, No 7/1971; the Republic of Croatia is a party to this Covenant according to the Decision on publishing of multilateral treaties that the Republic of Croatia is a signatory to based on the succession notification, Official Gazette – International Agreements, No 12/1993

26 Declaration on the Elimination of Discrimination against Women, Resolution adopted by the UN General Assembly 2263 (XXII), 7 November 1967

27 Konvencija o uklanjanju svih oblika diskriminacije protiv žena, Službeni list SFRJ, Međunarodni ugovori No 11/1981; the Republic of Croatia is a party to this Covenant according to the Decision on publishing of multilateral treaties that the Republic of Croatia is a signatory to based on the succession notification, Official Gazette – International Agreements, No 12/1993

28 Declaration on the Elimination of Violence against Women, A/RES/48/104, Resolution adopted by the UN General Assembly on 20 December 1993

29 Beijing Declaration and Platform for Action, the Fourth World Conference on Women Beijing Declaration, September 1995, UN Women, United Nations 1995

30 Fakultativni protokol uz Konvenciju o eliminaciji svih oblika diskriminacije protiv žena, Official Gazette – International Agreements, No 3/2001 and 4/2001

31 United Nations Millennium Declaration, A/RES/55/2, Resolution adopted by the UN General Assembly on 8 September 2000

32 The 2030 Agenda for Sustainable Development, A/RES/70/1, Resolution adopted by the UN General Assembly on 25 September 2015

It is assumed today that the Council of Europe as the oldest European international organisation has a decisive role in the area of human rights protection. Equality of women and men as well as (political) women's rights are at the heart of human rights protection and the Council of Europe, which has passed a wide and complex network of regulations, standards, guidelines and policies to achieve true gender equality in the Member States. In this context, the following conventions are considered key documents: the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) with Protocols no. 1, 4, 6, 7, 12, 13 and 14[33], the European Social Charter (1961)[34], the Council of Europe Convention on Action against Trafficking in Human Beings (2005)[35], the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, 2007)[36], and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, 2011).[37]

By accession of the Republic of Croatia to the European Union, the European law has been given supremacy over national law.[38] The development of the European Union did not originally aim at protection of human rights and fundamental freedoms, hence the founding treaties do not comprise provisions on fundamental rights and freedoms, since the original aims of all three (since 2002 of two) European Communities were economic in nature, and market-integration oriented.[39] However, the European Union is founded, *inter alia*, on the values that promote equality of women and men. A wide range of bodies has been active and cooperating in the area of legislation adoption and promotion of equality, fighting discriminatory policies and practices. These are primarily the European Commission, the

33 Konvencija za zaštitu ljudskih prava i temeljnih sloboda i Protokoli No 1, 4, 6, 7, 12, 13 and 14, Official Gazette – International Agreements, No 18/1997, 61/1999, 8/1999, 14/2002, 13/2003, 9/2005, 1/2006 and 2/2010

34 Europska socijalna povelja, Official Gazette – International Agreements, No 15/2002 and 8/2003

35 Konvencija Vijeća Europe o suzbijanju trgovanja ljudima, Official Gazette – International Agreements, No 7/2007

36 Konvencija Vijeća Europe o zaštiti djece od seksualnog iskorištavanja i seksualnog zlostavljanja, Official Gazette – International Agreements, No 11/2011

37 Konvencija Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i obiteljskog nasilja, Official Gazette – International Agreements, No 3/2018

38 See more on this subject in the decision of the Court of Justice of the European Union setting the basis for the principle of supremacy of EU law over national laws by reasoning that the Community constitutes **a new legal order of international law** for the benefit of which the States have limited their sovereign rights and the subjects of which comprise both states and their nationals ECR 13: Van Gend en Loos, Case 26/62, 1963

39 Omejec, J., *Vijeće Europe i Europska Unija, Institucionalni i pravni okvir*, Novi informator, Zagreb, 2008, p. 228

Council and the European Parliament. The European Union's anti-discrimination law has started with the provisions on equal pay for men and women and for work of equal value, in which, besides founding treaties, the secondary legislation had a special role in the European legal framework. As early as 1976, the European Union (then the EEC) adopted numerous guidelines as secondary sources of gender equality law. The first legislation in this reference was Directive 75/117 (1975) on equal pay, followed by Directive 76/207 on equal access to employment, vocational training, promotion and working conditions (1976.), and then Directive 79/7 on the principles of equal treatment in matters of social security (1978.), etc.[40] A full overview of the primary legislation, contractual provisions, directives, policies, initiatives, recommendations, conclusions and achievements of the EU in the area of gender equality and non-discrimination, as well as a survey of the progress in the case law of the Court of Justice of the European Union are not the topic of the paper due to the amount of documents and the size limitation of the paper.[41]

For the last two decades, the Republic of Croatia has strengthened the fundamental institutional mechanisms and introduced important changes in legislation with a view to preventing gender discrimination and promoting equal opportunities policy.[42] A network of regulations governing the issue of equality between women and men has been created, and in the context of this paper and in relation to the issue of political equality of women and men, the most important are the Political Parties Act (1993)[43], Act on Election of Representatives to the Croatian Parliament (1999)[44], Gender Equality Act (2008)[45], Anti-Discrimination Act (2008)[46], and the Act on Local Elections (2012)[47].

The Political Parties Act improves special measures by granting a 10% funding bonus (Art. 19, para. 4) to the parliamentary parties for each female representative, i.e. for underrepresented sex. Political equality of women and men is governed by

40 See in: Craig, P., de Burca, G., *EU Law, Text, Cases and Materials*, Fifth edition, Oxford, University press, 2011, pp. 873-874

41 See in: Vasiljević, S., *Slično i različito – Diskriminacija u Europskoj uniji i Republici Hrvatskoj*, TIM-press, Zagreb, 2011

42 Vasiljević, S., *Neka se čuje i druga strana: primjeri spolne i etničke diskriminacije*, Centar za ženske studije, Zagreb, 2012

43 Zakon o političkim strankama, Official Gazette, 76/1993, 111/1996, 164/1998, 36/2001, 28/2006

44 Zakon o izboru zastupnika u Hrvatski Sabor, Official Gazette, 116/1999, 109/2000, 53/2003, 69/2003, 167/2003, 44/2006, 19/2007, 20/2009,145/2010, 24/2011, 93/2011,120/2011, 19/2015, 104/2015

45 Zakon o ravnopravnosti spolova, Official Gazette, 82/2008, 69/2017

46 Zakon o suzbijanju diskriminacije, Official Gazette, 85/2008, 112/2012

47 Zakon o lokalnim izborima, Official Gazette,144/2012, 121/2016

the Act on Election of Representatives to the Croatian Parliament, which regulates the election of MPs to the Croatian Parliament and their nomination. The candidate application procedure is summarized in Article 20 para. 3 of the Act, which stipulates that political parties independently determine their party lists and the order of candidates, in the manner laid down in the statute of the political party, or in accordance with special statutory decisions. The Act on Local Elections (Article 9 paragraph 3) obliges political parties as proponents of the slates to observe the principle of gender equality, in accordance with a special law (which would be the Gender Equality Act). The current 2008 Gender Equality Act replaced the former 2003 Gender Equality Act[48] by introducing new and better solutions. The general provisions of this Act define the policy of equal opportunities by setting forth the general grounds for the protection and promotion of gender equality as the fundamental value of the constitutional order of the Republic of Croatia. Moreover, it defines and regulates the ways of protection against gender discrimination as well as the creation of equal opportunities for women and men (Article 1). Further provisions of this Act define gender equality by determination that women and men are equally present in all areas of public and private life, have equal status, equal opportunities to exercise all rights, as well as the same benefit of the results achieved (Article 5). The Act also introduces special measures in the form of quotas for elimination of gender inequality in cases where representation of one gender in political and public decision-making bodies is lower than 40% (Articles 9 and 12). The relevant law in this context is the Anti-Discrimination Act. The general provisions of this Act in Art. 1 provide for the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia, create the preconditions for achieving equal opportunities, and regulate protection against discrimination based on racial or ethnic origin or colour, gender, language, religion, political or other belief, social background, property status, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity, expression or sexual orientation.

In addition to the above-mentioned network of regulations, the Republic of Croatia has also set up a significant institutional protection with an aim to prevent gender discrimination and promote equal opportunities policy. The Gender Equality Committee of the Croatian Parliament has been established[49] as a working

[48] Zakon o ravnopravnosti spolova (Official Gazette 116/2003) was passed on 14 July 2003 by the Croatian Parliament and it expired on 15 July 2008

[49] See the official web site of the Gender Equality Committee of the Croatian Parliament (Odbor za ravnopravnost spolova Hrvatskog sabora), [https://ravnopravnost.gov.hr/institucionalni-mehanizmi-1639/odbor-za-ravnopravnost-spolova-hrvatskoga-sabora/2021/] Accessed 05.04.2019

body dealing with issues of gender equality. For conducting professional affairs, the Government of the Republic of Croatia has established the Gender Equality Office, whose scope of work is determined by the Gender Equality Office Ordinance[50] and the Gender Equality Act (2008). Additionally, pursuant to Article 19 of the Gender Equality Act, the institution of the gender equality ombudsperson has bas established as an independent body for fighting gender-based inequality or discrimination. The basic task of this Office is to monitor the implementation of the Gender Equality Act and other regulations related to gender equality. Articles 27 and 28 of this Act stipulate that gender equality coordinators are appointed in state administration bodies, that commissions for gender equality may be established in the local and regional self-government units, and that city and municipal commissions must be established as operating advisory bodies of county assemblies for the areas of regional self-government with the task of promoting gender equality at a local level.

The Croatian Government and the Croatian Parliament adopt national strategic plans for activities with the purpose of implementing the Gender Equality Act (2008), in accordance with Article 18, paragraph 2, item 4, and aiming at eliminating discrimination against women and establishing true gender equality by implementing a policy of equal opportunities. The first plan of this kind was the National Policy for the Promotion of Equality adopted in 1997, followed by the National Policy for the Promotion of Gender Equality 2001-2005, adopted in 2001, and later by the National Policy for the Promotion of Gender Equality of 2006 for the period from 2006 to 2010, and finally the National Policy for Gender Equality 2011-2015[51] adopted in 2011. Since 2015 no new strategic document has been drafted. In 2017 the report on the work of the Gender Equality Office of the Government of the Republic of Croatia argued that the document of National Policy for the period after 2015 had not been issued due to extraordinary elections for the Croatian Parliament held in 2016 and formation of the new Government of the Republic of Croatia.[52] The Working Group for drafting National Policy has been set up in 2015, but its composition was changed at the time of the 2017 elections. The result of these sequence of events is that for four years there has not been any  strategy for achieving gender equality in Croatia and that there are still

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[50] Uredba o uredu za ravnopravnost spolova, Official Gazette, 39/2012

[51] See in: Nacionalna politika za promicanje ravnopravnosti spolova za razdoblje 2001-2005, Official Gazette 112/2001, Nacionalna politika za promicanje ravnopravnosti spolova za razdoblje 2006-2010, Official Gazette 114/2006, Nacionalna politika za promicanje ravnopravnosti spolova za razdoblje 2011-2015, Official Gazette 88/2011

[52] See the official web site of the Government of the Republic of Croatia (Vlada RH), Izvješće o radu Ureda za ravnopravnost spolova Vlade RH u 2017, [https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2018/11%20studeni/125%20sjednica%20vRH//125%20-%2029.pdf] Accessed 05.04.2019

no signs when and for what period a new national gender equality policy will be adopted, which is essential to achieving effective gender equality.

## 4. EUROPEAN CHARTER FOR EQUALITY OF WOMEN AND MEN IN LOCAL LIFE

The European Charter was adopted in 2006 by the Council of European Municipalities and Regions (CEMR), which is the largest organization of local and regional authorities in Europe. It is the extension of the project "The City for Equality" funded by the European Commission since 2004 and drafted by the CEMR with examples of good practices in local communities, with a view to establishing a methodology for achieving equality in local communities.[53] The CEMR comprises 60 member associations from 41 out of 47 member states of the Council of Europe, including all 28 member states of the European Union. In total, they represent just over 150,000 municipalities and regions.[54] By the end of 2018, only 1736 signatories from 35 countries, or slightly over 1% of the CEMR members of the municipalities and regions, adopted the European Charter.[55] At the beginning of this section there are two problems that need to be pointed out. Firstly, the problem of unconsolidated official translations of the European Charter into the Croatian language. There are two official translations and they differ for basic terminology. The first translation was done by the Local Democracy Agency from Mostar (2012) published as a complete text of the European Charter in the Croatian language on the official website of the Council of Municipalities and Regions (CEMR).[56] The second translation is on the official web site of the Gender Equality Office of the Government of the Republic of Croatia, without any indication of the author.[57] The differences in these translations start with the very title of the document. The first translation of the European Charter reads as *Europska povelja o ravnopravnosti spolova na lokalnoj razini (the European Charter*

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[53] *The Cities for Equality* project is a virtual city designed as a model of enabling the local authorities to improve the conditions for the gender equality achievement. Retrieved from: [http://www.charter-equality.eu/the-charter/la-presidence-en.html/] Accessed 15.04.2019

[54] See official web site of Observatory European Charter for Equality of Women and Men in Local life, [http://www.charter-equality.eu/atlas-of-signatories-of-the-charter/presentation.html/] Accessed 12.04.2019

[55] *Ibid*.

[56] Europska povelja o ravnopravnosti spolova na lokalnoj razini, Mostar, 2012, [http://www.charter-equality.eu/wp-content/uploads/2013/03/European-Charter-in-Croatian-HR2.pdf/] Accessed 05.04.2019

[57] Europska povelja za ravnopravnost žena i muškaraca na lokalnoj razini, [https://ravnopravnost.gov.hr/institucionalni-mehanizmi-1639/europska-povelja-o-ravnopravnosti-zena-i-muskaraca-na-lokalnoj-razini/3088/] Accessed 15.04.2019

*on Gender Equality at the Local Level),* and the second translation reads as *Europska povelja za ravnopravnost* žena *i muškaraca na lokalnoj razini (the European Charter on Equality of Women and Men in Local Life).* Furthermore, the terminology of these two translations into Croatian is different. In "the Mostar translation", the original term *women and men* was shortened to *gender*, unlike "the Zagreb translation" and the original text of the European Charter in the English language (compare: Principle 2, Principle 6, Article 4 paragraph 2, Article 11 paragraph 1, Article 12 paragraphs 1 and 2 of the European Charter). However, comparison of the original text of the European Charter in English with both translations in Croatian reveals that neither of the two mentioned translations into the Croatian language is satisfactory. In other words, in both Croatian translations, the word *gender* has been translated as *spol* (*sex*) although the correct translation would be *rod* (*gender*)[58], and the term *gender equality* has been translated as *ravnopravnost spolova (sex equality)*, although the correct translation is *rodna ravnopravnost* (*gender equality*)[59]. In Croatian public sphere the term *rod (gender)* as a concept has caused considerable controversies, and has generated public discussions on differences between the terms *spol (sex)* and *rod (gender)* in the society when the term *rod (gender)* has often been put into a negative context, especially by the conservative section of the society. The mindset of the Croatian society is mainly traditional and there are certain social circles that contradict the concept of *rod (gender)* and do not accept it either as an idea or as a legal term. All this has obviously resulted in the tendency to avoid the term *rod (gender)* in the translations of the European Charter into the Croatian language.

Another problem is in reference to the fact that in many verified databases there are no scholarly or professional papers dealing with the topic of the text and the scope of the European Charter as a mechanism for increasing equality of women and men in local communities. All things considered, there is not only a lack of interest in accepting the European Charter in practice, but that there is a lack of interest, as the above data show, in the theory as well to solve the issue of gender inequality (at a local level). The author concludes that the weak public presentation of the European Charter, i.e. its presentation before the bodies of local and regional authorities that would have to be committed to it, led to the insufficient use of the Charter as a tool that did not encourage scientific research.

The European Charter is an instrument of political commitment of local authorities. It has been drafted as a clear guide for local authorities on undertaking actions

[58] See Article 2 paragraph 5, Article 2 paragraph 6, Article 8 paragraph 1, Article 14 paragraph 3 item 3, Article 15 paragraph 2 item 2

[59] See Article 4 paragraph 1 item 3, Article 12 paragraph 3 item b), e) and f), Article 27 paragraph 3 item 2, Article 30 paragraph 2 item 3

within their competences.[60] By signing it, the local authorities encourage policies and concrete measures aimed at achieving gender equality at the local level, in cooperation with relevant local, national, European and international institutions and organizations. Apart from promoting gender equality and equal opportunities policy, the European Charter primarily sets out assessing the gender-impact of gender-based decisions and policies by local authorities. The Charter is divided into three parts. The first part establishes the principles, the second part deals with implementation modalities of the Charter and its commitments, whereas the third part comprises thirty articles governing different areas elaborated by detailed action plans for achieving equality. This allows the signatories to select the areas that are priority for them, useful and feasible as their implementation tasks. It follows from the foregoing considerations that it is better to select a smaller number of clear, but achievable areas of action in the plan of action for equality than a large number of areas that cannot be achieved, and consequently will not lead to a targeted change. According to Part III of the European Charter, the activities in selected areas can be elaborated upon issues of democratic accountability, political role, general framework for equality, regulation of the role of employer, public procurement and contracts, role of service provision, planning and sustainable development. In relation to the political role of women, Article 2 of the European Charter regulates the issue of political representation by proclaiming the principle of balanced representation and recognizes equal rights for women and men; thus the paper analyses the application of this article in local communities in the Republic of Croatia. The implementation of Article 2 paragraph 1 recognizing the equal suffrage for women and men, to be a candidate for and to hold elected office for citizens in the Republic of Croatia does not seem too complicated, since general and equal suffrage (both active and passive) for both women and men is clearly guaranteed by Article 45 of the Constitution of the Republic of Croatia. Furthermore, the signatories to the European Charter recognize in Article 2 paragraph 2 equal rights of women and men to participate in the formulation and implementation of policies, to hold public office and to perform all public functions at all levels of government. This part of the task leaves no doubt and does not create any difficulties in implementation. However, paragraph 3 of Article 2 of the European Charter committing a local or regional self-government unit to recognize the principle of balanced representation in all elected and public decision-making bodies will be the most difficult task and it will be crucial in drafting the action plan for equality for the signatories to the Charter in the Republic of Croatia.

[60] See more on local self-government competences in: Chandler, J.A., *Local Government Today*, Third edition, Manchester University Press, 2001, pp. 100-116

The measures that the signatory should take in order to uphold the above mentioned rights and principles pursuant to Article 2 of the European Charter are called reasonable measures and they propose to encourage women to apply for entry into the registry of voters, to exercise their suffrage and to be candidate for public service. It also promotes the encouragement of political parties to adopt and enforce the principle of balanced representation of women and men and, if necessary, to issue quotas in order to increase the number of electoral female candidates or elected female representatives. Furthermore, the signatories are committed to regulating their own procedures and standards of conduct so that potential female candidates and elected female representatives are not discouraged by stereotypes in behavior and speech i.e. harassment as well as adoption of measures to enable elected female representatives / male representatives to harmonize their private, business and public lives. All aforementioned measures are praiseworthy and welcomed, and it is up to the local communities to clarify their implementation. Due to their general definition, there is a possibility that bodies in local communities developing equality action plans interpret them differently or adapt them according to their needs.

Namely, local and regional community policy is established in their representative bodies: city councils and county assemblies. City councils and county assemblies are, pursuant to Article 27 of the Law on Local and Regional Self-Government[61], defined as the citizens' representative bodies that pass the acts within the scope of the functions of the local or regional self-government units. Thus, they represent places where decisions on all important issues and local community policies are made. Therefore, the local communities will have to take important measures for ensuring the implementation of the task referred to in Article 2 of the European Charter in order to advance the balance between the representation of women and men in political representation.

As stated in Section III of this paper, the Local Elections Act (2012) obliges political parties to comply with the principle of gender equality as slate proponents in accordance with the Gender Equality Act (2008). The ultimate goal of the latter is to achieve, in reference to equal participation of women and men in authorities at all levels of government (Article 12), to reach the level of representation of both sexes according to their share in the total population in the Republic of Croatia, which is why special measures – quotas have been considered. However, as the results of this research paper show, the quotas as special measures require additional support, that can be found in Article 2 of the European Charter. There-

[61] Zakon o lokalnoj i područnoj (regionalnoj) samoupravi, Official Gazette 33/2001, 60/2001, 125/2005, 109/2007, 125/2008, 36/2009, 150/2011, 144/2012, 19/2013, 137/2015 and 123/2017

fore, the aim of the local communities that have adopted the European Charter should be to design the modalities in which the legally binding obligation of at least 40% representation of both sexes in the election slates for local elections and consequently equitable representation of both sexes in representative bodies of local communities will be achieved. One of the most important steps is certainly access to political parties. All political parties represented in the local community should be required to commit themselves to empowering and encouraging women to participate more actively in party's political work. This requirement is already a significant step forward, since, as a rule, the party policies are defined at national, and rarely at the local level. Likewise, political parties foster the activities related to inclusion of women in politics predominantly at the national level.[62] It is, thus, important to empower and encourage women at the local level to be more actively involved in the work of political parties by organizing additional campaigns and to promote their political function. In addition, political parties need to revise their nomination procedures and nomination for electoral slates in order to increase the level of representation of women in representative bodies and refer them to apply the so-called *zipper* system by which male and female candidates will be nominated alternately on electoral slates.

The local community must prompt political parties by the means of action plan for equality to building gender-aware party programmes, to imposing women's issues of local importance on the public, and to systematically empower and train women participating in political parties, as well as to motivate women's lobbying in representative bodies of local and regional self-government. Through this form of action plan for equality in the political sphere, the local community will undoubtedly improve the political status of women and bring them closer or even bring them to the goal of balanced or equal representation in representative bodies.

By the end of 2018 the European Charter was adopted only by three municipalities: Vela Luka, Punat, and Vižinada, twelve cities/towns: Opatija, Cres, Delnice, Zadar, Solin, Vodice, Vukovar, Osijek, Labin, Punat, Pregrada and Ludbreg and twelve counties: Brod-Posavina, Varaždin, Vukovar-Srijem, Virovitica-Podravina, Bjelovar-Bilogora, Istra, Dubrovnik-Neretva, Šibenik-Knin, Primorje-Gorski Kotar, Zagreb, Međimurje and Krapina-Zagorje Counties.[63] According to the data

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62 Barburska, O., *Political Party Strategies for Increased Representation of Women in Political Decision-Making in the EU Member States and Poland*, Yearbook of Polish European Studies, *Vol.* 6, 2002, pp. 133-152

63 Data available on: [https://ravnopravnost.gov.hr/institucionalni-mehanizmi-1639/europska-povelja-o-ravnopravnosti-zena-i-muskaraca-na-lokalnoj-razini/provedba-europske-povelje-o-ravnopravnosti-zena-i-muskaraca-na-lokalnoj-razini/3091/] Accessed 09.04.2019

of the Ministry of Administration of the Republic of Croatia[64] and the Statistical Yearbook 2018[65] a total of 576 local and regional self-government units were established in the Republic of Croatia. As only 27 units of local and regional self-government in the Republic of Croatia adopted the European Charter, i.e. only 4.7%, which gives a serious cause for concern. The Gender Equality Ombudsperson's report for 2017 stated that for the purpose of a clear commitment to respecting the principle of gender equality in the area of political participation at the local level all local and regional self-government units in the Republic of Croatia are recommended each year to sign the European Charter. However, the question remains why only a minority of local and regional self-government units in the Republic of Croatia adopted the European Charter. Is it because the topic of equality of women and men is not interesting enough or is it that political actors in local communities do not truly wish women were more represented in political decision-making.

Besides a small number of local and regional self-government units that adopted the European Charter, it should be pointed out that, according to the information available to the author of the paper, none of the local or regional self-government units in the Republic of Croatia has yet drawn up an action plan for equality. The aforementioned situation is a matter of concern, since the European Charter commits the signatories to drafting and adopting an action plan for equality within a reasonable time, but not exceeding two years after signing the European Charter, and this deadline has already expired in the Republic of Croatia. Due to such conduct on behalf of the signatories, a conclusion can be drawn that they had only formally agreed to sign the European Charter without any real intention of improving and achieving equality between women and men in everyday life in local communities.

The expectations were that such an important international instrument as the European Charter, would be more publicized among local and regional self-government units. Since this has not been the case, we can say that the European Charter in the Republic of Croatia, although adopted thirteen years ago, has not survived. Therefore, additional activities will be required to inform the entire Croatian public, especially political participants and the non-governmental sector, of the benefits and values that the European Charter promotes. This can be done through the systematic promotion of the European Charter by means of

[64] Data available on: [https://uprava.gov.hr/o-ministarstvu/ustrojstvo/5-uprava-za-politicki-sustav-i-organizaciju-uprave-1075/lokalna-i-podrucna-regionalna-samouprava/popis-zupanija-gradova-i-opcina/846/] Accessed 15.04.2019

[65] Statistički ljetopis 2018, Državni zavod za statistiku RH, Zagreb, 2018, p. 59

public communication, and in particular, by organizing gender equality training and public discussions that would make the public aware that disseminating and implementing the Charter will advance the equality of women and men in all areas of life in local communities.

## 5. RESEARCH INTO THE RESULTS OF LOCAL ELECTIONS HELD IN FOUR ROUNDS IN THE REPUBLIC OF CROATIA

Participation of women in the implementation of public policies at local and regional level provides insight into women's life experiences, personality, ability, education and creativity and it contributes to the development of local society. If we want to create a society based on equality and respect for all groups in the society, it is an imperative that local authorities accept the aspect of sex when planning and introducing strategies in managing their units as well as in everyday life practice. Having noted the above, the author decided to research and analyze the issue of representation of women and men in representative bodies of local and regional self-government in the Republic of Croatia.

This section deals with the results of the research conducted into the local elections data in the last four election rounds aimed at determining the level of implementation of the gender equality principle in the area of political participation at local and regional level, i.e. in city councils and county assemblies in all counties of the Republic of Croatia.

### 5.1. Methodology and Research Objectives

The hypothesis set to this research is that existing legal and institutional mechanisms are not sufficient to achieve a balanced representation of both sexes in representative bodies of local authorities. The research was conducted into the local elections data in the election years of 2005, 2009, 2013 and 2017. The statistics are derived from secondary sources and represent the local elections results officially pronounced by the State Election Commission of the Republic of Croatia and statistical data published by the Central Bureau of Statistics of the Republic of Croatia on their official web sites, as well as the data published on the official web site of the Ombudswoman for Gender Equality. The results have been analyzed by means of comparative analysis, while the descriptive statistics used in the paper has provided a description, comparison and analysis based on the presentation and statistical data processing; data editing, tabular and graphical presentations have been applied. The aim of the research was to determine, by observing the principle of gender equality, whether the results of local elections in the aforementioned

election rounds are data representing the existing (un)successful legal and institutional framework in the Republic of Croatia.

### 5.2. Research results

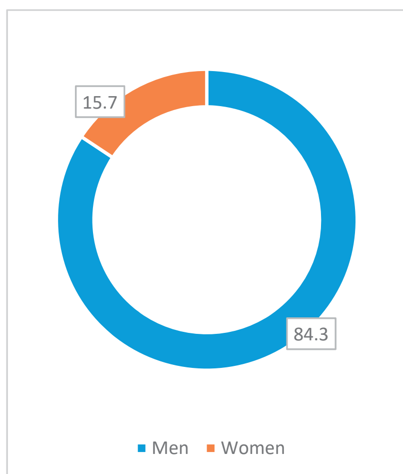
#### 5.2.1. *Local elections held in the Republic of Croatia in 2005*

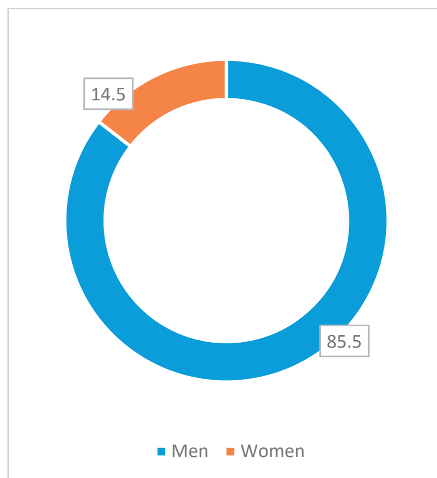
**Table 1:** Elected Representatives in Representative Bodies of Local and Regional Self-Government by Counties in the Republic of Croatia at Local Elections in 2005

| COUNTY | ELECTED REPRESENTATIVES IN CITY COUNCILS IN PERCENTAGE | ELECTED REPRESENTATIVES IN COUNTY ASSEMBLIES IN PERCENTAGE |
|---|---|---|
| Zagreb | 14.6 | 26.7 |
| Krapina-Zagorje | **7.5** | 13.7 |
| Sisak-Moslavina | 14.8 | 18.4 |
| Karlovac | 8.0 | 14.6 |
| Varaždin | 17.9 | 4.9 |
| Koprivnica-Križevci | **28.9** | 19.5 |
| Bjelovar-Bilogora | 17.6 | 14.6 |
| Primorje-Gorski Kotar | 15.2 | 14.6 |
| Lika-Senj | 12.1 | 6.7 |
| Virovitica-Podravina | 20.8 | 9.8 |
| Požega-Slavonija | 10.9 | 14.3 |
| Brod-Posavina | 15.9 | 15.7 |
| Zadar | 12.7 | 12.2 |
| Osijek-Baranja | 11.9 | 8.5 |
| Šibenik-Knin | 11.5 | **2.4** |
| Vukovar-Srijem | 10.2 | 9.8 |
| Split-Dalmatia | 12.4 | 7.8 |
| Istra | 21.1 | **26.8** |
| Dubrovnik-Neretva | 10.8 | 7.3 |
| Međimurje | 26.3 | **26.8** |
| The City of Zagreb | 27.5 | 27.5 |
| TOTAL | 15.7 | 14.5 |

*Data source on elected representatives in county assemblies: Croatian Central Bureau of Statistics, Women and Men in Croatia 2006, Zagreb, 2006, p. 74. Data source on elected representatives in city councils: Elections for Representatives of Representative Bodies of Local and Regional Self-Government (May 15, 2005), Gender Equality Ombudsperson, Zagreb, December 2005; available at: [http://www.prs.hr/attachments/article/130/LOKALNI%20IZBORI%202005.pdf/]*

According to the 2005 local elections data, the average representation of women as elected representatives in all city councils in the Republic of Croatia amounts to 15.7%, and in the county assemblies to 14.5%.




Women are most represented in the city councils of Koprivnica-Križevci County (28.9%) and in county assemblies of Istra County and Međimurje County (26.8%), whereas they are the most underrepresented in city councils of Krapina-Zagorje County (7.5%) and in the county assembly of Šibenik-Knin County (2.4%).

### 5.2.2. *Local elections held in the Republic of Croatia in 2009*

**Table 2:** Elected Representatives in Representative Bodies of Local and Regional Self-Government by Counties in the Republic of Croatia at Local Elections in 2009

| COUNTY | ELECTED REPRESENTATIVES IN CITY COUNCILS IN PERCENTAGE | ELECTED REPRESENTATIVES IN COUNTY ASSEMBLIES IN PERCENTAGE |
|---|---|---|
| Zagreb | 20.9 | 33.3 |
| Krapina-Zagorje | **9.2** | 20.0 |
| Sisak-Moslavina | 19.5 | 24.5 |
| Karlovac | 25.3 | 19.5 |

**Figure 1.** Average representation of women, elected representatives in city councils in the Republic of Croatia (local elections 2005)

**Figure 2.** Average representation of women, elected representatives in county assemblies in in the Republic of Croatia (local elections 2005)

| | | |
|---|---|---|
| Varaždin | 19.6 | 22.0 |
| Koprivnica-Križevci | **30.5** | 26.8 |
| Bjelova-Bilogora | 26.4 | **12.2** |
| Primorje-Gorski Kotar | 20.7 | 22.0 |
| Lika-Senj | 16.7 | 22.2 |
| Virovitica-Podravina | 18.9 | 14.6 |
| Požega-Slavonija | 17.3 | 19.5 |
| Brod-Posavina | 25.0 | 27.5 |
| Zadar | 18.6 | 24.4 |
| Osijek-Baranja | 19.3 | 12.8 |
| Šibenik-Knin | 18.8 | 17.1 |
| Vukovar-Srijem | 25.0 | 14.6 |
| Split-Dalmatia | 18.8 | 19.6 |
| Istra | 28.8 | 26.8 |
| Dubrovnik-Neretva | 20.5 | 19.5 |
| Međimurje | 18.9 | 22.0 |
| City of Zagreb | 26.1 | **35.3** |
| Total | 21.4 | 21.9 |

Source: Croatian Central Bureau of Statistics, Women and Men in Croatia in 2010, Zagreb, 2010, pp. 61-62.

According to the data on local elections held in 2009, the average representation of women as elected representatives in all city councils in the Republic of Croatia is 21.4%, and in county assemblies 21.9%.

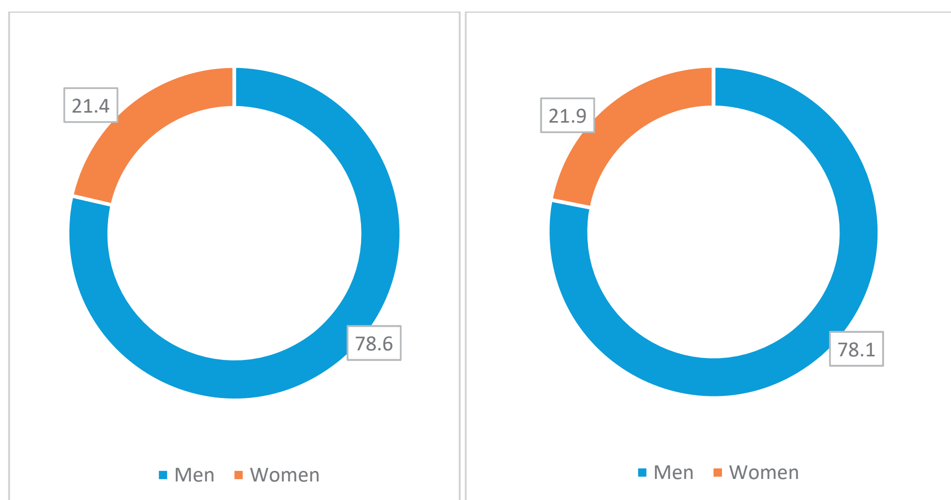


**Figure 3.** Average representation of women, elected representatives in city councils in the Republic of Croatia (local elections 2009)

**Figure 4.** Average representation of women, elected representatives in county assemblies in the Republic of Croatia (local elections 2009)

Women are most represented in the city councils of Koprivnica-Križevci County (30.5%) and the county assembly of the City of Zagreb (35.3%), and they are the most underrepresented in the city councils of Krapina-Zagorje County (9.2%) and in the county assembly of Bjelovar-Bilogora County (12.2%).

### 5.2.3. *Local elections held in the Republic of Croatia in 2013*

**Table 3:** Elected Representatives in Representative Bodies of Local and Regional Self-Government by Counties in the Republic of Croatia at Local Elections in 2013

| COUNTY | ELECTED REPRESENTATIVES IN CITY COUNCILS IN PERCENTAGE | ELECTED REPRESENTATIVES IN COUNTY ASSEMBLIES IN PERCENTAGE |
|---|---|---|
| Zagreb | 18.4 | 19.6 |
| Krapina-Zagorje | 18.1 | 26.8 |
| Sisak-Moslavina | 22.6 | **14.0** |
| Karlovac | 26.4 | 16.3 |
| Varaždin | 22.1 | 31.7 |
| Koprivnica-Križevci | **33.3** | 17.1 |
| Bjelovar-Bilogora | 27.2 | 14.6 |
| Primorje-Gorski Kotar | 23.0 | 26.7 |
| Lika-Senj | 23.0 | 18.8 |
| Virovitica-Podravina | 22.2 | 16.7 |
| Požega-Slavonija | 18.6 | 22.2 |
| Brod-Posavina | 26.2 | 19.0 |
| Zadar | 18.6 | 10.0 |
| Osijek-Baranja | **17.7** | 16.4 |
| Šibenik-Knin | 20.5 | 16.7 |
| Vukovar-Srijem | 23.5 | **14.0** |
| Split-Dalmatia | 24.9 | 21.6 |
| Istra | 30.4 | 35.6 |
| Dubrovnik-Neretva | 26.4 | 17.1 |
| Međimurje | 23.5 | 21.4 |
| City of Zagreb | 24.7 | **35.3** |
| TOTAL | 23.3 | 20.7 |

Source: Central Bureau of Statistics of the Republic of Croatia, Women and Men in Croatia in 2014, Zagreb, 2014, pp. 69-70.

According to the data of the local elections held in 2013 the average representation of women as elected representatives in all city councils in the Republic of Croatia is 23.3%, and in county assemblies 20.7%.

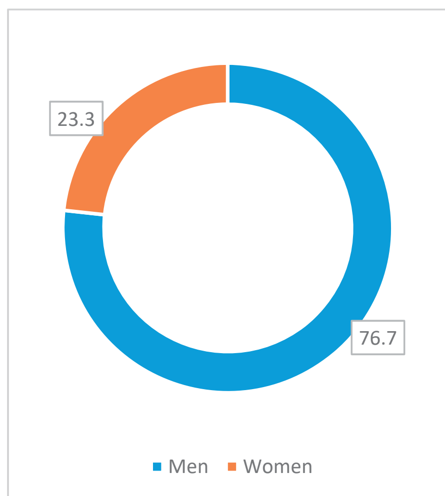



**Figure 5.** Average representation of women, elected representatives in city councils in the Republic of Croatia (local elections 2013)

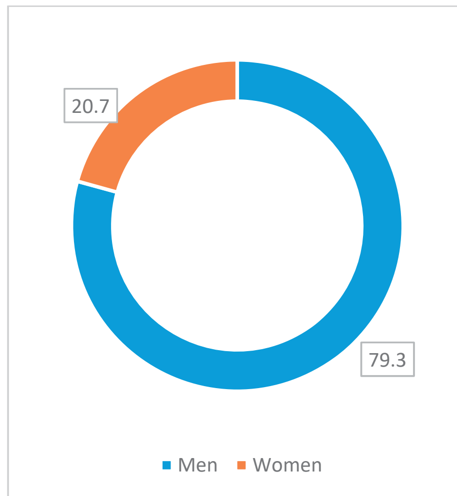



**Figure 6.** Average representation of women, elected representatives in county assemblies in the Republic of Croatia (local elections 2013)

Women are most represented in the city councils of Koprivnica-Križevci County (33.3%) and the county assembly of the City of Zagreb County (35.3%), and they are the most underrepresented in the city councils of Osijek-Baranja County (17.7%) and in the county assemblies of Sisak-Moslavina and Vukovar-Srijem County (14%).

### 5.2.4. *Local elections held in the Republic of Croatia in 2017*

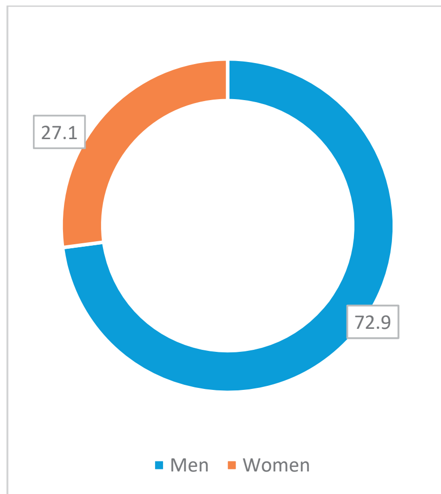
**Table 4:** Elected Representatives in Representative Bodies of Local and Regional Self-Government by Counties in the Republic of Croatia at Local Elections in 2017

| COUNTY | ELECTED REPRESENTATIVES IN CITY COUNCILS IN PERCENTAGE | ELECTED REPRESENTATIVES IN COUNTY ASSEMBLIES IN PERCENTAGE |
|---|---|---|
| Zagreb | 21.2 | 27.5 |
| Krapina-Zagorje | 28.6 | 36.6 |
| Sisak-Moslavina | 28.4 | 19.0 |
| Karlovac | 25.6 | 29.3 |
| Varaždin | **18.1** | 29.3 |

| | | |
|---|---|---|
| Koprivnica-Križevci | 24.6 | 19.5 |
| Bjelovar-Bilogora | 32.2 | 24.4 |
| Primorje-Gorski Kotar | 27.4 | 32.6 |
| Lika-Senj | 27.9 | 18.7 |
| Virovitica-Podravina | 35.2 | 29.7 |
| Požega-Slavonija | 29.8 | 21.6 |
| Brod-Posavina | **38.1** | 35.7 |
| Zadar | 25.5 | 33.3 |
| Osijek-Baranja | 23.2 | 16.4 |
| Šibenik-Knin | 31.0 | 33.3 |
| Vukovar-Srijem | 26.0 | 18.6 |
| Split-Dalmatia | 23.4 | **13.7** |
| Istra | 36.7 | 37.8 |
| Dubrovnik-Neretva | 23.0 | 24.4 |
| Međimurje | 23.5 | 23.8 |
| City of Zagreb | 29.4 | **39.2** |
| TOTAL | 27.1 | 26.9 |

Source: Central Bureau of Statistics of the Republic of Croatia, Women and Men in Croatia 2017, Zagreb, 2017, pp. 75-76.

According to the data of the local elections held in 2017 the average representation of women as elected representatives in all city councils in the Republic of Croatia is 27.1%, and in county assemblies 26.9%.



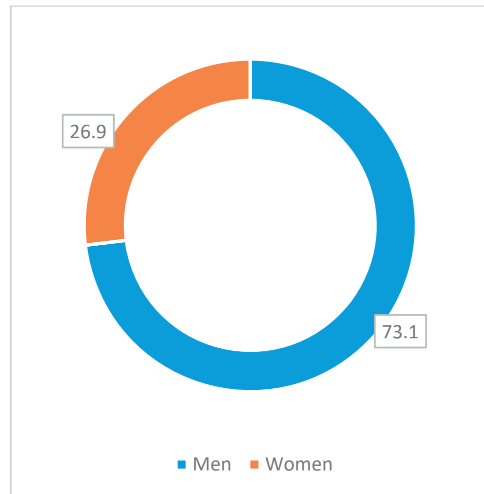



**Figure 7.** Average representation of women, elected representatives in city councils in the Republic of Croatia (local elections 2017)

**Figure 8.** Average representation of women, elected representatives in county assemblies in the Republic of Croatia (local elections 2017)

Women are most represented in the city councils of Brod-Posavina County (38.1%) and in the county assembly of the City of Zagreb County (39.2%), and they are the most underrepresented in the city council of Varaždin County (18.1%) and in the county assembly of Split-Dalmatia County (13.7%).

The Gender Equality Ombudswoman's Report for 2017 shows that at the local elections in 2017, women (albeit) were not a significantly underrepresented sex in the candidacy procedure – out of a total of 47,601 candidates there were 41.7% women, which was a direct consequence of observance of the principle of gender equality in terms of the gender quota set to at least 40% of one sex on a candidate list. The quota was not observed in as many as 14% of the candidate lists. However, in spite of this quite favourable quantitative representation on the candidate lists, other forms of inequality still exist. Women were most represented in lower positions on the lists, with only 15% of women among the list holders.

### 5.3. Overall results

The results of local elections held in 2005, 2009, 2013 and 2017 are presented in Table 5.

**Table 5:** Overview of representatives in city councils and county assemblies according to years of local elections

| Election year | representatives in city councils | | representatives in county assemblies | |
|---|---|---|---|---|
| | average representation | Increase/decrease in relation to the last local elections | average representation | Increase/decrease in relation to the last local elections |
| 2005 | 15.7% | | 14.5% | |
| 2009 | 21.4% | + 5.7% | 21.9% | + 7.4% |
| 2013 | 23.3% | + 1.9% | 20.7% | - 1.2% |
| 2017 | 27.1% | + 3.8% | 26.9% | + 6.2% |

The average representation of all elected representatives in 2005 local elections in city councils in the Republic of Croatia was 15.7%, and in the county assemblies 14.5%. In local elections held in 2009 in urban councils, the average representation of women was 21.4%, and in county assemblies 21.9%. In the elections held in 2013, the average representation of women in city councils was 23.3%, and in county assemblies 20.7%, while in local elections held in 2017, the average

representation of women in city councils was 27.1%, and in county assemblies it amounted to 26.9%.

The results of the research show that women participation in representative bodies of local and regional self-government is very low, that some progress has been made in local elections in 2009 compared to elected women representatives in local elections in 2005, when the ratio of participation of women representatives in city councils increased by 5.7% (from 15.7% to 21.4%) and that of female representatives in county assemblies increased by 7.4% (from 14.5% to 21.9%). In the following electoral round of local elections held in 2013, there was a slight increase in the number of elected women representatives in city councils by 1.9% (from 21.4% to 23.3%), but also a slight decrease in the number of elected women representatives in county assemblies by 1.2% (from 21.9% to 20.7%). In the last electoral round of local elections held in 2017, compared to the previous electoral round of local elections held in 2013, the expected results of equal representation of both sexes were apparently not achieved, as the participation of women representatives in city councils increased by only 3.8% (from 23.3% to 27.1%), and the number of women representatives in county assemblies increased by only 6.2% (from 20.7% to 26.9%) (Figure 9).

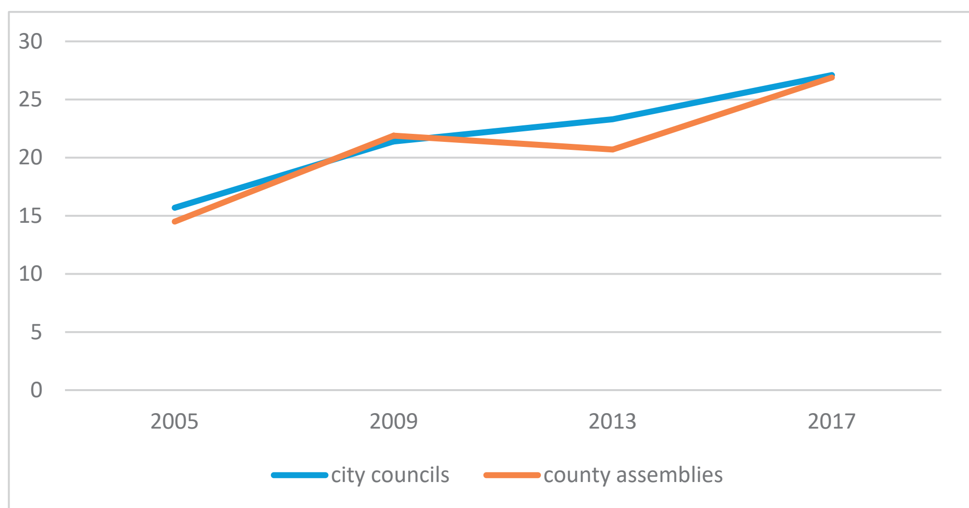



**Figure 9.** Comparative overview of the average representation of women in city councils and county assemblies of the Republic of Croatia according to the year of local elections

There is a tendency indicating a continuous but slow increase in the representation of women in city councils. At last local elections, women's representation in city

councils was by 11.4% higher than in 2005.
The increasing tendency of representation of women in county assemblies was briefly halted in 2013. At last local elections, the representation of women in county assemblies increased by 12.4% compared to 2005.

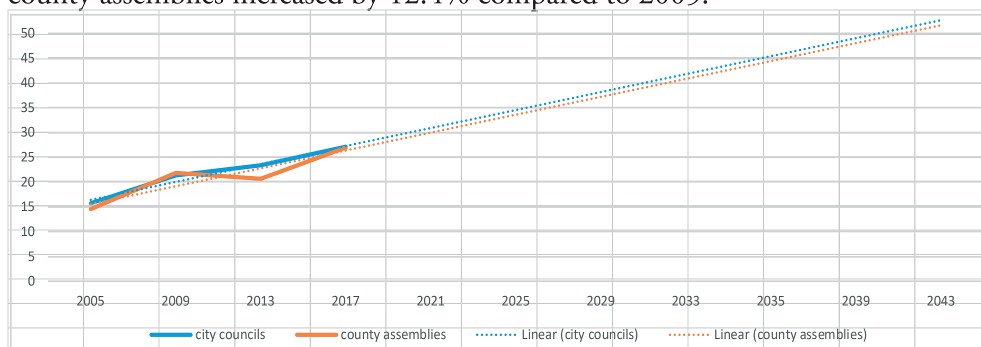



**Figure 10.** Comparative overview of gender equality achievement in city councils and county assemblies in the Republic of Croatia

The research results show that equality in representation of both sexes has not been achieved yet, as expected by the implementation of the Gender Equality Act (2008). Pursuant to Article 15 paragraph 2 of the Gender Equality Act (2008) a gradual increase in representation of under-represented sex is allowed but equality must be achieved at the latest upon the implementation of the third regular elections since the entry into force of the Gender Equality Act (2008), which should have been the case at the local elections held in 2017.[66] If social and political circumstances do not significantly change, and if new tools for increasing women's representation are not applied, this slow dynamics of women's representation increase in reaching a balanced representation of at least 40% of both sexes in representative local and regional bodies may only be expected in the elections held in 2033, i.e. after four regular electoral rounds, while accomplishment of true equality of both sexes shall still remain a difficult goal.

## 6. CONCLUSION

Despite the fact that gender equality is set as one of the constitutional values in the Republic of Croatia and that according to the Gender Equality Act (2008) it means that women and men are equally present in all areas of public and private life, as regards political participation at a local level women are still a considerably

[66] See more on this topic in: Lulić, M.; Tucak, I.: *Women and politics: the ineffectiveness of electoral gender quotas for parliamentary elections in the Republic of Croatia*, SGEM2017 Conference Proceedings 2017, Book 1, *Vol.* 2, pp. 307-320

underrepresented sex. The research results in this paper indicate that the average (political) representation is far below equitable representation of both sexes in representative bodies of local authorities.

It is beyond question that the aim and the purpose of all pieces of legislation listed in this paper is to achieve full equality and not to just normatively regulate the issue of representation of women. The set standards should have demonstrated some results by now. However, the results have been missing on multiple occasions and for a long time. Finally, the conclusion may be drawn that the legal and institutional mechanisms aimed at providing for gender equality have not achieved their goal, and obviously, local communities will have to seize for other tools in order to attempt to achieve full equality.

In the Republic of Croatia, local and regional self-government units are founded on the principle of autonomy of the authorities, which entitles them to independent management based on regulations that they independently pass as well as on the principle of subsidiarity, according to which the level of government closest to the citizens is entrusted with decision making and implementation. Taking the aforementioned circumstance into consideration, additional activities in the local community can considerably raise awareness among citizens and political actors of the need to increase the number of women in the representative bodies of local and regional self-government units. This can be done, in the first place, by recognizing the European Charter as a serious platform to which a number of positive actions can be upgraded in order to raise the awareness of the broader public. The effectiveness of the measures to be adopted by the action plan for equality will primarily depend on the inventiveness, skillfulness, understanding and creativity of the body in charge of its development. It is, therefore, necessary to strongly and skillfully present the European Charter to every local and regional authority, as well as to the general public, to highlight its scope and potential, and to point out its benefits for the local community. Furthermore, in order to achieve the goal set by the European Charter i.e. the equality of women and men at the local level, and to increase the political role of women in local communities as discussed in this paper, it is important to plan and work out the methods for motivating citizens and political parties to actions that will lead to substantial increase in representation of women, so that no action plan for equality remains just a dead letter on the paper, which was the case with the Gender Equality Act (2008) when it comes to equal representation of both sexes in representative bodies.

The European Charter makes it possible to strengthen the social and political environment supporting the equality of both sexes, as one of the foundations of the development of modern democracy. For this reason, local communities are recommended to draw up, based on the European Charter, functional action plans

for achieving equality meeting their own priorities; to use the European Charter for training the public, both civil and political through forums, roundtables, public presentations and debates, media campaign and to raise awareness about the importance of gender equality and to provide the public with feedback on state of affairs, and above all to point to the legal obligation of its improvements. The local communities are entrusted with the task to apply the available tools for activation of (political) potentials in women, but also for making the public aware of the issue and, thus improve the quality of their representative bodies and achieve a truly equitable and democratic society.

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Topic 4

# EU criminal law and procedure

# DECISIONS RENDERED IN ABSENTIA AS A GROUND TO REFUSE THE EXECUTION OF A EUROPEAN ARREST WARRANT: EUROPEAN LEGAL STANDARDS AND IMPLEMENTATION IN CROATIAN LAW*

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***ABSTRACT***

*The right of a person charged with a criminal offence to appear and take part in a hearing is enshrined in the right to a fair trial in Article 6 of the European Convention on Human Rights and Fundamental Freedoms. A trial in absentia is allowed only exceptionally, and in the member states of the European Union it is traditionally regulated under very different legal regimes. This has been an obstacle to the full implementation of the principle of mutual recognition of final judicial decisions and therefore to efficient judicial cooperation in criminal matters. In order to provide clear common grounds allowing the execution of a European arrest warrant even when the person subject to it was absent at the trial, Framework Decision 2009/299/JHA, amending Framework Decision 2002/584/JHA, defined the conditions under which a decision rendered at such a trial may be used as a ground to refuse the execution of a European arrest warrant. These conditions are the subject of this paper. Besides theoretical and normative analysis, the research includes the case law of the Court of Justice of the European Union, balancing between the efficiency of judicial cooperation and respect for fundamental human rights, as well as defining the notion of "the trial resulting in the decision" and specifying when the person was "summoned in person", or "by other means actually received official information of the scheduled date and place of that trial", since the right to take part in the trial may be waived. The research also includes an analysis of Croatian legislation and the jurisprudence of the Supreme Court of the Republic of Croatia in the same matter and an assessment of the implementation of European legal standards in Croatian law.*

***Keywords:*** *European arrest warrant, trial in absentia, decision rendered in absentia, trial resulting in the decision, fair trial, mutual trust*

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## 1. INTRODUCTION: RIGHT TO BE PRESENT AT THE HEARING AS A FUNDAMENTAL ASPECT OF THE RIGHT TO A FAIR TRIAL

The right of the accused to appear in person and take part in a hearing has been elaborated in the jurisprudence of the European Court of Human Rights (ECtHR) as one of the fundamental aspects of the right to a fair trial enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[1] It is also contained in Article 47(2) of the Charter of Fundamental Rights of the European Union,[2] which proclaims the right to a fair trial in compliance with Article 6(1) ECHR.[3] The presence of the defendant at the trial is considered "one of the fundamental premises of a fair trial",[4] enabling him to use other important procedural rights, including defence rights.[5]

Despite its fundamental character, the right to be present at a hearing is not an absolute right. On one hand, the accused may waive his right to take part in the trial, either expressly or tacitly, but the waiver "must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance".[6] It is up to the state to prove that the accused willingly chose not to attend the trial.[7] On the other hand, the absence of the accused from the hearing may be a result of *force majeure*,[8] i.e. circumstances beyond his control.[9] In either case, a trial *in absentia* may be justified with legitimate reasons and it may be in compliance with the requirements of a fair trial, as long as the accused is represented, i.e. defended with a defence counsel[10] and has the possibility to request a

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1 ECtHR, *Sejdovic v. Italy*, GC, 56581/00, 1 March 2006, par. 81; *Colloza v. Italy*, 9024/80, 12 February 1985, par. 29; *Hermi v. Italy*, 18114/02, 18 October 2006, par. 58

2 Charter of Fundamental Rights of the European Union [2000] OJEC C 364/1

3 And "the guarantees afforded by the ECHR apply in a similar way to the Union". Explanations relating to the Charter of Fundamental Rights [2007] OJ 2007 C 303/17, p. 30

4 Đurđević, Z., *Rasprava*, in: Kazneno procesno pravo Primjerovnik, Narodne novine, Zagreb, 2017

5 See Ivičević Karas, E., *Reopening of Proceedings in Cases of Trial* in absentia*: European Legal Standards and Croatian Law*, in: EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, Osijek, 2018, p. 293

6 ECtHR, *Sejdovic v. Italy*, GC, 56581/00, 1 March 2006, par. 86; *Colozza v. Italy*, 9024/80, 12 February 1985, par. 28

7 ECtHR, *Sejdovic v. Italy*, GC, 56581/00, 1 March 2006, par. 88; *Colozza v. Italy*, 9024/80, 12 February 1985, par. 30

8 ECtHR, *Colozza v. Italy*, 9024/80, 12 February 1985, par. 30; *Medenica v. Switzerland*, 20491/92, 14 June 2001, par. 57

9 See Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 255

10 ECtHR, Sejdovic v. Italy, GC, 56581/00, 1 March 2006, par. 91 – 93; Krombach v. France, 29731/96, 13 February 2001, par. 84; Poitrimol v. France, 14032/88, 23 November 1993, par. 34

retrial.[11] Yet, due to the fundamental nature of the right of the accused to be present at the trial, some contemporary legal orders still do not allow trial *in absentia*, while others that consider it an exception to the rule that the accused is entitled to take part in the hearing[12] do allow it, provided there are particular procedural guarantees. In other words, trials *in absentia* are still regulated under very different legal regimes, and the jurisprudence of the ECtHR obviously has not led to harmonization of the matter in national laws.[13] This does not support mutual trust – a cornerstone of efficient judicial cooperation in criminal matters between member states of the European Union. The first problems already appeared in the early years of the application of the European arrest warrant. The following chapter will analyse how European institutions have attempted to resolve these problems.

## 2. TRIAL *IN ABSENTIA* – AN OBSTACLE TO MUTUAL TRUST AND EFFICIENT JUDICIAL COOPERATION IN CRIMINAL MATTERS?

### 2.1. Problems in the early years of the European arrest warrant

The European arrest warrant (EAW) was constructed on the idea of building an area of freedom, security and justice within the European Union.[14] It was "the very first instrument" of judicial cooperation "that implemented the mutual recognition principle in the criminal law context"[15] and there were great expectations of its effectiveness. Yet, from the perspective of mutual trust, judgments *in absentia* were viewed right at the beginning of the application of this new instrument as a "particularly difficult and controversial" issue.[16]

The Framework decision on the European arrest warrant and the surrender procedures between member states (FD 2002/584/JHA)[17] originally provided the pos-

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[11] ECtHR, Sejdovic v. Italy, GC, 56581/00, 1 March 2006, par. 82, Medenica v. Switzerland, 20491/92, 14 June 2001, par. 54. See Trechesel. *op. cit.,* note 9, p. 254

[12] Ivičević Karas, *op. cit.,* note 5, p. 292

[13] Mauro, C., *Le défaut criminel: Réflexions à propos du droit français et du droit comparé, Revue de science criminelle et de droit pénale comparé*, Janvier/Mars 2006, p. 36

[14] Plachta, M., *European Arrest Warrant: Revolution in Extradition*, 11 Eur. J. Crime Crim. L. & Crim Just. 178, 2003, p. 179

[15] Ouwerkerk, J., *Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant*, European Journal of Crime, Criminal Law and Criminal Justice, *Vol.* 26, 2018, p. 103

[16] See Plachta, *op. cit.,* note 14, pp. 189-190.

[17] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1

sibility for the executing judicial authority to subject the surrender to the condition "that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment" (Article 5(1) FD 2002/584/JHA). In circumstances when there was a lack of the unique and clear concept of *in absentia* in member states, such a provision allowed quite a wide margin of discretion of the requested state to put a condition or even refuse the execution of an EAW in accordance with the standards of its own legal system.[18] This did not contribute to strengthening the mutual trust and the realization of the principle of mutual recognition proclaimed in Article 82(1) of the Treaty on the Functioning of the European Union,[19] even though the Court of Justice of the European Union (CJEU) has traditionally restrictively interpreted grounds for refusing the execution of an EAW in order to provide for the effectiveness of EU law through efficient judicial cooperation.[20] On the other hand, the CJEU must should (at least) preserve the reached level of fundamental human rights protection in the jurisprudence of the ECtHR, but also at national levels.[21] This actually required EU law to define and elaborate the (minimum) standards of trial *in absentia* which would, if the requesting state complied with them, exclude the possibility of the judicial authorities of the executing state refusing the execution of an EAW. This was done in 2009 through the amendment of FD 2002/584/JHA.

### 2.2. Reducing the possibility of refusing the execution of an EAW

Framework Decision 2009/299/JHA[22] amended several framework decisions and introduced new provisions on "decisions rendered following a trial at which a person did not appear in person" (Article 4a) in FD 2002/584/JHA, which replaced the former provision of Article 5(1). This amendment specified admissible grounds for the refusal of the execution of an EAW[23] and reduced the possibilities

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18 Cavallone, G., *European arrest warrant and fundamental rights in decisions rendered* in absentia*: the extent of Union law in the case C-399/11* Melloni v. Ministerio Fiscal, 4 Eur. Crim. L. Rev. 19, 2014, p. 29

19 Treaty on the Functioning of the European Union [2012] OJ O 326/47

20 See Millet, F-X., *How Much Lenience for How Much Cooperation: On the First Preliminary Reference of the French Constitutional Council to the Court of Justice*, 51 Common Market L. Rev. 195, 2014, p. 209

21 The respect for fundamental human rights is proclaimed in the 12th recital of the FD 2002/584 Preamble. See *ibid.*, p. 210

22 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 [2009] OJ L 81

23 Cavallone, *op. cit.* note 18, p. 21

for the member states to refuse the execution of an EAW when a national court complied with the new common rules on trial *in absentia*, which included the obligation of the state to ensure that the accused was informed of the trial, as well as the right of the accused to a new trial.[24]

After the amendment of FD 2002/584/JHA, the executing judicial authority may still refuse the execution of the EAW if the person did not appear in person at the trial resulting in the decision on a custodial sentence or a detention order, unless at least one of the procedural guarantees listed in Article 4a(1) has been respected. These four guarantees basically imply that: a) a person was summoned in person, or by other means actually informed of the scheduled trial, as well as informed that a decision may be handed down even in his/her absence; b) a person, being aware of the scheduled trial, took a legal counsel who indeed defended him/her at the trial; c) a person was served with the decision and was expressly informed of the right to a retrial or appeal, which may lead to the original decision being reversed, and the person expressly stated that he/she does not contest the decision, or did not request a retrial or appeal; or d) a person was not personally served with the decision, but will be served with it without delay after the surrender and will be informed of the right to a retrial, or an appeal, and of the timeframe to request it. If the requested person did not appear in the proceedings, and neither the information contained in the standard form for the EAW nor the information obtained pursuant to Article 15(2) FD 2002/584/JHA provided sufficient evidence on one of the situations listed in Article 4a(1) of the FD, the executing judicial authority is also entitled to refuse to execute the EAW.[25]

Even though the list of guarantees in Article 4a(1) tends to correspond to the additional safeguards required in cases of trial *in absentia* and defined in the jurisprudence of the ECtHR[26] (see *supra* 1), they do not fully comply, which will be considered in the following chapters.

## 3. FAVOURING THE EFFICIENCY OF JUDICIAL COOPERATION OVER RESPECT FOR FUNDAMENTAL HUMAN RIGHTS IN THE CASES OF TRIAL *IN ABSENTIA*?

After the amendment of FD 2002/584/JHA, the CJEU was supposed to rely on the new provisions, which aimed to contribute to striking the right balance between the efficiency of judicial cooperation and the protection of fundamental

24 Klip, A., *European Criminal Law*, Intersentia, 2016, p. 282.

25 CJEU, C-271/17 PPU *Slawomir Andrzej Zdziaszek*, 10 August 2017, par. 109

26 See Cavallone, *op. cit.*, note 18, p. 29

rights in EAW cases concerning decisions rendered *in absentia*. Yet, it seems that initially the CJEU focused more on the efficiency of proceedings, particularly in the *Melloni* and *Radu* judgments.[27]

In the judgment *Melloni*, using literal interpretation,[28] the CJEU specified that Article 4a(1) provides for a trial *in absentia* as an optional ground for the non-execution of the EAW, which, though, is "accompanied by four exceptions in which the executing judicial authority may not refuse to execute the European arrest warrant in question".[29] In this concrete case, Mr Melloni was informed of the trial and he was represented and effectively defended by two counsels that he appointed.[30] These two guarantees alone were sufficient to eliminate the option to refuse the execution of the EAW. The CJEU clarified that this actually precluded any additional surrender condition, including the conviction rendered *in absentia* to be open to review in the issuing member state, in the presence of the convicted person.[31] In other words, the CJEU actually specified that the list of grounds allowing the refusal of the execution of the EAW for Article 4a(1) is exhaustive, and the four guarantees are listed alternatively and not cumulatively. Yet, such reasoning is disputable from the perspective of the jurisprudence of the ECtHR. As Cavallone points out, it seems that the ECtHR requires both these requirements, the right to be represented by a lawyer and the possibility to claim a retrial, to be met cumulatively in order to comply with the right to fair trial guarantees[32] (see also *supra* 1). Therefore, the scope of human rights protection in the execution of an EAW, in cases of trials *in absentia*, does not seem to fully comply with the guarantees provided in the jurisprudence of the ECtHR.

Looking from the human rights perspective, another problem is that Article 4a(1) does not cover all violations of fundamental human rights, nor the general duty to respect human rights, and therefore that a breach of fundamental rights as such cannot be a ground to refuse the execution of an EAW, which may be subject to justified criticism.[33] Does this mean that the CJEU favours the efficiency of judi-

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27 See Pajčić, M., *Europski uhidbeni nalog u praksi Vrhovnog suda Republike Hrvatske*, Hrvatski ljetopis za kaznene znanosti i praksu, *vol.* 24, no. 2, 2017, p. 576

28 CJEU, (Grand Chamber) C-399/11 *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, par. 41

29 *Ibid.*, par. 40

30 See Cavallone, *op. cit.,* note 18, p. 30

31 CJEU, (Grand Chamber) C-399/11 *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, par. 40 and 46

32 Cavallone, *op. cit.,* note 18, p. 32

33 See 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 *Vol.* 24, No. 6, 2017, pp. 883 – 884

cial cooperation over respect for fundamental human rights? The CJEU offered strong arguments supporting a positive response to this question.

In the *Melloni* judgment, the CJEU expressly stated, in general, that Article 4a(1) "is compatible with the requirements under Articles 47 and 48(2) of the Charter".[34] Yet, when elaborating this standpoint, it stated that even when the standard of protection of fundamental rights guaranteed by the national constitution is higher than the one deriving from the Charter, the member state is not allowed "to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution".[35] Thereby, the CJEU considers the principle of mutual recognition as an objective of constitutional value, which can then be balanced against fundamental rights protection, which is wrong, as Xanthopoulou expressly pointed out.[36] The principle of mutual recognition is actually a regulatory method, and not an objective of constitutional value itself, and it should therefore not be balanced against fundamental rights protection.[37]

Another case where the CJEU seems to have given priority to the principle of mutual recognition over the protection of fundamental human rights was the *Radu* case. According to the judgment in *Radu*, the fact that the requested person was not heard in the issuing member state before the EAW was issued for the purposes of conducting a criminal procedure may not be a ground for the refusal of execution.[38] The CJEU referred to the principle of mutual recognition,[39] and pointed out that the objective of the FD was to accelerate judicial cooperation[40] and that in principle the member states are "obliged to act upon a European Arrest Warrant".[41] It stated that the fact that Mr Radu was not heard before the issuing judicial authorities issued the EAW does not fall within the grounds for non-execution listed in Article 4a(1).[42] It concluded that Articles 47 and 48 of the Charter do not require "that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conduct-

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34 CJEU, (Grand Chamber) C-399/11 *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, par. 54

35 *Ibid.*, par. 64

36 Xanthopoulou, Ermioni, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, 6 New J. Eur. Crim. L. 32, 2015, p. 46

37 *Ibid.*, p. 46

38 CJEU, (Grand Chamber) C-396/11 *Ciprian Vasile Radu*, 29 January 2013, par. 43

39 *Ibid.*, par. 33

40 *Ibid.*, par. 34

41 *Ibid.*, par. 35

42 *Ibid.*, par. 38

ing a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued",[43] adding that "the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system".[44]

On one hand, it is possible to clearly distinguish the positions of the CJEU in the *Melloni* and in the *Radu* cases. Cavallone pointed out that in the *Radu* judgment the CJEU did not take such a strict approach as it did in *Melloni*,[45] and similarly, Suominen held that the CJEU's attitude concerns only the right to be heard and not human rights aspects more generally.[46] On the other hand, even though the CJEU did not explicitly exclude a breach of fundamental human rights as a ground for the refusal of the execution of the EAW in the *Radu* case, as it did in *Melloni*, it did give priority to the efficiency of the surrender system and mutual recognition over protection of the right to a fair trial, just as it did in the *Meloni* judgment.[47] As Xanthopoulou stated, "the focus of the Court is the effectiveness of the surrender system",[48] which should "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...".[49] Therefore, it is difficult to conclude that the CJEU reached the right balance between the efficiency of judicial cooperation and respect of fundamental human rights.

## 4. RESTORING THE BALANCE

It seems that, after the *Radu* and *Melloni* judgments, the CJEU focused on the interpretation of the "trial *in absentia*" concept within FD 2002/854/JHA. The amended Framework decision specifies guarantees under which the executing judicial authority may not refuse to execute the EAW, but it does not define the notion of "trial resulting in the decision". Knowing that different legal orders provide different situations when either a particular hearing, or the entire trial, may be held in the absence of the defendant, the concept of "trial resulting in the decision" under Article 4a(1) of FD 2002/854/JHA needed autonomous interpreta-

[43] *Ibid.*, par. 39

[44] *Ibid.*, par. 41

[45] Cavallone, *op. cit.,* note 18, p. 30

[46] Suominen, A., *Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts*, 4 Eur. Crim. L. Rev. 210, 2014, p. 219

[47] See Xanthopoulou, *op. cit.,* note 36, pp. 45 and 39-40

[48] *Ibid.*, p. 40

[49] CJEU, (Grand Chamber) C-399/11 *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, par. 37; and (Grand Chamber) C-396/11 *Ciprian Vasile Radu*, 29 January 2013, par. 34

tion from the CJEU. The CJEU also interpreted the standard that the person was "summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision".

### 4.1. The concept of "trial resulting in the decision"

In the judgment in *Tupikas*,[50] the CJEU examined the scope of the "trial resulting in the decision". It had to clarify whether that term covers only first-instance proceedings, or also the appeal proceedings, and under what circumstances. In this case, the defendant was tried and sentenced in his presence, then appealed the judgment, but the appeal procedure did not result in an amendment of the sentence. The EAW did not reveal whether Mr Tupikas was present in the appeal proceedings.[51] The Court of Justice, determining the scope of the concept of "trial resulting in the decision" stated that in such a case, when the criminal procedure involved several degrees of jurisdiction, which then may imply successive judicial decisions, "at least one of which has been handed down *in absentia*", the concept "must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case".[52] This means, on one hand, that the concept of a "trial resulting in the decision" applies to the appeal proceedings as well, implying that the person concerned must be in a position to fully exercise defence rights,[53] as long as the court at that stage of the proceedings makes a final ruling on the person's guilt and imposes a penalty, after having re-examined the merits of the case, in fact and in law. In addition, such reasoning meant that a breach of defence rights in first-instance proceedings can actually be remedied at the appeal stage.[54]

In the *Zdziaszek* judgment, the CJEU additionally elaborated criteria specified in the *Tupikas* judgment. In this case, Mr. Zdziaszek was not present in person in the proceedings in which the court decided to combine separate custodial sentences which had previously been imposed on him into one single custodial sentence. Interpreting the concept of a "trial resulting in the decision", the CJEU extended the scope of its application defined in the *Tupikas* judgment, specifying that "it must be interpreted as referring not only to proceedings which gave rise to the decision

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[50] CJEU, C-270/17 PPU *Tadas Tupikas*, 10 August 2017

[51] *Ibid.*, par. 29

[52] *Ibid.*, par. 98

[53] Van der Mei, *op. cit.,* note 33, p. 892

[54] *Ibid.*, p. 892

on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard".[55] The CJEU held that such proceedings "determine the quantum of the sentence", and therefore the person concerned must be able to exercise defence rights and influence the respective decision.[56]

It is possible to conclude from *Tupikas* and *Zdziaszek* that in order to be able to execute the EAW, it is required for the requested person to have been present in the proceedings which gave rise to the decision which finally determined the guilt, as well as in the proceedings where the final sentence was determined, proceedings which do not necessarily coincide.[57] It seems that the focus of the CJEU was on fair trial rights, which contributed to restoring the balance with the requirement of the efficiency of judicial cooperation.

The CJEU provided a further interpretation of a "trial resulting in the decision" in the *Ardic* case. Mr Ardic was present in person in criminal proceedings that resulted in judgments imposing on him two custodial sentences, but the subsequent suspension revocation decisions were handed down *in absentia*.[58] The CJEU considered whether a decision to revoke the suspension of execution of a custodial sentence previously imposed should be qualified as a judicial decision that finally amended the level of one or several previous sentences, in the sense that it definitely ruled on the guilt of the person and the custodial sentence imposed on him, where relevant, after assessing the case in fact and in law.[59] Relying on the jurisprudence of the ECtHR, the CJEU found that the decisions to revoke the suspension of the execution of previously imposed custodial sentences "did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned, which form the basis of the European arrest warrant".[60] Therefore the concept of a "trial resulting in the decision" does not include "subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, pro-

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55 CJEU, C-271/17 PPU *Slawomir Andrzej Zdziaszek*, 10 August 2017, par. 96

56 *Ibid*., par. 91

57 See van der Mei, *op. cit.,* note 33, p. 893

58 CJEU, C-571/17 PPU *Samet Ardic*, 22 December 2017, par. 61

59 *Ibid*., par. 66 -68

60 *Ibid*., par. 78

vided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed".[61]

### 4.2. The requirement that a person be summoned or/and informed of the scheduled date and place of a trial which resulted in a decision

Another guarantee, excluding the possibility to refuse the execution of an EAW which required autonomous interpretation, was the requirement that a requested person be "in due time summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision" or alternatively "by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial" (Article 4a(1)(a)(i) FD 2002/584/JHA). If that requirement is complied with, and if, in addition, the requested person was informed that a decision may be handed down even in the case of his/her absence from the trial (Article 4a(1)(a)(ii) FD 2002/584/JHA), the EAW must be executed, despite the trial *in absentia*.

In the *Dworzecki* case, the CJEU interpreted these two criteria. In this case, Mr. Dworzecki was absent from the trial leading to the judgment imposing a sentence. He was not summoned in person and therefore informed of the trial, but the summons was served on his grandfather, being an adult resident of the addressee's household.[62] The problem is that it could not be determined, from the EAW, whether his grandfather actually passed that summons on to Mr. Dworzecki.[63] In such a case, "the issuing judicial authority must provide evidence showing that the person concerned was actually aware of that information".[64] So if a summons was not served directly on the person concerned, but on an adult resident of the same household who undertook to pass it on to the person concerned, and if it cannot be ascertained from the EAW if and when that adult really passed the summons on, the conditions set out in Article 4a(1)(a)(i) FD 2002/584 are not satisfied,[65] which means that it is allowed for the executing authority to refuse the execution of the EAW if none of the other three guarantees from Article 4a(1) has been complied with.

As Ouwerkerk points out, the judgment in the *Dworzecki* case "primarily deals with the interpretation of technical-legal terms" from the EAW Framework Deci-

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[61] *Ibid.*, par. 92

[62] CJEU, C-108/16 PPU *Pawel Dworzecki*, 24 May 2016, par. 12

[63] *Ibid.*, par. 33

[64] *Ibid.*, par. 41

[65] *Ibid.*, par. 54

sion.[66] The CJEU indeed repeatedly pointed out that the purpose of the FD 2009 was not to harmonize trial *in absentia* in member states in general, "but only to lay down common grounds for refusal as regards judgments delivered *in absentia* in criminal matters".[67] Yet, even though the CJEU did not consider the fair trial guarantees as such, it made clear that the right to information must be real and effective, in order to comply with the protection of fair trial guarantees.

## 5. IMPLEMENTATION IN CROATIAN LAW

The Croatian legislator transposed the provisions of Article 4a(1) FD 2002/584/JHA into the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (AJCCM).[68] Article 21(2) AJCCM regulates that the court may refuse the execution of the EAW if the person was absent from a trial resulting in a decision on a custodial sentence or a detention order,[69] unless four listed procedural guarantees have been respected, which must derive from the information given in the EAW. When the surrender is requested for the purpose of conducting criminal proceedings, and not to execute a final sentence, the trial *in absentia* may not be invoked as a ground to refuse the execution of the EAW.[70]

The risk of violation of fundamental human rights is not provided as a ground to refuse the execution of an EAW,[71] which has been criticized in the literature,[72] even though the AJCMM does proclaim the principle of respect of fundamental human rights (Article 3.a AJCMM), just like the principle of mutual recognition between member states (Article 3 AJCCM). The criticism is justified, since Croatian criminal procedure law does provide strong fair trial safeguards in cases of trial *in absentia*: mandatory defence, i.e. mandatory representation by a defence

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[66] Ouwerkerk, *op. cit.,* note 15, p. 103

[67] CJEU, C-108/16 PPU *Pawel Dworzecki*, 24 May 2016, par. 14. Similarly, in CJEU, (Grand Chamber) C-399/11 *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, par. 43

[68] Zakon o pravosudnoj suradnji s državama članicama Europske unije, Official Gazette 91/2010, 81/2013, 124/2013, 26/2015, 102/2017, 68/2018

[69] If the decision to revoke the suspension of the execution of a previously imposed custodial sentence, because the convicted person committed another criminal offence during the probation period, was brought *in absentia*, but the convicted person was obviously informed of the decision revoking the suspended sentence, since he opposed the execution of the prison sentence, according to the Supreme Court of the Republic of Croatia, there is no ground for the refusal of the execution of the EAW. VSRH, Kž-eun 26/2018-4, 28 August 2018. It is interesting that the Supreme Court made no reference to the judgment of the CJEU in *Ardic* (see *supra* 4.1)

[70] VSRH, Kž-eun 14/13-4, 24 October 2013

[71] Unlike some member states of the European Union, see Čule, J.; Hržina, D., *Primjena europskog uhidbenog naloga u Republici Hrvatskoj – očekivanja i stvarnost*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 20, no. 2, 2013, p. 723

[72] See Pajčić, *op. cit.,* note 27, p. 573

counsel, as well as the right to claim an "automatic" reopening of proceedings that have ended with a final judgment.[73]

The four procedural guarantees under Article 21(2)1-4 AJCCM comply with those listed in Article 4a(1) FD 2002/584/JHA, yet from the legislative phrasing it is not completely clear whether those guarantees are listed alternatively or cumulatively. It could be understood that they are listed cumulatively, since there is no conjunction "or" between each of the four guarantees. Yet, the Supreme Court of the Republic of Croatia[74] clarified that these four guarantees do not have to be cumulatively fulfilled, since "it is sufficient to meet certain of these assumptions" that the court considers to be appropriate to provide the requested person with a fair trial and respect of fundamental rights and freedoms guaranteed by the ECHR, in the requesting country and according to its law.[75] In the concrete case, the Supreme Court concluded that this requirement was fulfilled since, as the EAW stated, the requested person would have the right to request a retrial, and in addition, he was summoned in person or by other means informed of the date and the place of the trial held *in absentia*.[76] In another case, the requested person was represented by a defence counsel during the proceedings *in absentia*, he authorised the defence counsel to receive documents, and therefore the Supreme Court concluded that he was aware of the proceedings and informed through the counsel that the trial, if he did not appear, may be conducted in his absence.[77] The Supreme Court concluded that these circumstances excluded any reason allowing refusal of the execution of the EAW.[78] The jurisprudence of the Supreme Court provided additional clear confirmation that the requirements under Article 21(2) AJCCM are listed alternatively, stating that even though, in the concrete case, the requested person was tried *in absentia* and was not informed of the scheduled date and place of the trial, and was not informed that he may be tried *in absentia* if he did not appear at the trial, it was sufficient that the requesting state provided a guarantee that the requested person would have the right to claim a retrial, according to Article 21(2)4 AJCCM.[79]

Even when the EAW provided information that the requested person was "in the other way officially informed of the scheduled time and place of the hearing

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73 In more detail, see Ivičević Karas, *op. cit.,* note 5, p. 297 ff.

74 The Supreme Court of the Republic of Croatia decides on appeals against first-instance decisions of county courts on surrender based on the EAW

75 VSRH, Kž-eun 28/14-4, 4 July 2014

76 *Ibid.*

77 VSRH, Kž-eun-15/2017-4, 26 April 2017

78 *Ibid.*

79 VSRH, Kž-eun 37/16-4, 19 October 2016

that resulted in the decision", the Supreme Court still instructed the first-instance county court to remove doubts on whether the person was really informed of the proceedings conducted *in absentia*, and also whether he was represented by a defence counsel, in order to bring a new decision.[80] Still, this should not lead to the conclusion that the Supreme Court would demand both requirements to be complied with cumulatively, but rather that the Supreme Court insists that the issued EAW should contain clear and precise information relevant for deciding on the surrender. If the EAW does not show clearly whether a requested person was tried in his/her presence or *in absentia*, the Supreme Court orders a repeating of the proceedings before the county court, with the instruction to collect information whether the trial was held *in absentia* and, if it was, the information requested in Article 21(2) 1-4 AJCCM.[81] If neither the EAW nor additionally requested information provides sufficient evidence that any of the guarantees under Article 21(2) AJCCM was complied with, the first-instance court should refuse the execution of the EAW (see the *Zdziaszek* judgment, *supra* 2.2). In addition, there has to be a good quality translation of the EAW in the Croatian language, so that the first-instance court can verify whether the guarantees for Article 21(2) points 1-4 are fulfilled, before bringing a lawful and reasoned decision on the EAW.[82]

## 6. CONCLUDING REMARKS

It is possible to conclude that Croatia has so far implemented common grounds from FD 2002/584/JHA for a refusal to execute an EAW as regards judgments delivered *in absentia*. The risk of violation of fundamental human rights is not prescribed as a ground to refuse the execution of an EAW. Still, respect for fundamental human rights, including the right to a fair trial, is proclaimed as a principle of judicial cooperation. The Supreme Court adjudicates in line with FD 2002/584/JHA and the jurisprudence of the CJEU, yet it shows particular attention to the protection of the right to a fair trial. In one case before the Supreme Court, the requested person appealed against a decision on surrender, on the ground that the judgment of the Italian court, the imposition of fifteen years of imprisonment, was the result of trials conducted *in absentia*. The Supreme Court stated that "even though the requested person did not attend the hearing at which the judgment was issued", he was informed of the scheduled hearing and authorised legal representatives (two lawyers from Verona) who effectively represented him during the hearing.[83] Therefore, there were no grounds to justify the refusal of the execution

[80] VSRH, Kž-eun 18/2018-4, 18 July 2018. Similarly, in VSRH, Kž-eun 6/2019-4, 20 February 2019

[81] VSRH, Kž-eun 34/2018-4, 30 October 2018

[82] VSRH, Kž-eun 23/14-4, 30 May 2014

[83] VSRH, Kž-eun 5/15-5, 11 February 2015

of the EAW due to trial *in absentia*. Still, the Supreme Court has considered allegations of violations of the right to a fair trial in proceedings which resulted in a judgment *in absentia*, with reference to the jurisprudence of the ECtHR. The Supreme Court first explained that only a risk of the flagrant denial of a fair trial may be a ground to refuse extradition, and it is up to the requested person who appealed to provide a reason to believe that such a risk exists.[84] An evaluation of evidence, presented by the requested person, as such, did not lead to the conclusion, in the Supreme Courts' opinion, that he was denied the right to a fair trial under Article 6(1) ECHR in proceedings that resulted in a judgment *in absentia*.[85] Even if the Supreme Court referred to extradition, and not specifically to the EAW, and it did not explicitly state that the flagrant denial of a fair trial might be a ground to refuse the execution of the EAW, it actually stressed the importance of the right to a fair trial in general, as it did in some other cases.[86] It implicitly indicated that the right to a fair trial should not be outweighed by the tendency to provide efficient judicial cooperation. It remains to be seen how the jurisprudence of the CJEU will further balance between the two tendencies, to what extent it will comply with the ECtHR case law regarding trial *in absentia*, and how the Supreme Court of the Republic of Croatia will continue implementing European legal standards.

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[84] *Ibid.*

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**EU LAW**

1. Charter of Fundamental Rights of the European Union [2000] OJEC C 364/1
2. 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 [2009] OJ L 81
3. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1
4. Explanations relating to the Charter of Fundamental Rights [2007] OJ 2007 C 303/17
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8. VSRH, Kž-eun 28/14-4, 4 July 2014
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10. VSRH, Kž-eun 14/13-4, 24 October 2013

# CAN LAW ON PROBATION IMPROVE THE IMPLEMENTATION OF THE MEASURES FOR PROVIDING THE DEFENDANT'S PRESENCE IN THE CRIMINAL TRIALS IN MACEDONIA?

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***ABSTRACT***

*The author critically elaborates the jurisdiction of the new Probation Service as regulated within the provisions of the newly enacted Law on Probation in Republic of Macedonia. He states that the Macedonian legislator has omitted to regulate one very important part of the Probation service's jurisdiction, such as the implementation of the measures for providing the defendant's presence during the criminal procedure. The author stresses the fact that in one broader European sense, the Probation Services has imminent jurisdiction regarding the proper implementation of these measures, as ordered by the courts. Through this jurisdiction the probation service is serving to the court as Pre-trial service. In order to overcome this situation, author initially examines the connection between these measures and the Probation service and in addition provides specific suggestions for further improvement of Law on Probation provisions'.*

***Keywords:*** *measures for providing defendant's presence, probation, house detention, electronic monitoring*

## 1. INTRODUCTION

Measures for providing of the defendants' presence are often seen as necessary evil for effective and efficient commencement of the criminal trials. This is due to the fact that these measures are bearing significant restrictions to the defendants' basic human rights guaranteed during the criminal trials while the defendant is primarily observed as innocent until proven guilty beyond reasonable doubt. This means that trough the imposition of these measures during the criminal trial defendants' rights generally and in particular right to liberty and right to free movement are severely restricted despite the fact that the defendant is considered innocent. Henceforward, extensive implication of these measures could even harm defendants' presumption of innocence. Due to these reasons implication of the measures for providing defendant's presence during the criminal trials by the court should be restricted only in those cases where they are necessary of inevitable. For these

reasons the courts should address extra caution while deciding which measure is most suitable to implement while at the same time to provide al less intrusion to the defendant's guaranteed rights.

For these reasons, while deciding which measure for providing defendants' presence during the criminal trial is the most appropriate and the most effective, courts often can't rely solely upon the evidence provided by the prosecution. This fact, according to Macedonian experience, relies to the prosecutors' practice where in many cases supported evidence of the request for imposition of some measure for providing defendant's presence is not sufficient since it lacks important information regarding the defendant's personality of his/hers family or social ties and connections. It is needless to say that this information is of essential importance for the court while deciding whether to impose a measure at all, or to determine the most appropriate measure for providing of the defendants' presence during the trial.

From the comparative point of view, this problem is also observed in other criminal justice systems in EU states. Due to that, several EU member states have introduced within their criminal justice systems specific state agencies which are responsible for gathering and administering these specific evidence to the court regarding the defendants' personality and his/hers social milieu. In most cases these information regarding the defendants' profile to the court as part of the procedure for implementation of the measures for providing of the defendant's presence and as part of the sentencing process are served as the Pre-sentence report by the Police, by the Probation services or by other state bodies.

Delegation of this duty to the Probation services in most cases is justified by the fact that there is strong thread of similarity between the alternative criminal sanctions and the less severe measures for providing of the defendant's presence during the criminal trial, despite the fact that they serve completely different purpose.

In this text author elaborates the jurisdiction of the newly enacted Law on Probation in Republic of North Macedonia and examines the possibility for transferring of this above mentioned duty to the Macedonian probation service in comparison to the jurisdiction of equivalent services in several EU member states. Law on Probation in Republic of North Macedonia was enacted on 25-th of December, 2015 (No. 226/2015)[1] with *vacatio legis* until 01-st of November 2016, with main idea to foster and to increase the implementation of the alternative sanctions by

1 Unfortunately, despite the fact that the *vacatio legis* has elapsed, this Law has been implemented in practice only since the beginning of 2018, and until now there are only less than 20 Probation officers in the Republic of North Macedonia

the courts. Unfortunately, this Law has omitted to regulate this additional and equally important area – implementation of the less severe measures than detention for providing of the defendant's presence during the criminal trial. Furthermore, this article also contains specific recommendations for extending of the outreach of the Law on probations.

## 2. THEORETICAL BACKGROUND FOR CONNECTION OF THE LESS SEVERE MEASURES FOR PROVIDING DEFENDANT'S PRESENCE AND PROBATION SERVICES

Considering the nature of the alternative sanctions and the nature and the specific purpose of the less severe measures than detention for providing of the defendant's presence during the trial, it is acceptable to interconnect these two types of measures within one agency for their proper administration.[2] The interconnection between these two types of measures, as Hucklesby and Marshall[3] emphasizes lays upon their minimum limitation of the defendant's right to liberty and bears minimum limitation towards their social activities, despite the fact that alternative measures are criminal sanctions and are imposed only upon finished criminal procedure and to the defendants which were found guilty, while the second measures for providing defendants' presence are imposed only to the defendants which are presumed innocent and during the phase of the criminal trial. In addition, these two types of measures identically impose certain obligations or limitations to the defendants in order to test their responsibility and capability to properly function with their everyday life within the community of their origin.[4]

Henceforward the same arguments which are used to justify the necessity to reduce the implementation of the imprisonment sanctions and to foster the imposition of the alternative sanctions are or can be used in the justification of the promotion of the implementation of these less intrusive measures to the defendant's right to liberty in comparison to the detention.[5]

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[2] See: Gianluka,C., *Probation officers are key actors in reforming pre-trial detention and ensuring effective cross-border justice in the EU*, available at:[http://cep-probation.org/probation-officers-are-key-actors-in-reforming-pre-trial-detention-and-ensuring-effective-cross-border-justice-in-the-eu/] Accessed 02.04.2019

[3] See: Hucklesby A.; Marshall E., *Tackling Offending on Bail*, The Howard Journal, *Vol.* 39, No.2. May, 2000, p. 150-170; or for example: Haddad, J. B. *et al*, *Criminal Procedure, Cases and Comments*, 5-th ed. Foundation Press, New York, 1998, p. 823-824

[4] See: Turnbull S.; Hannah – Moffat, K., *Under These Conditions. Gender, Parole and Governance of Reintegration*, The British Journal of Criminology, 2009, (1-20), p. 4

[5] For the benefits of the imposition of the alternative sanctions see: Kanevcev M., *New Alternative Measures in the Macedonian Criminal Code*, Macedonian Review for Criminal Law and Criminology, *Vol.* 13, No. 2, 2006, (191-212), p. 197-200; Buzarovska G., *Alternative Measures in Macedonian Criminal*

The reason for this analogy can be found in at least two different aspects.

The first aspect is connected to the empirically proved fact[6] that the processes of the resocialization and punishment of the convicted persons are far more effective and efficient if this person is not deprived from his/hers natural environment, meaning that the sanction is served within the convicted persons' community. Due to this fact if these arguments are plausible to the convicted persons they should be even more acceptable to the persons whish are standing trial and are protected with the principle of presumption of innocence. Hence, if the defendant is considered innocent until proven guilty it should be also treated likewise by the courts and his/hers right to liberty should be deprived only in specific, limited by law and necessary cases. This means that defendants' presence during the criminal trial in every other case should be provided, if needed, only through the imposition of the less severe measures for providing the defendant's presence. These measures as determined within the Criminal Procedure Code are very similar to the alternative sanctions as regulated within the Criminal Code, particularly regarding their implementation.

Second aspect considers the fact that specific state body or agency is necessary for proper administration of these measures, both the alternative sanctions and the alternatives to detention. Since establishment of a specific state agency for administration of the criminal sanctions is always expensive and connected with significant financial burden to the state's budget, it is also appropriate to provide as much as possible similar workload to these agencies which would reduce the court's or prison authorities' workload, but in the same time it would increase the overall court's and criminal justice system efficiency. This means that if we establish new criminal justice agency, then this agency should be in charged with performance of the complete workload of the other criminal justice stakeholders (such as the courts and prison authorities) that provide same or similar services in order to provide specialization of its services. It is needless to mention that the specialization of the workload of one agency leads to increase of the quality of its work performance.[7] Additional opinions which support the idea for concentration of the duties for implementation of these measures by the probation services are based upon the facts that probation service officers have more appropriate educa-

*Legislation*, Macedonian Review for Criminal Law and Criminology, *Vol.* 13, No. 2, 2006, (213-232), p. 225-227; Gruevska Drakulevski A., *The Future of the Imprisonment, Proceedings in Honor of prof. Gjorgji Marjanovik*, Faculty of Law, Skopje, 2011, (299-310), p. 305

6 See: Arnaudovski LJ.; Gruevska Drakulevski A., *Penology*, 2013 Skopje, or Corre N.; Wolchover D., *Bail in Criminal Proceedings*, 3-rd ed., Oxford University Press, 2007, p. 35

7 See: Kleiman M. *When Brute Force Fails, How to Have Less Crime and Less* Punishment, Princeton University Press, 2009, p. 184, or Arnaudovski Lj., *Court Management*, Skopje, 2010

tional background and experience than the police officers for implementation of these measures. This, on the other hand, generates better interpersonal relations between the parole officers and the defendants, which means better answer to the defendant's needs and overall improves the satisfaction from the implementation of these measures during the trial by the defendants[8]. In this sense it could be expected that the defendants would be more willing to obey the court's imposed orders and reduce the possibility of risk of absconding or possible further committing crimes as defendants' desired and expected behavior.

Hence more, considering the EU member states' criminal justice systems, together with the EU acquis, we can conclude that this jurisdiction of the Probation services is often common in most states that do have established such specific service. For example this experience of the Probation service can be found within the criminal justice systems in several EU member states, such as Netherlands, Belgium, Slovakia, UK or Austria.[9] Furthermore, in most of the EU member states Probation services are providing presentence reports or are performing personal information data gathering for the courts which provides the necessary information of the defendant's character and social ties to the judges while determining which is the most appropriate measure for providing of the defendant's presence during the criminal trials.[10]

Possibility of interconnection of the implementation of the alternative sanctions and less severe measures than detention can be also indirectly concluded trough the EU acquis[11]. The most important document on EU level regarding the implementation of the measures for providing of the defendants' presence is EU's Framework Decision 2009/829/JHA[12] on supervision measures as an alternative to provisional detention. Hence, in the article 6 of this Framework Decision it is regulated that the jurisdiction for implementation of the alternatives to detention rests upon state agencies, while omitting direct specification of which specific state

8 See: Porporino, F., *Developments and challenges in probation practice: Is there a way forward for establishing effective and sustainable probation systems?,* European Journal of Probation, *Vol.* 10(1) 76– 95, 2018; or: Nagy, S., *Use and Abuse of Pre-Trial Detention in Council of Europe States: A Path to Reform*, 13 Loy. U.Chi. Int'l L. Rev. pp. 159, 2016

9 For extensive information see: Kalmthout, A.M.; Durnescu, I. (eds.). *Probation in Europe*, Wolf Legal Publishers, 2009

10 *Ibid*.

11 Since Republic of North Macedonia is a candidate member state to the EU, and has started its accession process through its specific "High Level Accession Dialogue - HLAD" process, it is needless to mention that EU acquis is also source of law for our national legal system and Macedonian legal system need to be harmonized with the EU acquis

12 EU Framework decisions No. 2009/829/JHA on supervision measures as an alternative to provisional detention

agency is responsible for this. Due to this fact we can conclude that there is no formal objection for Probation agencies to implement these less severe measures to detention.

In regard to the above mentioned arguments we can conclude that despite the fact that on first sight it might appear that we are comparing "apples and pears", these two types of measures are having significant mutual resemblance. This is primarily based upon the facts that the implementation of these less severe measures and the alternative sanctions in practice is usually connected with same or similar problems and they have similar implementation methodology.

Due to this, in the next chapter we will critically examine the provisions of the Macedonian Law on Probation and trough the comparative method we will examine the areas where this law could be improved in order to be suitable tool for proper implementation of the less severe measures than detention by the Macedonian courts.

## 3. ANALYSIS OF THE JURISDICTION OF THE MACEDONIAN LAW ON PROBATION

The enactment of the Law on Probation[13] was eagerly expected by the Macedonian academics and judicial professionals since it was considered as one useful and necessary tool for proper implementation of the alternative measures together with the improved implementation of the less severe measures than detention during the criminal trials. Unfortunately, it is obvious that the Macedonian legislator has significantly reduced the impact of this law only within the implementation of the alternative measures to prison as regulated within the Criminal Code[14] and somehow has timidly introduced risk evaluation as possibility for assistance to the judges.

Having on mind several EU member states' experience, [15] together with the experience of the US Probation Services, it is obvious that Macedonian Law on Probation does not regulate the area of the support for the implementation of measures for providing of the defendants' presence. This situation is rather unusual, since it is not clear why this significant and eminent jurisdiction of the probation

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13 See articles 1 and 3 of the Law on Probation, Official Gazette of Republic of Macedonia, No. 226/2015

14 Criminal Code, Official Gazette of Republic of Macedonia, No. 37/1996 with the latest amendments of 21.12.2018.

15 For Austrian experience see: [http://cep-probation.org/wp-content/uploads/2015/03/Probation-in-Europe-2013-Chapter-Austria.pdf] or for Italian experience: [http://cep-probation.org/wp-content/uploads/2016/04/Chapter-Italy-final.pdf] Accessed 02.04.2019

services[16] was omitted from the Macedonian legislator. Furthermore, besides the implementation of the alternative sanctions, and measures for providing of the defendant's presence, another most common official duty of the probation services[17] are support to the courts while implementation of the less severe measures than detention for providing of the defendants presence and providing risk evaluation of the defendants' personal character.[18]

In order to exam whether there are actual possibilities for extension of the jurisdiction of the Macedonian probation service we need to evaluate the actual reach of the provisions of the Law on Probation, together with the correlation between the alternative sanctions and the measures for providing of the defendants' presence. Finally, we need to evaluate the correlation to the EU standards and whether they are in correlation to the types of alternative sanctions which are dealt by the Macedonian probation services.

### 3.1. Probation services during the criminal procedure and implementation of the risk evaluation schemes

In most of the criminal justice systems where the probation service is established, one of its core duties is the analysis of the defendants' personality, trough creation of the risk evaluation schemes[19]. Performance of the risk evaluation is particularly important for the courts while deliberating the most appropriate measure for providing defendant's presence during the criminal trial, or sanction at the end of the criminal trials.[20]

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16 For the jurisdiction and organization of US Probation and Pretrial Services System see: [http://www.uscourts.gov/services-forms/probation-and-pretrial-services] Accessed 02.04.2019, or Haddad, J. B., *et al*, *Criminal Procedure, Cases and Comments*, 5-th ed. Foundation Press, New York, 1998

17 Pretrial Service and the Probation service are part of the Administrative Office of the US Federal Courts. Despite the fact that these two distinct services are particularly administering the part of the criminal justice process where they are involved, in fact they are part of one state agency. See: [http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history] Accessed 02.04.2019

18 See: Abadinsky H., *Probation and Parole*, Theory and Practice, 7-th Ed., Prentice Hall, 2001, p. 3

19 See: A Measure of Last Resort? The practice of pre-trial detention decision making in the EU, Fair Trials, available at: [https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf] Accessed 02.04.2019 or: Persson A.; Svensson, K., *Shades of Professionalism: Risk Assessment in Pre-Sentence Reports in Sweden*, European Journal of Criminology, *Vol.* 9 (2), 2012; or: Ostrom, B.J.; Kauder, N.B., *The Evolution of Offender Risk Assessment in Virginia*, Federal Sentencing Reporter, *Vol.* 25, N0. 3,2013, pp. 161-167, Retrieved from: Vera Institute of Justice.

20 See: Tombs J.; Jagger, E., *Denying Responsibility, Sentencers' Accounts of their Decisions to Imprison*, British Journal of Criminology, 2006, (803-821), . 810; or: Rumgay J. *Custodial Decision Making in a Magistrate Court*, *Court Culture and Immediate Situational Factors*, The British Journal of Criminology, Vol. 35, No.2, 1995, (201-217), p. 214

Fortunately, this duty of the probation service has been envisioned by the Macedonian legislator and within the Article 12 of the Macedonian Law on Probation. This article regulates the obligation of the probation services to summon the defendant and to perform an interview with him/her, and/or to collect additional documents and personal data from other state agencies as requested by the courts and by using specific risk assessment tools to generate final report to the court regarding the defendants' state of risk.

However, despite the fact that duty of the Macedonian probation service means great improvement of the judges' position, unfortunately the authorization for the judge to request this information from the probation service has not yet been prescribed within the provisions of the Criminal Procedure Code[21]. This means that, at this point, there are no legal grounds within the Criminal Procedure Code for the judges to undertake the activities as regulated within the article 12 of the Macedonian Law on Probation.

Therefore we think that this legal situation should be implemented within the new amendments of the Criminal Procedure Code[22] in order to introduce the possibility for the court to request from the probation service performance of the risk evaluation schemes and presentence reports as part of the courts' decision making process for implementation of the measures for providing of the defendant's presence or of the alternative sentences. Hence we think that only with this provisions in the CPC, the judges will be able to use this probation services' duty as an effective tool for assessment of the most suitable measure for providing defendant's presence.

### 3.2. Similarities between the less severe measures than detention for providing defendant's presence during the criminal trials and alternative sanctions

As a precondition to the determination whether it is possible to transfer the authority of implementation of the less severe measures for providing of the defendant's presence during criminal trial to the probation services it is necessary to analyze the level of similarity between these measures and the alternative sanctions. The level of similarity between these measures rests upon the fact that implementa-

[21] Criminal Procedure Code, Official Gazette of Republic of Macedonia, No. 150/2012

[22] Macedonian Ministry of Justice has formed a work group for drafting of the amendments and changes to the Macedonian Criminal Procedure Code. However, the Draft-Amendments have been officially published only on the Ministry of Justice's web page as part of the public debate process, but these amendments are not entered into Parliamentary procedure for enactment until 15.3.2019. Unfortunately, these amendments do not contain any amendments regarding the presentence reports or risk evaluation for the defendants

tion of alternative sanctions and the alternatives to detention bear same or similar burden regarding the professionalism and knowledge of the probation agencies' employees. Hence, it is often practical to correlate implementation of these two types of measures into one state agency.

Macedonian legislator within the article 144 of the Criminal Procedure Code has regulated the following measures for precaution: ban for leaving the residence, mandatory reporting to a specific state organ or official person, temporary ban of driving license or ban for its issue, temporary ban of the passport or ban for its issue, temporary restriction for visiting specific places or areas, restrictions regarding maintaining contact with specific persons and temporary ban for undertaking specific professional activities or work related activities. These measures together with the house detention, bail, short time detention and citation as considered as less severe measures to detention and serve for providing of the defendants presence during the criminal trials. The above mentioned measures for providing of the defendants' presence during the criminal trials are also harmonized with the EU Framework Decision 2009/829/JHA on Supervision Measures as an Alternative to Provisional Detention.[23] The general idea for implementation of these measures is based upon the theory that the defendant's right to liberty will be of primal importance, while this right might be limited only in inevitable cases, where the detention, as most severe measure, will be imposed only in strictly limited and necessary cases.

Considering the effect and implementation of these measures, it is obvious that they carry resemblance with several of the alternative sanctions as defined within the Criminal Code. It is also useful to mention that alternative sanctions which are regulated within the Criminal Code are also harmonized with the EU Framework Decision 2008/947/JHA on Probation Decisions and Alternative Sanctions and Framework Decision 2008/909/JHA on the Mutual recognition of Judicial Decisions on Custodial Sentences or Measures Involving Deprivation of Liberty.[24] Furthermore both of these measures are following Council of Europe's Recommendations regarding the deprivation of liberty and alternative sanctions.[25] In the

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[23] See EU Framework Decision No. 2009/829/JHA on supervision measures as an alternative to provisional detention

[24] See: EU Framework decisions No.: 2008/909/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty; and 2008/947/JHA on probation decisions and alternative sanctions

[25] See: Council of Europe's Recommendations: Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d743f, and Rec(2010)1 of the Committee of Ministers to member states on the

later lines we will demonstrate the exact similarities between the above mentioned types of measures.

**3.2.1.** At the beginning, it is obvious that the most similar measures are **house detention** as regulated with the article 163 of the Criminal Procedure Code and **house imprisonment** as regulated with article 58-a of the Criminal Code. Despite the fact the Macedonian legislator has opened the legal lacunae for implementation of the house detention,[26] contrary to the nature of this measure, to every defendant and not only limiting it to pregnant women, chronically diseased and elder people, as defined with the house imprisonment within the provisions of the Criminal Code.

These two measures bear significant resemblance due to the fact that both of them are implemented within the premises of the defendant's or convict's house, together with the fact that control over the implementation of this measure, so far, has been performed by the police officers. This means that with both measures the convicted person or the detainee should not leave the premises of the house or residence, while supervision and control of the proper implementation, so far until the enactment of the Law on Probation, was dedicated to the police officers. Granting the implementation of the house imprisonment to the probation service is far more efficient and effective, since the probation service's officers have additional knowledge and training than regular police officers, in order to be able to determine whether the detainees or convicted persons are law abiding citizens and that they do obey the limitations and restrictions imposed by the court with these measures. In addition, police officers, generally, are not sufficiently trained regarding meeting these specific duties, which in this situation leaves them unguarded or unprepared, regarding the possible obstructions or factual needs of the detainees or convicted persons, which means that they can't provide the proper support or monitoring over the less severe measures for providing defendants' presence.

**3.2.2.** Similar arguments can be set regarding the implementation of the **electronic monitoring**,[27] which is defined as a measure for support of the implementation of the house detention within the provisions of the article 163 of the CPC.[28] Unfortunately this measure is also not covered by the provisions of the

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Council of Europe Probation Rules, available at: [https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cfbc7] Accessed 02.04.2019

26 See: Misoski B., *Bail, precaution measures and/or house detention: analysis and recommendations for their more frequent use*, Proceedings of the Post Doc Colloquium in Public Law, Tirana and Skopje, SEELS Network, 2014

27 See Article 25 of the Law on Probation

28 See Article 163 of the CPC, Official Gazette, No. 150/2010

Law on Probations, despite the fact that the probation service is the most suitable state agency for undertaking these activities. In addition, implementation of the electronic monitoring within the CPC remains vaguely regulated, since the CPC is does not provide further provisions regarding this issue and probably it should be regulated with additional legal bylaws or other laws.[29]

**3.1.3.** The same dilemma can be raised regarding the implementation of the precaution measures as regulated within the CPC. [30] Hence, it remains the fact that there is strong treat of similarity between the measures of the article 144 of the CPC: **ban of leaving the premises of the house or residence, obligation for report to the specific official body, ban of visit specific premises or areas, ban of contacting with specific persons, ban related undertaking specific work related activities**; and measures regulated within the article 58, paragraphs 1, 6, 7 and 9 of the Criminal Code which are regulating the control over the additional obligations determined together with the conditional sentence with protective supervision. Considering the provisions of this article of the Criminal Code we can conclude that the Criminal Code has regulated the very same measures as support to defendant's conditional sentence. The only obvious difference is that the first measures are imposed prior to the sanction and are implemented to presumed innocent person during the criminal trial, while the second measures are considered as sanctions imposed to guilty persons as determined by the court after the criminal trial.

**3.2.4.** Hence, even grater similarity is obvious between the measures **ban for issuance of the driving license or temporary cease of the driving license,** article 144 of CPC**,** and the **sentence ban for driving of motor vehicle** as regulated within the article 38-c of the Criminal Code. Meaning that despite the fact that the one is criminal sanction, while the former is measure for providing the defendant's presence, both measures are bearing the same effect – ban of operating motor vehicle.

**3.2.5.** The same can be said regarding the sanction **ban of performing specific work related activities** as regulated within article 38-b of the Criminal Code and the measure for **temporary ban of performing specific work related activities**

[29] See: paragraph 4 and 5 of the Article 163 of the CPC

[30] For instance the Legal Analysis as supportive document to the Strategy does not contain any information regarding the reasons for not implementing the less severe measures than detention for providing of the defendants' presence during the criminal trials as part of the Law on Probation, only mentioning the house detention. Hence, it is not clear whether the authors of the Strategy have evaluated the possibility for implementation of these less severe measures to detention as part of the Law on Probation at all

as regulated in the article 144 of the CPC. Furthermore, these both measures (as discussed in 3.2.4 and in this paragraph) at the moment are implemented by the police, or court and, unfortunately, are not transferred under the jurisdiction of the Probation Services.

This simple "face-to-face" comparison between these alternative sanctions and the preventive measures for providing the defendant's presence during the criminal trial reveals the pattern that, despite the fact that between the two measures are significant differences regarding the purpose of their implementation, the practical implementation is the same.

However, leaving these measures to be implemented by two, or sometimes three different state agencies, one to the probation service supported with additional training regarding meeting the convicted persons' personal needs and characteristics, while the second implemented by the police and courts that does not have any understandings regarding the defendants' personal needs and characteristic, opens the floor for unequal and erroneous implementation.

Due to these facts, we deem that the implementation of the preventive measures as regulated within the CPC should be delegated to the probation service, since this service, if properly staffed with trained employees, should implement these measures with greater success, particularly taking into consideration the needs and individual characteristics of the defendants' and not disregarding the aim of the criminal justice process. [31]

Furthermore, testing of one similar measure during the criminal trial could provide significant insight to the law-enforcement agencies regarding the effectiveness of this measure to the specific persons if it will be imposed at the end of the criminal trial as a sanction. This means that the effectiveness of one measure imposed to the defendant regarding his/hers preparedness to follow instructions, obeying certain rules etc., can be evaluated during the early stages of the criminal procedure.

On the other hand imposition of these measures automatically as a sanction, simply because they were implemented as a measure during the criminal trial, without knowing the insight of the real defendant's behavior during the imposition of this measure within the criminal trial, is also not acceptable or desirable practice. Due to the fact that the defendant has different motivations during the criminal trial,

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[31] For example see the USA Probation services' or UK Probation services' experience: Hucklesby A., *Bail Support schemes for Adults*, The Policy Press, University of Bristol, UK, 2011, p. 18, and Dhami Mandeep K., *Do Bail Information Schemes Really Affect Bail Decisions?,* The Howard Journal, *Vol.* 41, No. 3, 2002, (245-262), p. 248-250

where he/she is presumed innocent and at the end of the trial where he/she is proven to be guilty.

This practice is comprehensively elaborated by the case law of the European Court of Human Right in several judgments where the court is elaborating the reasoning of the implementation of these measures during the trial and at the end of the trial as sanctions. [32]

Finally, by establishing of the implementation of these two types of measures "under the hood" of one state agency will increase the imposition and implementation these measures and sanctions, since the judges will be confident that there is one state agency which undertakes all necessary preconditions for proper implementation of these measures. Furthermore, in correlation to the risk evaluation schemes judges would be completely certain that they have done the right selection and made a proper decision regarding the special and general prevention, as general aim of the criminal justice process.[33]

## 4. CONCLUSION

The enactment of the new Law on Probation in Republic of North Macedonia has been long expected as an effective tool for judges for implementation of the alternative sanctions and less severe measures for providing defendant's presence as an alternative to detention.

Unfortunately, Macedonian Law on Probation has failed to meet these expectations. This is due to the fact the Macedonian legislator with the enactment of the Law on Probation has omitted to regulate the implementation of the alternative measures to detention as a measures for providing of the defendant's presence during the criminal trials, despite the fact that this part of the criminal justice system can be considered as genuine area of jurisdiction of the probation services. This is based upon the fact that there is great resemblance between the implementation and the essence of the alternative sanctions and the measures for providing of the defendant's presence which are less severe than detention during the trial. This resemblance is noted both trough comparative criminal law perspective, but

[32] See ECtHR's judgement: Wemhoff v. Germany, available at: [http//hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57595] Accessed 02.04.2019

[33] See: Buzarovska G.; Andreevska S.;, Tumanovski A., *Application of the Pretrial Detention Pursuant to the Criminal Procedure Code of 2010 – Legal Analysis*, OSCE, Skopje, 2015; Misoski B., *Protection of the Right to Bail as a Derived Human Right from The Article 5 of the ECHR in Macedonia*, SEE-LAW NET: Networking of Lawyers in Advanced Teaching and Research of EU Law post-Lisbon Outcome of the SEE Graduates EU Law Teaching & Research Academy Collection of Papers, Saarbrucken, Germany 2013

also considering the positive regulation within the Macedonian criminal justice system.

Having on mind the comparative experience from several EU member states we can conclude that probation services are usually preferable choice than police for implementation of these less severe measures for providing defendant's presence. This is due to the fact that probation services are, generally, more specialized, better trained and staffed and better equipped for undertaking these activities than police or other state agencies.

Finally, in order to improve the practical implementation and increase the frequency of these less severe measures than detention it is necessary to introduce legal amendments of the Law on Probation which will allow Macedonian probation service jurisdiction over the implementation of these measures. Amendments should be also performed to the Criminal Procedure Code, where this duty of implementation of these less severe measures for providing defendant's presence will be delegated to the Probation Services.

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# EVALUATION OF THE RESULTS OF THE EUROPEAN INVESTIGATION ORDER*

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***ABSTRACT***

*Authors are researching development and analyzing first effects of cross-border investigative measures, following enactment of the European Investigation Order (EIO). The EIO extends number of investigative actions which can be requested from other countries, and simplifies the process of evidence transfer. The paper is discussing problems during development of the EIO, its' reception in Croatian system and a case study of the first orders received in Croatian police in 2018 is performed.*

*This instrument is not imposing common legislative standards, but introducing the principle of mutual recognition which is derived from other law fields. The main risk is that diversity of some investigative measures could lead to the inadmissibility of evidence in subsequent criminal procedure. Results are showing that there hadn't been obstacles in police practice so far. Main issues on principle of mutual recognition, double criminality or admissibility of evidence were not manifested in case study, but research indicates areas of potential problems.*

***Keywords**: European Investigation Order, investigative measures, police, admissibility of evidence*

## 1. INTRODUCTION

After a long period of identifying difficulties and trying to find appropriate solutions, the introduction of the EIO in 2014 accelerated and expanded European

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cross-border co-operation.[1] The Directive was transposed into Croatian legislation in 2017, so it is possible to observe its first effects in the practice. The Act on Judicial Cooperation in Criminal Matters with Member States (AJCCM) entered into force in 2018.[2] The main advantages of this legal instrument are that it defines deadlines for investigative measures, enforces limitations for rejecting orders and it reduces bureaucratic procedures. Besides collection of evidence, this instrument also includes the transfer of evidence to the issuing country.

Despite the aforementioned advantages, criticism was focused on the EIO. Giving priority to speed could have negative impact on other aspects such as different legal proceedings in each state and admissibility of evidence in a criminal procedure. The EIO is essentially based on the principle of mutual recognition which is derived from the free market principles. Such principle was previously unknown in the area of criminal procedure law until the European Arrest Warrant (EAW) had been introduced.[3]

The aim of the paper is to show a brief development of the EIO, to present discussions in European scientific circles, and to perform case-study of first orders that were received in Croatian police units. Only one work on the EIO was published in Croatian periodicals so far, and it is focused on domestic provisions without analyzing background that was elaborated in foreign discussions. Part of this paper is directed on analyzing important issues that have not been covered. Case study tries to connect theoretical problems with observed effects in practice.

## 2. SOME ISSUES DURING THE EIO'S DRAFTING

### 2.1. Problems of co-operation development

If we try to recall the milestones of cross-border development in the last two decades, we can see that it has gone through several basic phases. In the first stage, only the acquisition of data that already existed in a particular legal system was possible. This concerned only access to particular records or the transfer of existing evidence. At the second stage of development, the powers were broadened so it was possible to request a new investigatory activity that had not been executed previously. The third stage of development was the introduction of additional

[1] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] OJ L130/1, 1.5.2014, p. 1-36

[2] Act on Judicial Cooperation in Criminal Matters with Member States of the European Union, Official Journal No. 91/10, 81/13, 124/13, 26/15, 102/17, 68/18

[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L190/1, 18.7.2002, p. 1-20

processing of the collected sources such as expert analysis, analytical processing and some criminalistic methods. The EIO has introduced the last two phases, which means that its contribution to the expansion of the scope is very important. The goal was to unify various approaches and types of cooperation into one legal instrument.[4]

The emergence of a solution that increases the number of investigative actions was not easy, because many problems have arisen in practice. There were various negative experiences with earlier instruments (e.g. order for freezing evidence - 2003).[5] Such legal instrument has proved inadequate in practice. It was adopted by almost all European countries but the application was very rare. That was reason why it was changed soon, so in 2008 the European Evidence Warrant (EEW) was introduced.[6] The existence of significant difficulties has shown that it took five years to complete drafting procedure. Even greater dilemmas were displayed by the fact that only two years after its adoption, a new concept has emerged. The main issue was the arrangement of general principles that would respect various legal frameworks. It is also peculiar that the EIO initiative was not initiated on behalf of the official EU bodies. Launching the legal framework for the EIO was started by few member states that revealed space to accelerate cross-border cooperation.[7] It can be seen that introducing such instrument was not easy development.

### 2.2. Introducing the principle of mutual recognition

Further characteristic is that the differences in law systems have been overpowered by the principle of mutual recognition. This principle is essentially related to a trust in foreign judicial decisions. European integration has progressed significantly over the decades and such processes have invoked greater confidence in foreign justice. But the EIO has been a subject of criticism because of adopting this principle. Allegrezza considers it is difficult to predict the application of this principle, and although the principle is neutral in its action, the negative consequences could arise from variations of law systems.[8]

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4 Mangiaracina, A., *A new and controversial scenario in the gathering of evidence at the European level: the proposal for a directive on the European investigation order*, Utrecht Law Review, 10, 2014, p. 113

5 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, [2003] OJ L196/45, 2.8.2003, p. 45-55

6 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, [2008] OJ L350/72, 30. 12. 2008

7 Mangiaracina, *op. cit.,* note 4.

8 Allegrezza, S., *Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality*, in: Ruggeri, S. (ed.), Transnational Evidence and Multicultural

One of the factors that contributed to the introduction of principle was the role model used in the European Arrest Warrant (EAW). That instrument significantly accelerated co-operation in arrests, irrespective of criticism that it is limiting fundamental rights for minor criminal offenses. According to the model, the executing country should apply procedural formalities from the issuing country, which means that they have in fact expanded the differences on another law systems rather than attempting to close them together.

The principle of mutual recognition has enhanced the cooperation, but there are a number of grounded remarks which would need to be verified in practice. The principle of trust which is essential part of the principle of mutual recognition is not considered to be justified in situations of excessive differences in law systems.[9] There are too many differences in investigative procedures, data protection, equality of arms and various evidentiary rules. The rule of law is not less important than the speed of a procedure. It seems that collection and transfer of evidence using the EIO are having preference over other issues. Critics therefore refer to such rule as mutation in which national evidentiary rules are still in force, because of absence of uniform European procedural approach.[10]

As one of the biggest negative sides of the EIO, Schünemann considers the consequence of the transfer of free market principle into the area of criminal proceedings.[11] The principle of mutual recognition has roots in economy, but criminal proceedings have quite different environment. Allegrezza finds roots of this principle in economic reasons.[12] The principle of mutual recognition was created with the aim to faster exchange of products, as it ensures quick action, it does not consider differences between individual systems, and does not impose any particular limitations. Evidence is not like products that will depend on the market's preference, but there are additional values in each criminal proceeding. The goal of improving transfers of evidence from one country to another is not so important

Inquiries in Europe, Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases, Springer, London, 2014, pp. 51-71

9 Heard, C.; Mansell, D., *The European Investigation Order: changing the face of evidence-gathering in EU cross-border cases*, New Journal of European Criminal Law, 2(4), 2011, pp. 353-367

10 Daniele, M., *Evidence gathering in the realm of the European Investigation Order: from national rules to global principles*, New Journal of European Criminal Law, 6(2), 2015, pp. 179-194

11 Schünemann, B., *The European Investigation Order: A Rush into the Wrong Direction*, in: Ruggeri, S. (ed.), Transnational Evidence and Multicultural Inquiries in Europe, Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases, Springer, London, 2014, pp. 29-37

12 Allegrezza, S., *Critical remarks on the Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility*, Zeitschrift für Internationale Strafrechtsdogmatik, 5, 2010, pp. 569-579

to have a priority ahead of legal values. Allegrezza compares it with the exchange of unsafe products.[13]

Neither one cross-border cooperation instrument seems to have been so much criticized in the drafting stage. Schünemann concludes that the EIO is a deviation from the applicable principles.[14] The EIO drafting process was bureaucratic and non-transparent, and the flexibility in its implementation is considered to be a violation of principle of legal certainty. Allegrezza emphasizes insufficient transparency in making of the EIO Draft and problem of circumvention of empirical scientific research.[15]

With respect to the principle of mutual recognition, it is significant to consider new jurisprudence of the highest European courts. The judgment delivered by the European Court of Justice in joined cases *Aranyosi* (C-404/15) and *Căldărar* (C-659/15) found that during the execution of the EAW it was necessary to ascertain whether there was a probability of breach of the fundamental rights in another state. If there are no guarantees of respecting fundamental rights, the EAW proceedings should be suspended, regardless of the principle of mutual recognition. If similar jurisprudence would have been imposed on the EIO, it could challenge the principle of mutual recognition.[16]

The EIO didn't eliminate problem arising causes, but it followed the need for increasing the cooperation. It did not unify or set minimum standards in criminal proceedings. The EIO has not introduced revolutionary changes in legislation.[17] It is an instrument that has brought progress in some areas, but they are not coherent in general.[18] It is dangerous if, due to the lack of common standards in some legal systems, the fundamental rights in other countries could be violated.

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13 *ibid.*, p. 572

14 Schünemann, *op. cit.*, note 11

15 Allegrezza, *op. cit.*, note 12.

16 Łazowski, A., *The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldararu*, Croatian Yearbook of European Law and Policy, 14(14), 2018, pp. 1-30
„However, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made in exceptional circumstances", (§ 82.). „Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State", *Aranyosi* i *Căldăraru* (C-404/15 i C-659/15), § 92

17 Daniele, *op. cit.*, note 10

18 Gless, S., *Transnational cooperation in criminal matters and the guarantee of a fair trial: approaches to a general principle*, Utrecht Law Review, 9, 2013, p. 108

## 3. DIFFERENCES IN LEGAL SYSTEMS THAT COULD HAVE AN EFFECT ON THE EIO

Some remarks during the EIO's adoption were that it was trying to introduce too much change too soon.[19] EU does not have unified law system neither in the judiciary nor in the practice. The problem is that the countries with the most severe criminal law or weakest procedural provisions in the protection of citizen's rights, can submit an order that should be enforced in any other European country.[20] The obligation of the EIO to use the law of issuing country had intention to reduce the possibility of transfer to another country with broader investigatory powers and lower protection of rights of citizens.[21]

Since each system achieves a delicate balance in a specific way, it is not possible to combine their remoted parts. The EIO is making a hybrid procedural law which will be very difficult to deal with, both by the prosecution and the defense. For instance, the powers of covert surveillance were left out of the Draft Directive. Hesitation on introducing the covert measures, which are considered as one of the most dangerous measures for fundamental rights, shows that there was reluctance in accepting the principle of trust in all law systems. Despite these remarks, covert measures were later adopted in a final draft of the Directive.[22]

Given that the EIO procedure can request various investigative measures that may not exist in some states, this could override domestic law system. A consistency test is required to find the suitable measure. Particular investigative measures may be limited to certain categories of persons or criminal offenses. Vermuelen found it naive to expect that all countries will approve required measures of the EIO, regardless of their legal system.[23] As countries could pursue to move investigation to another country in which it is easier to be implemented, perpetrators would similarly try to escape to the country where it is most difficult to gather evidence against them,[24] or where they have the widest rights of defense. Our AJCCM has

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19 Bachmaier, L., *Mutual Recognition and Cross-Border Interception of Communications*, in: Brière, C. *et al.* (eds.), The Needed Balances in EU Criminal Law: Past, Present and Future, Hart Studies in European Criminal Law, Bloomsbury Publishing, 2017, pp. 313-336

20 Schünemann, *op. cit.*, note 11, p. 31

21 Zimmermann, F.; Glaser, S.; Motz, A., *Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: a Critical Analysis of the Initiative for a European Investigation Order*, European Criminal Law Review, 2011, pp. 56-84

22 Mangiaracina, *op. cit.*, note 4

23 Vermeulen, G., *Free gathering and movement of evidence in criminal matters in the EU: Thinking beyond borders, striving for balance, in search of coherence*, Maklu, Apeldoorn, 2011, p. 33

24 Gless, *op. cit.*, note 18

provided possibility of refusal of the investigative order if it is opposite to our legal order (eg. Art. 42. ab).

Spencer has considered proposal of so-called standardized packages for investigative actions as one of the model that could uniform European approach. For some investigative actions, the minimum procedural guarantees must be fulfilled.[25] The imposition of such rules could gradually lead to the equalization of criminal investigation and other investigatory actions.

For intrusive forms of criminal investigation that have a number of material and procedural conditions, violation of any provision will lead to exclusion of evidence. Due to possible major differences, the AJCCM stipulates that covert investigative actions will have to be approved according to our legal order (decision of investigating judge according to the CPA).[26] In Croatian law, evidence will be illegal if a judge has not explained reasons for issuing a warrant for covert measures. It makes no difference if covert actions were substantially founded. Similar situation is with procedural formalities in investigatory measures such as home search or interrogation of suspect. For example, if interrogation is not videotaped, it will be considered illegal without considering if statements were voluntary, and the rule of fruits of poisonous tree applies too. There are forty-five provisions in the CPA whose violations will automatically lead to the illegality of evidence, and there could be some more if constitutional rules could be directly applied.

As a part of the solution for different legal arrangements, some consider appropriate to use the standards adopted by the European Court of Human Rights (ECtHR) jurisprudence. The position of the ECtHR as a basic assimilation element is often presented in the elaboration of the problems encountered by the EIO. According to some viewpoints, this is the only model that can promote certain rights.[27] Such expectations are unrealistic. Allegrezza justifiably suggests that the role of ECtHR can only be an abstract role because it does not have wide authority in the EU.[28] The role of the Court is primarily in other aims and it can not be a key supporter of harmonization of cross-border cooperation.

Usage of collected materials in criminal procedure is not governed by the EIO although this is the main long-term purpose of the evidence gathering procedure.

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[25] Spencer, J. R., *The Green Paper on obtaining evidence from one member state to another and securing its admissibility: the reaction of one British lawyer,* Zeitschrift fur Internationale Strafrechtsdogmatik, 9, 2010, pp. 605

[26] Criminal Procedure Act, Official Journal No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

[27] Gless, *op. cit.*, note 18, p. 103

[28] Allegrezza, *op. cit.*, note 12

Due to differences in gathering procedures, there are situations where significant problems may arise in the admissibility of evidence. If the investigatory action is determined by the law of one country, executed under provisions of another country after which evidence is returned to the foregoing, complex situations may arise. The EIO does not deal with the use of its results, especially if more countries are involved and evidence is not repeatable.[29] This area is one of the most problematic that could occur as a consequence of the EIO.[30] Because of positive intentions in the area of enhancing speed and widening scope of the investigative actions, main problem could have been relocated to the area of admissibility. In Croatian law system, real evidence can also be excluded if some procedural provisions were not followed, unlike many European systems.

Complex interpretations on admissibility of evidence were present in Croatian legislation. Examples of interpretation of provisions on a vehicle search, rules on presence of two witnesses during a home search, rules on interception of text messages and similar legal issues have come up with inconsistent case-law during last decades.[31] If there are problems with interpreting rules that originates from our own legal system, then we can expect it will be more difficult to interpret foreign rules.[32]

## 4. ANALYSIS OF THE FIRST EIO'S IN 2018

### 4.1. General data

For the purpose of this research, a case study on the small EIO sample was performed. The analysis presented herein is a part of wider scientific project aimed at identifying features in the application of this instrument and the problems that have arisen. At this preliminary stage of the project, due to a small number of investigation orders and early stage of the criminal proceedings, there are no extensive data. Therefore, this analysis can present only insight in the first effects of the new cooperation tool, but it can suggest some potential issues for the future. The EIO's sample collected from the authorities of the General Police Directorate in 2018 includes only five investigation orders. Police is a body which is most often conducting investigative actions in Croatia, nevertheless that other authori-

29 Ouwerkerk, J. W., *Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters*, Cambridge, Intersentia, 2011, p. 278

30 Kusak, M., *Common EU minimum standards for enhancing mutual admissibility of evidence gathered in criminal matters*, European Journal on Criminal Policy and Research, 23(3), 2017, pp. 337-352

31 Karas, Ž., *Illegal Police Evidence*, Laserplus, Zagreb, 2006

32 Karas, Ž., *Inconsistent Case Law in Criminal Procedure as a Violation of the European Convention on Human Rights*, Collected Papers of Zagreb Law Faculty, 64 (1), 2014, pp. 111-131

ties are also involved in the EIO proceedings. There are some other investigative orders that are in the scope of the public prosecutor's office. Cases in police work are more complex and they need a variety of other measures that are not available to other authorities in Croatia.

The orders were sent to Croatia from various European countries (Germany, France, and Netherlands) and two EIO's from Italy. Such small number of orders indicates that this co-operation instrument was very rarely used by police in the first months of its application. In almost all investigation orders received, urgent procedure was required. The reason for the urgency was related to the danger of concealment of evidence, or because there was a need to arrest all participants in several countries simultaneously.

Concerning investigative measures that were required, three investigative orders requested only one investigative measure, one order required four investigative actions, and one order required seven different investigative measures. Observing the type of investigative measures, three orders mainly dealt with police powers from the Police Powers and Duties Act (PPDA),[33] and two orders required different evidentiary actions from the CPA.

In three covered cases, issued EIO's are based on a prior court's decision in issuing country. There wasn't any opposite decision delivered by Croatian courts, which means that the rules which are governing the principle of mutual recognition were not an issue in covered cases. The criminal offenses are from various domains of smuggling of immigrants, drugs and arms trafficking, and pornographic materials of minors. All offenses are also enlisted in the Croatian criminal law so there weren't any issues in that field.

### 4.2. Types of investigative measures

Ambiguities may arise because of a definition of the investigative measures required by some investigation orders. In two investigation orders, secret surveillance of suspects was requested. It was not entirely clear whether short-term monitoring can be carried out as a covert police power, or a long-term surveillance was needed. It could fall under the definition of special evidence measures but then it would require a particular legal procedure according to Art. 332 of the CPA. The assessment depends on the level of restriction of privacy in Croatian law. A long-term monitoring is revealing a lot of private data and it can not be defined as covert police measure (Art. 80, para. 2 of the PPDA) that doesn't need a warrant.

[33] Police Powers and Duties Act, Official Journal No. 76/09, 92/14

In our jurisprudence, there were a variety of benchmarks in determining whether some measures could be defined as a special evidence action that needed a court warrant,[34] and it is apparent that similar criteria should be used for cross-border cooperation too. Effects of this interpretation should be visible in later stages of procedure. Such issues could emphasize differences in definitions of certain investigatory measures elaborated earlier.

In the case of covert measures, in accordance with our legal regulation, a special approval of the investigating judge is needed (Art. 42.am para. 2 of the AJCCM). In order to prepare such approval, it is necessary for police to present more evidence to the court, rather than short summary in the EIO. The court approval should be the same as for domestic citizens, because it would otherwise reduce the protection and risk inadmissibility of evidence. The Croatian law system has many provisions governing covert measures that are stricter than many rules in comparative law.

In one of the covered cases, an investigative measure of the home search was requested. That order required compliance with some specific procedural formalities of issuing country. Given that France was issuing state, it was necessary to use two suspect's relatives during the search. Such rule is rare in comparative law since some European states prescribe the obligation to remove all other persons from the search site in order to preserve the privacy. However, that rule was not an issue in Croatian law because presence of two witnesses during the home search is an obligatory provision. Furthermore, if two witnesses were separated during the home search in different rooms, all gathered evidence will be illegal, despite there wasn't any remark on the reliability of gathered evidence. Irrespective that one witness confirms there is nothing suspicious in discovering that particular evidence, it must be excluded according to our exclusionary rule. This feature emphasizes differences and potential problems in the field of admissibility as stated above.

The interpretation of this rule has been cause of many problems in Croatian law (Art. 246 CPA). Such French provision would not have caused difficulties, but some difficulties could arise if the EIO came from a different law system that would forbid the presence of two witnesses during the home search, or if a suspect would consider that his privacy could be undermined by a witness presence. The Croatian statutory provisions stipulate that the EIO will be performed in accordance with domestic legal regulations (Art. 42.h para. 1 AJCCM). If a home search reveals evidence of some other criminal offense, it would be inadmissible if the compulsory provisions of the CPA were not respected. It seems that the execu-

[34] Karas, *op. cit.*, note 32

tion of the EIO would require a thorough knowledge of comparative law and all involved consequences.

Looking at additional procedural formalities, in one EIO it was requested that two certified investigators should participate in interrogation that was related to sexual crimes. Similar rule exists in our law system too, so there was not any obstacle detected.

### 4.3. Suspects discovered by issuing country

If we look at the characteristics of the citizenship of the persons that were subjected to investigative measures, in the most cases foreign nationals were involved in the commission of offenses. Offenses were perpetrated outside the territory of Croatia. Only some minor part of the criminal activities was executed in Croatia, or some evidence could be found here. There were no double criminality issues in this analysis.

There is only one case in which suspects were nationals of Croatia. In that criminal case, information was gathered on the smuggling of weapons and narcotics from Croatia to another European country. Given that the investigating authorities of that foreign country discovered preparatory activities, they started covert measures and collected data that requested similar actions on the territory of Croatia. During the start of investigation, the Croatian authorities were not familiar with a fact that mentioned suspects intend to commit any criminal offenses. It follows that a significant initiative may be instigated by a foreign country using the EIO.

In this respect, the EIO may indirectly stimulate some criminal investigations that certain states may not have started by themselves. If there is a lack of interest in investigating certain criminal acts, other country can use the EIO as some kind of warning signal for domestic authorities. This consequence could be particularly sensitive if some other crimes would be investigated, such as political corruption or some offenses connected with political figures.

### 4.4. Sources of discovery

Most of the criminal offenses were detected by some covert measures executed by foreign countries (communication surveillance, confidential sources, informants etc.). Some of these covert sources (informants) could eventually originate from executing country too, but this is not described as measure in the EIO. Sometimes it should be presented on which reliable sources certain facts are founded in a court warrant. This could provoke procedures for questioning reliability of par-

ticular covert sources, but that procedure isn't governed by the EIO. This is one of potential issues that may arise in future practice.

For all criminal offenses, the foreign police units have already collected suspect's personal data and other detailed information. There have not been sought investigative actions aimed on establishing the identity of suspect. Only actions at the final stages prior to arrests were asked from Croatia.

## 5. CONCLUSION

From the remarks that were emphasized during the EIO's adoption, we can see that many aspects of this instrument were problematized in theory, but negative consequences were not shown in practice so far. During the EIO's enactment, many foreign scientific papers expressed serious remarks on various aspects of the instrument. The purpose of the research in this paper was to examine some of those problems and to analyze if they had already manifested in practice. Preliminary results indicate some vulnerable fields, but further research should be performed on a wider sample to gain a complete insight.

In the analysis, there were no issues revealed concerning provisions regulating the principle of mutual recognition, double criminality or admissibility of evidence. That is a consequence of procedural similarity between Croatia and few issuing countries, but there should be considered that covered sample is too small to reach broader conclusions. The analysis is not indicating that our law system is being used to avoid some procedural provisions of issuing country. The case study indicates that particular investigatory measures (eg. home search, covert measures, interrogation of suspect) are governed by provisions different from other countries, and it will be interesting to analyze such situations in the future.

There could emerge some difficulties in definitions of some covert investigatory measures or during the execution of some procedural formalities. The definition of covert measures depends on their duration, the intensity of the fundamental rights constraint and the application methods. Such features may differ between countries. A court warrant for covert measures must have a detailed explanation, what could be impossible without receiving more detailed data from the issuing country. In some cases, there will be a need to check a reliability of covert sources used for intrusive measures approval. That could be difficult if foreign informants were used. Results suggest that the EIO could be used as indirect encouragement if an executing state was not familiar with organized criminal activities that originate from its' territories.

Results of analysis of the first investigative orders submitted to Croatian police in 2018 can suggest in which fields there could appear problems in the future. All consequences are not yet apparent because of the short term of application. Therefore, subsequent stages of this project during 2019 and 2020 will be focused on a wider sample, and on investigation orders issued by Croatian authorities.

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# NE BIS IN IDEM IN EUROPEAN CRIMINAL LAW – MOVING IN CIRCLES?*

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***ABSTRACT***

*Current article takes a closer look at the dialogue between the Strasbourg and the Luxembourg courts on the interpretation of the ne bis in idem principle and analyses how it influenced the (non)acceptance of the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It starts with the pre-Zolotukhin jurisprudence of the European Court for Human Rights and analyses how the Luxembourg interpretation of Article 54 CISA had a major influence on the change in the way the Strasbourg court perceived the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It further explores how the Luxembourg court followed the way indicated by Zolotukhin and accepted the stance of the Strasbourg court on the possibility of duplication of criminal and administrative penal proceedings against the same person for the same acts under the ne bis in idem protection afforded to individuals by Article 50 of the Charter of Fundamental Rights of the European Union. Finally, it analyses whether the recent shift in the Strasbourg court's jurisprudence, which was also followed by the Luxembourg court, means that the ne bis in idem principle in European criminal law has, on the question of the duplication of criminal and administrative penal proceedings, basically come to the positions which were dominant in the pre-Zolotukhin jurisprudence***.**

***Keywords***: *ne bis in idem, European criminal law, duplication of administrative and criminal proceedings*

## 1. INTRODUCTION

In the last decade there has been a tremendous development with regard to the understanding of the *ne bis in idem* principle in European criminal law. At the centre of this development was the question whether it is possible, under this principle, to conduct criminal and administrative penal proceedings for the same acts or omissions of the same person. Namely, acts or omissions of a person can present, at the same time, a violation of the substantive criminal and the substantive administra-

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tive provisions of a legal order. At a first glance, the possibility to conduct criminal and administrative proceedings for the same acts or omissions does not seem to be problematic from the viewpoint of the *ne bis in idem* principle. The traditional concept of the *ne bis in idem* principle prohibits the duplication of prosecution or punishment of the same person for the same acts in *criminal proceedings*.[1] It does not touch upon the question of duplication of *criminal and administrative proceedings*. However, after the European Court for Human Rights accepted that, by virtue of its autonomous interpretation of the term "criminal charge" used in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] proceedings which are classified as administrative under national law may nevertheless be considered criminal under the Convention terms,[3] the duplication of criminal and administrative proceedings became one of the central issues of the interpretation of the *ne bis in idem* principle in European criminal law.

For a very long time, the main role in the interpretation of the principle in European criminal law has been in the hands of the European Court for Human Rights in Strasbourg. However, in the last two decades the Court of Justice of the European Union established itself as a very important actor in the interpretation of the *ne bis in idem* principle in European criminal law. Ever since the Court of Justice emerged as an important player in the European *ne bis in idem* scene, the interpretation of the principle has developed in the constant dialogue between the Strasbourg and the Luxembourg courts.[4]

Current article takes a closer look at this dialogue and analyses how it influenced the interpretation of the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It starts with the pre-*Zolotukhin* jurisprudence of the European Court for Human Rights and

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[1] On the rationale of the principle, see the monograph van Bockel, B., *Ne Bis in Idem Principle in EU Law*, Kluwer Law International, 2010, pp. 25-30

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, signed at Rome on 4 November 1950, and came into force on 3 September 1953

[3] The Court did that by using criteria, which became famous at the *Engel criteria*. These criteria refer to the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of the severity of the penalty that the person concerned is liable to incur. More detailed on *Engel criteria*, see in Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2014, p. 233, Mahoney, P., *Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.*, Judicial Studies Institute Journal, 2004, pp. 109-111

[4] More on the issue, see in Gutschy, M., *Tumačenje načela ne bis in idem - Interakcija Europskog suda pravde i Europskog suda za ljudska prava nakon stupanja na snagu Lisabonskog ugovora*, Zbornik radova „Odnos prava u regionu i prava Evropske unije", Istočno Sarajevo, 2015, pp. 494–514

analyses how the Luxembourg interpretation of Article 54 CISA[5] had a major influence on the change in the way the Strasbourg court perceived the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. It further explores how the Luxembourg court followed the way indicated by *Zolotukhin* and accepted the stance of the Strasbourg court on the possibility of duplication of criminal and administrative penal proceedings against the same person for the same acts under the *ne bis in idem* protection afforded to individuals by Article 50 of the Charter of Fundamental Rights of the European Union.[6] Finally, it analyses whether the recent shift in the Strasbourg court's jurisprudence, which was also followed by the Luxembourg court, means that the *ne bis in idem* principle in European criminal law has, on the question of the duplication of criminal and administrative penal proceedings, basically come to the positions which were dominant in the pre-*Zolotukhin* jurisprudence.

## 2. PRE-*ZOLOTUKHIN* JURISPRUDENCE AND *ZOLOTUKHIN* LEGACY

As already explained, this article focuses on the possibility to conduct both, criminal and administrative penal proceedings, against the same person for the same acts. Before we analyse the issue from the perspective of the *ne bis in idem* principle, it is necessary to remind the reader of an important explanation. The *ne bis in idem* principle, which is guaranteed, as a basic human right, with the provision of Article 4 of Protocol No. 7 to the European Convention for Human Rights, does not prohibit the possibility to conduct criminal and administrative proceedings against the same person for the same acts, as long as the administrative proceedings may not be considered criminal within the autonomous meaning of a criminal charge, a notion present in Art. 6 of the European Convention for Human Rights. Therefore, the starting point of every analysis of the question whether the duplication of criminal and administrative proceedings leads to a violation of the *ne bis in idem* principle, is the analysis of the question whether the proceedings which are formally administrative are, in their essence, criminal. If formally administrative proceedings may not be deemed criminal, there can be no violation of the *ne bis in idem* principle. If the analysis results in the conclusion that the administrative proceedings are in their essence criminal, there are still further tests that have to be undertaken in order to come to a final conclusion that there has

[5] Convention Implementing the Schengen Agreement, Official Journal L 239, 22. 9. 2000, p. 19 – 62. Extensively on the interpretation of Article 54 CISA by the Luxembourg court, see in Burić, Z., *Načelo ne bis in idem u europskom kaznenom pravu - Pravni izvori i sudska praksa Europskog suda*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 60, No. 3-4,2010, pp. 819-859

[6] Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10 .2012, p. 391–407

been a violation of the *ne bis in idem* principle. These further tests refer primarily to the *idem* and the *bis*.

Before the judgment in the *Zolotukhin* case, the European Court for Human Rights, allowed, under certain circumstances, the duplication of the criminal and the administrative penal proceedings. The room for such interpretation was found in the way the European Court for Human Rights understood the term *idem*. Generally speaking, there are two main approaches to the understanding of *idem* within the framework of *ne bis in idem*. The first approach is based on *idem factum*, and the second one is based on *idem crimen*. The *idem factum* approach focuses on identity of facts, while the *idem crimen* approach requires, besides the existence of *idem factum*, also the identity of legal classifications of facts. The latter approach, *idem crimen*, is a more restrictive one, when viewed from the perspective of the individual, because it allows prosecution and punishment of an individual in both, criminal and administrative penal proceedings, as long as what is being dealt with in those two sets of proceedings is legally not the same.

Although the European Court for Human Rights took different paths in its understanding of *idem*,[7] the approach which is based on *idem crimen* was predominant in the pre-*Zolotukhin* era. That meant, as already explained, that it was possible to conduct criminal and administrative penal proceedings, which is also in essence criminal, against the same person for the same acts, without infringing the basic human right guaranteed by Article 4 of Protocol No. 7. However, the judgment in the *Zolotukhin* case brought an end to this understanding of *idem*. In that judgment, the Court decided in favour of *idem factum* approach. The Court defined *idem factum* in the following terms: "facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space".[8] In the following paragraphs, we deal with two issues. First, we look at the possible reasons which led the European Court for Human Rights to change its position on *idem* and second, we look at the consequences which this change had on the possibility to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts.

It is not an exaggeration to claim that the decisive influence on the Strasbourg court to change its position on *idem* came from the Luxembourg court. The latter, in its interpretation of Article 54 CISA has established and has consistently held, and still does, the approach of *idem factum*. The issue of understanding of *idem*

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[7] Ivičević Karas, E.; Kos, D., *Primjena načela ne bis in idem u hrvatskom kaznenom pravu*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 19, No. 2, 2012, p. 561

[8] *Sergey Zolotukhin v. Russia*, Grand Chamber Judgment of 10 February 2009, Application no. 14939/03, § 84

has first appeared before the Court of Justice of the European Union in 2006, in *Van Esbroeck* case.[9] In that case, the Court relied on two main arguments to reject the *idem crimen* approach. Firstly, it relied on the text of Article 54 CISA, which refers to the "same acts", unlike the text of Article 4 of Protocol No. 7 to the European Convention for Human Rights, which refers to "an offence".[10] However, what was more important to the Court of Justice of the European Union for the acceptance of *idem factum* approach was the context in which Article 54 CISA is being applied. The context is a transnational one, a context of a single legal area of freedom, security and justice where freedom of movement is guaranteed to every citizen and where differences in national legal orders of Member States would represent a significant limitation to that freedom, if *idem crimen* approach was accepted.[11] Namely, the acceptance of *idem crimen* approach in the transnational context would mean that a person who has already been criminally prosecuted in one Member State may again be prosecuted in another Member State, if the acts he or she committed have different legal classifications in those two legal systems involved. Such a solution is obviously inacceptable for the European Union, which is founded on freedom of movement of persons, as one of its leading values.[12] The Court of Justice of the European Union understood *idem factum* in the following way: "Identity of the material acts, understood in the sense of the existence of a set of concrete circumstances (facts) which are inextricably linked together".[13] The Court added that the facts need to be inextricably linked together "in time, in space and by their subject-matter".[14] The approach inaugurated in *Van Esbroeck* was followed, without exceptions, in the ensuing jurisprudence of the Luxembourg court on Article 54 CISA.[15] Without entering into a deeper analysis of the issue, it is worthy noticing that the context in which the Court of Justice of the European Union accepted *idem factum* approach in its interpretation of the *ne bis in idem* principle is very different from the context in which the Strasbourg court interprets *ne bis in idem*. On one side, there is the problem of multiple criminal prosecutions of the same person for the same acts in different European jurisdictions (Luxembourg perspective) and on the other side there is the problem

[9] *Leopold Henri Van Esbroeck*, Judgement of the Court, 9 March 2006, C-436/04

[10] *Ibid*, § 28

[11] *Ibid*, § 29-35

[12] Burić, *op. cit.*, note 5, pp. 843-844

[13] *Leopold Henri Van Esbroeck*, § 36

[14] *Ibid*, § 38

[15] See, for example, the following judgments: *Jean Leon Van Straaten*, Judgement of the Court, 28 September 2006, C-150/05, § 49-50, *Gasparini and Others*, Judgement of 28 September 2006, C-467/04, § 148–154, *Kretzinger*, Judgement of the Court, 18 July 2007, C-288/05, § 37, *Norma Kraaijenbrink*, Judgement of the Court, 18 July 2007, C-367/05, § 29-31, *Gaetano Mantello*, Grand Chamber Judgment, 16 November 2010, C-261/09, § 39-40

of duplication of criminal and administrative penal proceedings against the same person for the same acts (Strasbourg perspective).

Moving on to the second issue, we look at the consequences which the acceptance of *idem factum* by the Strasbourg court had on the possibility to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts. The acceptance of *idem factum* approach meant that it was no longer possible for national jurisdictions to conduct two sets of proceedings, criminal and administrative penal, against the same person for the same acts, because such practice contradicts the basic human right which is guaranteed by Article 4 of Protocol No. 7 to the European Convention for Human Rights. Namely, if it was not enough to rely on the differences in the treatment of the same acts in criminal law, on one side, and in the administrative penal law, on the other side, the space inside which duplication of criminal and administrative penal proceedings against the same person for the same acts was in accordance with the *ne bis in idem* guarantee was lost. This is exactly why the *Zolotukhin* judgment was so important and why it caused such a strong reaction by the national (criminal) justice systems. It meant that the national (criminal) justice systems had to find a way to bring an end to the practice of a two-track system, pursuant to which it was possible to punish the same person for the same acts in both, criminal and administrative penal, proceedings. In other words, their two-track systems had to be transferred into a single-track system, whereby a person can, due to his or her unlawful acts, be punished either in the criminal proceedings or in the administrative penal proceedings. This meant that they had to use their substantive criminal and administrative penal law or procedural mechanisms of their justice system do draw a line between these different reactions of the national legal system to a single human act.[16]

## 3. LUXEMBOURG COURT'S ALIGNMENT WITH *ZOLOTUKHIN*

As elaborated before, the jurisprudence of the Luxembourg court on the interpretation of the transnational *ne bis in idem* had a decisive influence on the Strasbourg court's interpretation of the national *ne bis in idem* which is primarily problematic in the area of cumulative criminal-administrative legal response to the same acts of the same person. However, in 2013, the former court came into a

[16] For the reaction of the Croatian criminal justice system, see Ivičević Karas, E., *Povodom presude Europskog suda za ljudska prava u predmetu Maresti protiv Hrvatske – Analiza mogućeg utjecaja na reformu prekršajnog prava u Republici Hrvatskoj*, Program III. specijalističkog savjetovanja: Primjena Prekršajnog zakona i ostalih propisa s područja prekršajnog prava u Republici Hrvatskoj, Hrvatsko udruženje za kaznene znanosti i praksu, Zagreb, 2009, pp. 1-18, Novosel, D.; Rašo, M.; Burić, Z., *Razgraničenje kaznenih djela i prekršaja u svjetlu presude Europskog suda za ljudska prava u predmetu Maresti protiv Hrvatske*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 17, No. 2, 2010, pp. 785-812

position to decide whether the *Zolotukhin* judgment and its legacy developed in the jurisprudence of the European Court for Human Rights are acceptable for the Luxembourg court in the context of national cumulative criminal-administrative penal response in the area of non-payment of VAT. Here, we are talking about the case of Åkeberg *Fransson*.[17]

There are three interconnected factors which differentiated the factual-legal background of *Fransson* case from the previous jurisprudence of the Court of Justice developed in the context of Article 54 CISA. First of all, *Fransson* did not deal with the interpretation of Article 54 CISA, but with the interpretation of Article 50 of the Charter. Article 54 CISA regulates the question of transnational *ne bis in idem*. On the other hand, Article 50 of the Charter deals both with transnational dimension of the *ne bis in idem* principle, but also with its national dimension, which is limited within the single legal regime of an individual Member State. In this case, it was the question of the Swedish national legal system and its compatibility with the *ne bis in idem* guarantee contained in the Charter. Second, it did not deal, as was the case in the jurisprudence established in relation to Article 54 CISA, with the cumulative criminal response of multiple criminal justice systems to the same acts of the same person. It dealt with the cumulative criminal-administrative response of the single justice system to the same acts of the same person. And third, it dealt with the area of protection of financial interests of the European Union, since it related to the evasion of VAT payments. All these factors taken together made it difficult to predict whether the Luxembourg court will follow the jurisprudence of the Strasbourg court which was established on *Zolotukhin* and its legacy or it would find a way to interpret Article 50 of the Charter in a way which is more efficiency-friendly, and less individual-protective.

Despite all these considerations Luxembourg court was faced with, it reached a conclusion which put its interpretation of the national dimension of the *ne bis in idem* principle guaranteed in Article 50 of the Charter in line with the jurisprudence of the European Court for Human Rights established in *Zolotukhin* and ensuing judgments. The Luxembourg court concluded that "the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature".[18] In other words, the Court of Justice concluded that the duplication of criminal and administrative penal proceedings,

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[17] Åkeberg *Fransson*, Grand Chamber Judgment, 26 February 2013, C-617/10. For a detailed analysis of the case, see Gutschy, *op. cit.*, note 4, pp. 502-504

[18] Åkeberg *Fransson*, § 37

which are in nature criminal, against the same person for the same acts is contrary to the right guaranteed by Article 50 of the Charter. With this judgment the dialogue between the Courts on the interpretation of the *ne bis in idem* principle which was started with *Zolotukhin* continued. However, the Strasbourg court, in 2016, with a major shift in its understanding of *ne bis in idem*, opened another round of talks between the Courts.

## 4. A SHIFT IN STRASBOURG COURT'S UNDERSTANDING OF *BIS*

In November 2016, the Grand Chamber of the European Court for Human Rights, in the case of *A and B v. Norway*,[19] was, once again, more than 7 years after *Zolotukhin*, faced with a difficult issue of duplication of criminal and administrative penal proceedings against the same person for the same acts. However, unlike in *Zolotukhin*, this time the main issue did not evolve around *idem*. Rather, it evolved around the understanding of *bis*. The European Court was to decide whether two sets of proceedings against the same person for the same acts, criminal proceedings and administrative penal proceedings, can represent, not two responses to the unlawful conduct, but one "combined and integrated"[20] response which represents a "coherent whole".[21]

In this case, applicants were prosecuted and punished in tax proceedings and in criminal proceedings for the same acts. National courts and the European Court concluded that the administrative (tax) proceedings was in essence criminal. However, the national courts concluded that there was no breach of Article 4 of Protocol No. 7 to the Convention because "there was a sufficient connection in substance and time"[22] between the tax proceedings and the criminal proceedings the applicants were subjected to. This connection was founded on the following factors: both proceedings are based in the same factual circumstances, they had been conducted in parallel and had to a great extent been interconnected.[23] The European Court was now to decide whether the argumentation of the Norwegian national courts was acceptable to it and whether duplication of criminal and administrative penal proceedings against the same person for the same acts may be

[19] *A and B v. Norway*, Grand Chamber Judgment of 15 November 2016, Application nos. 24130/11 and 29758/11

[20] *Ibid*, § 111

[21] *Ibid*.

[22] *Ibid*, § 29

[23] *Ibid*.

in accordance with the *ne bis in idem* guarantee proclaimed in Article 4 of Protocol No. 7 to the Convention.

The Court gave a lot of weight to the national legal differences[24] and to the powers of the Contracting States "to choose how to organise their legal system, including their criminal-justice procedures".[25] It went on to conclude that "States should be able legitimately to choose complementary legal responses to socially offensive conduct […] through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned".[26] Finally, the Court concluded that two sets of proceedings may not necessarily represent a duplication of trial and punishment in the meaning of *bis*, provided these two sets of proceedings "were sufficiently closely connected in substance and in time".[27] The Court also defined criteria for the assessment whether the proceedings were sufficiently closely connected in substance and in time. Applying these criteria to the circumstances of the case, the Court concluded that there was no violation of Article 4 of Protocol No. 7 to the Convention, although the applicants were prosecuted for the same acts in criminal proceedings and in administrative proceedings, which were in their essence criminal.

Without undertaking a deeper analysis of the criteria for the assessment whether the proceedings were sufficiently closely connected in substance and in time, some general remarks need to be given with regard to the conclusions of the Court. First of all, the Court accepted that parallel criminal and administrative penal proceedings against the same person for the same acts may not present a violation of *ne bis in idem* rule. However, such an outcome is accepted by the Court as an exception to the rule of a single-track response to socially offensive conduct. Namely, the Court emphasized that "the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process".[28] Second, what seems to be essential for the Court to launch an assessment whether the proceed-

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24 By referring to the Opinion of the Advocate General before the Court of Justice of the European Union in the *Fransson* case, who reminded that „the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States, especially in fields such as taxation, environmental policies and public safety". *Ibid*, § 118

25 *Ibid*, § 120

26 *Ibid*, § 121

27 *Ibid*, § 130

28 *Ibid*, § 130

ings were sufficiently closely connected in substance and in time is that the proceedings are complementary, meaning that the proceedings had been pursued with their "purposes and means employed being complementary".[29] That means if both sets of proceedings have the same purpose and employ the same means, or have different purposes and means, but which are not complementary, a duplication of those proceedings is contrary to the *ne bis in idem* rule. Third, the understanding of the *ne bis in idem* principle which was abolished with *Zolotukhin*, namely, that it is possible to conduct criminal and administrative penal proceedings against the same person for the same acts, was now resurrected with the *A and B* judgment. But, unlike the in the pre-*Zolotukhin* jurisprudence, where such possibility was built on the interpretation of *idem*, in *A and B* the Court built that possibility on the understanding of *bis*. It seems that the European Court for Human Rights came back where it stood in the pre-*Zolotukhin* era, however, by using different means. This conclusion is accentuated by the fact that the assessment of complementarity of purposes and means is very much look-alike to the assessment of "essential elements" of the offence, which was characteristic for the pre-*Zolotukhin* understanding of idem.[30] To sum up, it seems like the European Court for Human Rights has made a circle in its understating of the *ne bis in idem* principle, going back to the positions which predated *Zolotukhin*. Fourth, this newest change in the understating of *ne bis in idem* principle represents a shift from an individual-protective understanding of the principle to its efficiency-friendly interpretation.

With *A and B v. Norway* the European Court for Human Rights significantly altered its interpretation of the *ne bis in idem* principle and notably limited the scope of its application with regard to the possibility to duplicate criminal and administrative penal proceedings against the same person for the same acts.[31] It did not take long before the Luxembourg court was faced with a dilemma – to follow the path indicated by the Strasbourg court or to insist on the broader scope of the *ne bis in idem* principle, under which duplication of criminal and administrative penal proceedings is not allowed, notwithstanding the fact that the two sets of proceedings might be sufficiently closely connected in substance and in time? The first case in which the Luxembourg court had to decide on the issue was *Luca Menci*.

[29] *Ibid*, § 129

[30] *A and B v. Norway, Dissenting opinion of judge Pinto de Albuquerque*, § 56

[31] Some authors find that the Court, with its judgment in *A and B v. Norway*, "developed a significant and controversial exception" to *the ne bis in idem* right guaranteed by Article 4 of Protocol No. 7 to the Convention. See Ligeti, K.; Tosza, S., *Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US*, in: Ligeti, K.; Tosza, S. (eds.), *White Collar Crime: A Comparative Perspective*, Hart Publishing, 2019, p. 32

## 5. LUXEMBOURG FOLLOWS STRASBOURG ONCE AGAIN

On 20 march 2018, the Court of Justice of the European Union delivered its long-awaited judgment in the *Luca Menci* case.[32] What made this judgment so significant was the fact that in it the Luxembourg court needed to give an answer to the question whether the position of the European Court for Human Rights adopted in the case of *A and B v. Norway* is possible and acceptable from the point of view of Article 50 of the Charter. The case concerned a cumulation of administrative (tax) proceedings and criminal proceedings against the same person for the same acts – non-payment of VAT.

The Court of Justice first noticed that Italian law allows for duplication of proceedings and penalties in administrative penal (which are criminal in nature) proceedings and criminal proceedings against the same person for the same acts.[33] It further noticed that such duplication represents a limitation to the fundamental right guaranteed by Article 50 of the Charter[34] and went on to analyse whether such a limitation is justified.[35] In its analysis, the Court of Justice basically integrated the criteria which the European Court for Human Rights inaugurated in *A and B v. Norway* judgment and adapted them to the specific context of justified limitations of rights guaranteed by the Charter. Such an operation of the Court of Justice resulted in a Luxembourg-modified version of sufficiently closely connected in substance and time-criteria.[36] To conclude, the Luxembourg court

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32 *Luca Menci*, Grand Chamber Judgment, 20 March 2018, C-524/15. On the same day, the Court decided in two further cases which dealt with the same legal issue: *Garlsson Real Estate and Others*, Grand Chamber Judgment, 20 March 2018, C-537/16 (duplication of administrative penal proceedings for market manipulation and criminal proceedings) and *Di Puma*, Grand Chamber Judgment, 20 March 2018, C-596/16 (duplication of administrative penal proceedings for insider dealing and criminal proceedings). In the latter two cases, the Court adopted the same legal standards as in the *Luca Menci* case. Therefore, those cases will not be the object of the analysis undertaken here

33 *Luca Menci*, § 39

34 *Ibid*.

35 In its previous jurisprudence, the Court of Justice already accepted limitations to the right guaranteed by Article 50 of the Charter, on the basis of Article 52(1) thereof. See the *Spasic* case, *Zoran Spasic*, Grand Chamber Judgment, 27 May 2014, C-129/14 PPU. Generally about the limitations on the exercise of the rights and freedoms recognised by the Charter, see in Lenaerts, K., *Exploring the Limits of the EU Charter of Fundamental Rights*, European Constitutional Law Review, *Vol.* 8, 2012,, pp. 388-393. More on *Spasic* case, see in Vervaele, J., *Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: M and Zoran Spasic*, Common Market Law Review, *Vol.* 52, 2015, pp. 1343-1348, Munivrana Vajda, M., *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*, EU and Comparative Law Issues and Challenges Series – Issue 2, 2018, p. 332

36 *Ligeti* and *Tosza* find that „the CJEU opted not to preclude the use of criminal sanction for facts that have already been the subject to sanctions of a different kind. However, the criteria chosen by the Court in order to make this permissible were different". See Ligeti; Tosza, *op. cit.*, note 31, p. 33.

found that the duplication of administrative penal proceedings and criminal proceedings against the same person for the same acts may, under certain conditions, present a justified limitation of the right guaranteed by Article 50 of the Charter.[37] By doing so, the Luxembourg court once more followed the Strasbourg court in its interpretation of the *ne bis in idem* principle. However, unlike in *Fransson* case, where the path indicated by the Strasbourg court was directed towards greater protection of individual, this time it was directed towards limitation of the rights of the individual in the interest of maximized State efficiency.

## 6. CONCLUSION

The goal of this contribution was twofold. First, to show interesting developments and trends in the interpretation of the *ne bis in idem* principle in European criminal law. Second, it was also to analyse the way in which the interaction and the dialogue of the Strasbourg and the Luxemborug courts influenced these developments and trends. This article showed that there were two major turning points in the development of the *ne bis in idem* principle in European criminal law. The first turning point was the judgment of the European Court for Human Rights in *Zolotukhin* case. This judgment represented a strong shift of the Strasbourg court towards an individual-protective understanding of the *ne bis in idem* principle. At the same time, it was a strong message to the national jurisdictions of Contracting States that they need to reorganize, at least some of them, their national justice systems in order for these systems to be in line with the Strasbourg human rights guarantees. The second turning point was the decision of the European Court for Human Rights in *A and B v. Norway* case. In this decision, the Strasbourg court showed that it might have bit off more than it could have chew in its *Zolotukhin* decision. Faced with the unwillingness of Contracting States to adapt their justice systems to *Zolotukhin* standards, the European Court for Human Rights took a step back in its understanding of the *ne bis in idem* principle and opened the doors to the upholding of the practices that were meant to be abolished with the *Zolotukhin* judgment. Now, going back to its pre-*Zolotukhin* positions, the European Court for Human Rights opened the door for the cumulation of criminal and administrative penal response of the State to the same acts of the same person. Such a shift of the Strasbourg court in its understanding of the *ne bis in idem* principle shows, together with some other trends in the development of Court's jurisprudence, that there are some new winds in Strasbourg, not favouring the activism of the Court in the development of ever stronger human rights protection standards.

[37] For a more detailed analysis of the judgment in the *Luca Menci* case and its implications for Article 50 of the Charter, see Lo Schiavo, G., *The principle of ne bis in idem and the application of criminal sanctions: of scope and restrictions*, European Constitutional Law Review, *Vol.* 14, 2018, pp. 644-663

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# PRE-TRIAL DETENTION OF CHILDREN: EUROPEAN STANDARDS AND CROATIAN LAW*

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***ABSTRACT***

*This paper deals with the issue of pre-trial detention of children in criminal proceedings from the aspect of European standards established under the competence of the European Court of Human Rights and the EU law, as well as from the aspect of Croatian criminal procedure law. Authors will first provide a short overview of international documents pertaining to the issue of deprivation of liberty of children. Furthermore, they will analyse the relevant case law of the European Court of Human Rights, especially the recent one. In several cases, ECHR established a violation of Art. 5 because pre-trial detention had not been used as a measure of last resort i.e., domestic courts did not take into account the applicants' young age when deciding on pre-trial detention. Hence, special attention in the paper will be given to the provisions of Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Articles 10 to 12 of the Directive emphasise the ultima ratio nature of detention, the need for a periodic judicial review of the decision, the availability of alternative decisions and specific treatment regarding the separation of children from adults, health care, education and family life. The adequacy of the measure of pre-trial detention for children has recently been discussed in the Croatian judicial practice regarding the case of a fourteen-year old child accused of aggravated murder. The issue of national law on pre-trial detention is especially relevant in the context of the need to transpose Directive 2016/800. Consequently, the authors will critically examine the Croatian legislation and practice and their compliance with the European standards on pre-trial detention.*

***Keywords****: deprivation of liberty, Directive 2016/800/EU, European Court of Human Rights, pre-trial detention of children*

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# 1. INTRODUCTION

## 1.1. Definition and scope

Deprivation of liberty, as the most coercive measure in the criminal proceedings, should be used as a last resort, and this principle is especially emphasised in relation to children who are in a particularly vulnerable position regarding their physical and mental condition upon detention. Inadequate detention conditions can have detrimental effects on children, contrary to the purpose of the criminal proceedings which should be focussed on the upbringing, needs and best interests of a child. As the research indicates, even short periods of detention can undermine a child's psychological and physical well-being and compromise cognitive development.[1]

Pre-trial detention, in the context of this paper, should be defined as a procedural measure of deprivation of liberty of the suspect or the accused, determined by a court before or during the criminal proceedings under prescribed legal conditions consisting of temporary detention for the purpose of securing a particular scope prescribed by criminal procedural law.[2] The analysis focusses on the measure of pre-trial detention imposed on children defined in accordance with the United Nations Convention on Rights of a Child (UNCRC)[3] as persons below the age of eighteen years, which is also the wording of Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[4] Other child-related international documents and the European Court of Human Rights (ECHR) use the term "minors" or "juvenile". The Croatian Juvenile Courts Act (JCA) uses the term *minor* for a person whose age, at the time of perpetration, was between fourteen and eighteen, and it distinguishes junior minors (14-16 years old) and senior minors (16-18 years old).[5]

In this paper, the authors will focus on international, especially the European standards, on the use of pre-trial detention on children in view of the abundant ECHR case law and the new EU legislation regarding this issue, and the manner in which these standards are implemented in the Croatian law, i.e. to what extent the Croatian legislation and practice are harmonised with these standards.

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1 Fair Trials: Advancing the Defence Rights of Children Manual for Practitioners, October 2018, p. 32, [https://www.fairtrials.org/publication/advancing-defence-rights-children] Accessed 06.05.2019

2 Krapac, D. *et al., Kazneno procesno pravo, Prva knjiga: Institucije*, Zagreb, 2014, p. 381

3 UN Convention on Rights of a Child, General Assembly resolution 44/25 of 20 November 1989

4 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132

5 Article 2, Juvenile Courts Act, Official Gazette, 84/11, 143/12, 148/13, 56/15

### 1.2. Data on the use of pre-trial detention on children

Even though the official international statistics do not present the number of children in detention before and during the trial in Europe and throughout the world, the issue of overuse of pre-trial detention can be detected. It is estimated that in 2011, a total of 3386 children were held in pre-trial detention in only 7 EU Member States.[6] The experts state that a routine use of pre-trial detention is considered as one of the most pressing issues in the present juvenile justice system and that the real problem lies with the practices and not the norms.[7] Some research indicates a strong correlation between the pre-trial detention and the imposed custodial sentence to children, i.e. the pre-trial detainees are more likely to get a custodial sentence after conviction.[8]

In all EU Member States (EUMS), the pre-trial detention is applicable to children who have reached the minimum age of criminal responsibility which is mostly between the age of 13 and 15, with the exception of 5 jurisdictions which apply a lower age limit.[9] According to the available data in most EUMS, the age limit for the pre-trial detention overlaps with the age limit prescribed for the custodial sanctions and measures,[10] but few countries, including the Republic of Croatia,[11] have a higher age limit for the implementation of custodial sanctions with respect to the pre-trial detention, i.e., in these countries the children liable to pre-trial detention cannot be subjected to custodial measures. This legal solution can lead to a paradox where a more severe measure may be imposed on the accused child during the trial while he/she is presumed innocent than after the trial.

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According to this report Republic of Croatia is misplaced in the category of countries with categorical value 15–16 for pre-trial detention instead in category of 13 -14 years

[11] Belgium, Hungary, Slovenia, *ibid.*

The Committee on the Rights of the Child, currently revising its General Comment No. 10 (2007) on children's rights in the juvenile justice system, proposed 16 years as the age limit for the use of the deprivation of liberty, either at the pre-trial or post-trial stage.[12] This proposal, according to some commentators, does not contribute to public safety and is incompatible with the harsh realities juvenile justice practitioners face in daily practice.[13]

Data on the use of pre-trial detention of children in the Republic of Croatia imply a relatively small number of children in pre-trial detention.[14] In the last five years, this number has varied from 57 in 2013, 49 in 2014, 30 in 2015, 33 in 2016 and 45 children in 2017. However, an increase in the number of pre-trial detainees in 2017 is rather indicative, especially in relation to the decreasing number of accused minors.[15]

## 2. INTERNATIONAL DOCUMENTS ON PRE-TRIAL DETENTION OF CHILDREN

International community has developed a set of specific standards on the deprivation of liberty of children, and Article 37 of UNCRS, the most important international instrument for the protection of the children`s rights, prescribes the relevant binding rules. UNCRC together with the soft law documents which are more specifically oriented towards the juvenile justice system and deprivation of liberty, Beijing Rules[16] and Havana Rules,[17] "serve as a comprehensive, internationally accepted framework to be incorporated by states with a view to counter-

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12 Paragraph 101, Committee on the Rights of the Child, Draft General Comment No. 24 (201x), replacing General Comment 10 (2007) on Children's rights in juvenile justice, [https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx] Accessed 04.05.2019

13 Comments on Draft General Comment No. 24 (201x), replacing General Comment 10 (2007) on Children's rights in juvenile justice, Department of Child Law, Leiden Law School, Leiden University, The Netherlands Leiden, 7 January 2019, [https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/leiden-university-comments-draft-gc-no.-24-final.pdf] Accessed 04.05.2019

14 Data obtained from Administration for Prison System and Probation of Ministry of Justice, Republic of Croatia.

15 In 2017 a total of 380 minors where accused for criminal offences, in 2016 422, in 2015 492, in 2014 626 and in 2013 637. Data from Statistical Yearbooks of the Republic of Croatia, Croatian Bureau of Statistics, available at [https://www.dzs.hr/default.htm] Accessed 06.05.2019

16 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Adopted by General Assembly resolution 40/33 of 29 November 1985

17 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990

acting the detrimental effects of detention."[18] In the European context, the instruments under the Council of Europe should be added to this list and furthermore analysed, especially the European Rules for juvenile offenders[19] and Guidelines on child-friendly justice.[20]

Considering the importance of the standards established by the ECHR case law, and the development of new binding standards under the European Union law, these will be further analysed in Chapters 3 and 4.

### 2.1. Basic principles

The basic principle provided in Article 37(b) of UNCRC in relation to detention is the principle of legality which encompasses lawfulness and non-arbitrariness.[21] Furthermore, in terms of children in pre-trial detention, the presumption of innocence should be the leading principle for the treatment of untried detainees.[22]

All international instruments on children`s rights highlight the *ultima ratio* nature of detention: pre-trial detention can be used only as a measure of last resort and for the shortest appropriate period of time, i.e. with utmost restraint and only after careful consideration.[23] The principle of last resort requires that alternative options to detention be considered,[24] hence special efforts must be undertaken to avoid pre-trial detention.[25]

This principle requires not only that alternative options should be considered but also that an 'appropriate' time frame is considered.[26] In that sense, the internation-

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18 Manco, E., *Detention of the Child in the Light of International Law-A Commentary on Article 37 of the United Nation Convention on the Rights of the Child*, Amsterdam Law Forum, *Vol.* 7, No. 1, 2015, p. 58

19 Recommendation CM/Rec (2008)11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures adopted by the Committee of Ministers on 5 November 2008

20 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. We should also mention Recommendation of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency (no. R (87)20), Recommendation Rec (2003) 20 of the Committee of Ministers of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice

21 Cf. Liefaard, T., *Deprivation of Liberty of Children* in: Kilkelly, U.; Liefaard, T. (eds.), International Human Rights of Children, Springer, 2019, p. 333

22 Havana Rules,17; European Rules,108

23 Liefaard, *op. cit.,* note 23, p. 329

24 Havana Rules, 13.2.; Beijing Rules, 17; Recommendation Rec (2003) 20, 17

25 European Rules, 10

26 Manco, *op. cit.,* note 20, p. 63

al standards require the use of pre-trial detention only for the shortest appropriate[27] or shortest possible time. *Liefaard* emphasises that appropriateness should be understood in the light of the impact of deprivation of liberty on children, including the level of security. In particular, with regard to the use of pre-trial detention, this is supported by the Beijing Rules, Havana Rules, European Rules and ECHR case law which prescribe the shortest possible time.[28] In considering whether to prevent further offending by remanding a child in custody, the courts should undertake a full risk assessment based on comprehensive and reliable information on the young person's personality and social circumstances.[29]

### 2.2. Procedural rights

International instruments set up *habeas corpus* rights for children deprived of liberty: right to a prompt access to legal and other appropriate assistance, right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[30] According to the Committee on the Rights of Children (CRC Committee), every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours and the legality of a pre-trial detention has to be reviewed regularly, preferably every two weeks.[31] Furthermore, the competent authority should make a final decision on the charges no later than six months after they have been presented. Right to a prompt decision implies that a decision must be rendered within or no later than two weeks after the challenge has been made. Recommendation Rec (2003) 20 provides that children should not be remanded in custody for longer than six months before the commencement of the trial. This period can only be extended if a judge who is not involved in the investigation of the case is convinced that any delays in proceedings are completely justified due to exceptional circumstances.

[27] UNCRC, Guidelines of CoE on child friendly justice, Directive 2016/800

[28] Liefaard, *op. cit.,* note 23, p. 332

[29] Recommendation Rec (2003) 20, 18

[30] Article 37 (d) UNCRC

[31] Committee on The Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, CRC/C/GC/10 25 April 2007, paragraph 83. [https://www.refworld.org/docid/4670fca12.html] Accessed 06.05.2019. New Draft of General Comments proposes review of legality on a weekly basis. Draft General Comment, *op. cit.* note13, paragraph 102

### 2.3. Treatment of detainees

The fundamental principle regarding the treatment of child detainees is the requirement of humane treatment with respect for the inherent human dignity in a manner which is adequate to a child's age.[32] The first obligation that arises from this principle is to separate children in detention from adults, unless it is considered in the child's best interest not to do so. Unlike the Beijing Rules,[33] the CRC Committee explicitly states that a child deprived of liberty should not be placed in a prison for adults and that states parties should establish separate facilities for children deprived of their liberty, which should include, according to the new Draft of General Comment, appropriately trained personnel and operate according to child-friendly policies and practices.[34] Havana Rules further require that untried detainees should be separated from convicted juveniles.[35] European Rules also state that juveniles should not be detained in institutions for adults but rather in institutions specially designed for them. According to the Guidelines on child-friendly justice when children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.

The second aspect of the right of human treatment relates to the right of a child to maintain contact with his/her family through correspondence and visits, except in exceptional circumstances.[36] While in custody, the juveniles should receive care, protection and all necessary individual social, educational, vocational, psychological, medical and physical assistance that they may require in view of their age, sex and personality.[37] According to Havana Rules, the conditions under which an untried juvenile is detained should take into account the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile.[38] Among other requirements, the CRC Committee emphasises that every child has the right to be examined by a physician or a health practitioner upon admission to the detention/correctional facility and receive adequate medical care.[39]

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[32] Article 37(c) UNCRC

[33] Beijing Rules, 13.4

[34] Draft General Comment, *op. cit.* note 13, paragraph 104

[35] Havana Rules,17

[36] Manco, *op. cit.,* note 18, p. 72

[37] Beijing Rules, 13.5

[38] Havana Rules, 18

[39] General Comment no. 10 (2007), *op. cit.* note, paragraph 89

# 3. ECHR STANDARDS ON PRE-TRIAL DETENTION OF CHILDREN

## 3.1. Pre-trial detention of children under the European Convention on Human Rights (the Convention)[40]

The right to personal liberty is guaranteed by Article 5 para 1. of the Convention which sets out an exhaustive list of legitimate grounds for detention.[41] Detention for purposes of criminal proceedings is regulated by sub-paragraph c). It is necessary to delimit the scope of application of sub-paragraph d) which allows detention of a minor by lawful order for the purpose of educational supervision or their lawful detention for the purpose of bringing them before the competent legal authority in relation to sub-paragraph c). The deprivation of liberty under sub-paragraph d) cannot be justified in cases involving minors charged with the offence, but such deprivation of liberty should have its basis in sub-paragraph c.).[42] However, the detention of a minor accused of a crime during the preparation of a psychiatric report necessary for deciding on his/her mental conditions has been considered to fall under sub-paragraph d) as detention for the purpose of bringing a minor before the competent authority.[43]

Paragraphs 2 and 4 of Article 5 set out specific rights guaranteed to all persons deprived of their liberty (right to be informed of the reasons for the arrest and the right to *habeas corpus* proceedings[44]), while paragraph 3 consists of two specific safeguards which only apply to detention for the purposes of criminal proceedings: right to be brought before the judge and right to be released within reasonable time.[45]

## 3.2. ECHR case law on pre-trial detention of children

The European Court of Human Rights developed a specific case law on pre-trial detention of children. This case law mostly refers to Article 5 (lawfulness and

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[40] Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950

[41] Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford, 2006, p. 503

[42] see Graovac, G., *Zaštita prava na osobnu slobodu u praksi Ustavnog suda Republike Hrvatske*, doktorski rad, Zagreb, 2017, pp. 185. – 186

[43] *X. v. Switzerland,* no. 8500/79, Commission decision of 14 December 1979, Guide on Article 5 of the Convention – Right to liberty and security, Council of Europe/European Court of Human Rights, 2019, pp. 23
[https://www.echr.coe.int/documents/guide_art_5_eng.pdf] Accessed 06.05.2019

[44] That is right to take proceedings to review the lawfulness of detention

[45] See Trechsel, *op. cit.* note 41, pp. 408, 503

length of pre-trial detention, *habeas corpus* proceedings), however, when conditions of the placement and treatment of detainees are concerned, it can raise the issue of inhumane and degrading treatment under Article 3 of the Convention.

Supporting the requirements of the international documents, ECHR believes that pre-trial detention of minors should be used only as a measure of last resort for the shortest possible period,[46] and, where detention is strictly necessary, minors should be kept apart from adults.[47]

### 3.2.1. *Article 5 § 1*

According to ECHR standards, pre-trial detention is unlawful if it is not authorised by a judicial decision or if the domestic courts did not provide enough grounds for detention. This was the case in *Kuptsov and Kuptsova v. Russia* where ECHR found the period of almost six months of pre-trial detention for a 15-year-old accused of several counts of armed robbery unlawful due to the fact that there was no judicial decision authorising detention, and afterwards, when the court order was delivered, it did not provide any grounds for maintaining the custodial measure or fixing the time-limit for extended detention.[48] In *Grabowski v. Poland,* ECHR found that the Polish practice of detaining juveniles, subject to correctional proceedings without a judicial decision authorising the continued detention, is contrary to the principle of legal certainty.[49]

The Court deems necessary that domestic courts should provide detailed reasons for the pre-trial detention and consider alternative measures before ordering the most coercive measure. Hence, in *Korneykova v. Russia* the Court concluded that the domestic authorities failed to advance comprehensive reasoning for imposing a custodial measure on the 14-year-old applicant.[50] In assessing the lawfulness of the pre-trial detention, the health condition of a minor must be taken into account, which was not the case in *Korneykova* where the applicant suffering from tuberculosis and psychiatric disturbances was placed in a standard pre-trial detention facility for adults without assessing likelihood of damage to the applicant's

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46 *Korneykova v. Ukraine* (2012), app. no. 39884/05,§ 43-44, *Selçuk v. Turkey* (2006), app. no. 21768/02, §§ 35-36, *Nart v. Turkey* (2008), app. no. 20817/04, §§ 31 and 33

47 *Nart v. Turkey* (2008), § 31

48 *Kuptsov and Kuptsova v. Russia* (2011), app. no. 6110/03, § 82

49 *Grabowski v. Poland* (2015), app. no. 57722/12, §50. Applicant who was minor was arrested on suspicion of committing a number of armed robberies continued to be detained in the shelter for juveniles without any specific court order for the period of 5 months and 2 days

50 *Korneykova v. Ukraine* (2012), §48

health.[51] In the recent judgement *Agit Demir v. Turkey*, the Court found that the placement in detention of a 13-year-old minor charged for participating in a demonstration could not be regarded as lawful as the reasons given by the magistrate in the pre-trial detention order did not suggest that the alternative measures, although provided by the law, had been considered first.[52]

In several cases, ECHR established a violation of Article 5 § 1 due to the fact that the child's placement in detention was not justified on valid grounds covered by Article 5 §1, i.e., it could not fall under the scope of "educational supervision" as in the key case *Blokhin v. Russia* in relation to the 12-year-old applicant who, under the age of criminal liability, committed some criminal offences and was placed in temporary detention centre for young offenders in order to "correct his behaviour".[53] Likewise, in *Ichin and Others v. Ukraine*, the Court reached the same conclusion regarding two minors who stole some food and kitchen appliances from a school canteen and were placed in a juvenile holding facility for 30 days.[54]

### 3.2.2. *Article 5 §3*

As the Court emphasises in its case law, Art 5§3 should be read with Article 5 §1(c), which together form a comprehensive unit. It prescribes that the judicial authority should consider legal criteria relating to the merits of the detention and order provisional release if it is unreasonable, and secondly, it implies the right to release pending trial under reasonable circumstances.[55]

A significant factor in the balancing of relevant arguments pro and against release is the defendant's age. In a number of judgements, ECHR established a violation of Article 5 §3 due to the excessive periods of detention where the authorities did not take the young offender's age into consideration when deciding on the extension of pre-trial detention. That was the case in *Selçuk v. Turkey,* where the applicant charged with robbery spent four months in pre-trial detention at the age of sixteen, and also in *Nart v. Turkey* in relation to the applicant who spent forty-eight days in detention at the age of seventeen on suspicion of armed robbery of a grocery shop and was kept in a prison with adults[56] In *Nart,* ECHR emphasised that the question of whether or not a period of detention is reasonable had to be

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51 *Ibid.*, § 47

52 *Agit Demir v. Turkey* (2018), app. no. 36475/10, §44-45

53 *Blokhin v. Russia* (2016), app. no. 47152/06, § 171 -172

54 *Ichin and Others v. Ukraine* (2010), app. nos. 28189/04 and 28192/04, § 39 – 40

55 Harris, D.J.; O'Boyle, M.; Bates, E.P.; Buckley, M., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights,* Oxford University Press, 2014, p. 338

56 *Nart v. Turkey* (2008), §33

determined on a case-specific basis, by considering whether or not there is a genuine requirement of public interest that outweighs the rule or respect of individual liberty.[57] Furthermore, the Court established a violation of Article 5§3 due to the excessive length of detention in *Güveç v. Turkey,* where the 15-year-old applicant charged with the offence of carrying out activities for the purpose of bringing about the secession of part of the national territory, was kept in pre-trial detention for a four and a half years.[58] In *Dinç and* Çakir *v. Turkey,* the Court found that the reasons given in the decisions of the domestic courts were not sufficient or relevant to justify the applicants' continued detention which lasted in total one year and two months, whereas they did not provide any explanation as to the insufficiency of alternative measures to ensure the appearance of applicants at the trial who were taken into custody for having made and used Molotov cocktails at the age of 17.[59]

In *Kuptsov and Kuptsova v. Russia,* the Court noted that the detention of the first applicant which lasted slightly more than eleven months deprived him not only of his liberty, but also of an opportunity to attend school and pursue secondary education.[60] The Court concluded that the domestic authorities bore responsibility for the four-month delay in the commencement of the trial taking into account the fact that a higher than usual degree of diligence in the conduct of the proceedings was required in view of the first applicant's age, and as a result he was denied a trial within a reasonable time in violation of Article 5 §3.[61] In the recent judgement *Zherdev v. Ukraine,* the Court concluded that although the reasoning for the severity of the charges against the applicant (at the age of 16 he was accused of murder and theft) and the risk of his absconding or interfering with the investigation had been given in the initial order for detention, it did not evolve with the passage of time. On several occasions, the domestic courts failed to provide any reasons whatsoever for their decisions for the extension of detention and, in view of the length of the applicant's detention (three years), this was sufficient to conclude that there has been a violation of Article 5 §3.[62]

However, it should be emphasised that the young age and the prolonged detention itself are not sufficient to determine the breach of Article 5. Thus, in *J.D. v. Denmark*, where a 15-year-old applicant was charged with rape and homicide of an 85-year-old woman, the Court concluded that, having regard to the nature and

[57] *Ibid.*, § 29. See Fair Trials, *op. cit.* note 1, p. 34

[58] *Güveç v. Turkey* (2009), §108 – 110.

[59] *Dinç and* Çakir *v. Turkey* (2013), app. no. 66066/09, § 60. – 66

[60] *Kuptsov and Kuptsova v. Russia* (2011), §91

[61] *Ibid.*, § 94

[62] *Zherdev v. Ukraine* (2017), app. no. 34015/07, § 123 – 124

severity of the crimes committed and to the vital significance of determining an appropriate sanction to be imposed on the applicant, the period of one year and four months, during which two forensic psychiatric examinations were carried out, cannot be considered excessive to such an extent that for that reason alone there was a breach of the invoked article.[63] The other important factor for this conclusion was the fact that, for almost the entire period, the applicant was placed in a secure institution for young offenders meaning that Danish courts applied a less interfering measure than the ordinary pretrial detention.[64]

### 3.2.3. *Article 5 § 4*

Regarding the procedural rights of minor detainees, the Court believes that the nature of the proceedings and the capabilities of an applicant determine whether the legal representation is required, in addition to the applicant's personal presence, by Article 5 § 4 of the Convention in an oral hearing in the context of an adversarial procedure.[65] The Court considers it to be essential for a lawyer to be present at a hearing where a juvenile is remanded in custody, otherwise a necessary safeguard would be denied.[66] In *Kuptsov and Kuptsova,* the Court concluded that the appeal proceedings did not meet the "equality of arms" requirement since the counsel did not appear at the hearing where the first applicant was remanded in custody and neither the first applicant nor his lawyer were present at the appeal hearing, whereas the prosecutor attended and made oral submissions, so the first applicant was not afforded an adequate opportunity to participate in the examination of his appeal.[67] Furthermore, the Court believed that the periods of thirty-three days to examine the first applicant's appeal against the detention order and twenty-five days to examine the appeal against the extension order cannot be considered compatible with the "speediness" requirement of Article 5 § 4.[68] In *Grabowski,* the Court found that the decision of dismissing the child's application for release did not explain the legal basis for his continued detention in the shelter for juveniles and was therefore contrary to Art. 5 §4.[69]

63 *J.D. v. Danmark* (2012), app. no. 34421/09, § 59

64 *Ibid.* § 63

65 *Kuptsov and Kuptsova v. Russia* (2011), § 100. As a general rule, a detainee should have a right to participate personally in a hearing where his detention is discussed

66 *Bouamar v. Belgium* (1988), app. no. 9106/80, § 60

67 *Kuptsov and Kuptsova v. Russia* (2011), §102

68 *Ibid.,* §107

69 *Grabowski v. Poland* (2015), §62 – 63. See My lawyer, My Rights: European case law regarding the rights of children in conflict with the law – General table (August 2017), [http://www.mylawyermyrights.eu/Mlmr/european-court-of-human-rights/] Accessed 06.05.2019

### 3.2.4. *Article 3*

International documents on human rights set special requirements for the treatment of minors during the pre-trial detention, and the lack of these requirements may in certain circumstances, especially when it has detrimental effect on their health, lead to inhumane and degrading treatment and subsequently to the violation of Article 3 of ECHR. Thus, in *Blokhin v Russia*, the Court established a violation of Article 3 on account of the lack of necessary medical treatment at the temporary detention centre for juvenile offenders, having regard to his young age (12 years old) and a particularly vulnerable situation, as he was suffering from ADHD.[70] In *Güveç v. Turkey,* the Court reached the same conclusion having regard to the applicant's age (15), the length of his detention in prison with adults (four and a half years), the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure to take steps with a view to preventing his repeated attempts to commit suicide.[71]

## 4. NEW EU STANDARDS: DIRECTIVE (EU) 2016/800

Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, adopted as the fifth legislative measure under the EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings in 2016, provides the minimum rules concerning the procedural rights of children, *inter alia*, the rights of children deprived of their liberty in criminal proceedings.[72] In accordance with the Charter of Fundamentals Rights of the European Union, the Directive emphasises the child's best interest as the leading principle in the actions of EUMS.

The Directive sets specific guarantees for children deprived of liberty in line with the existing international standards, however, the added value of the Directive is that upon its adoption these soft law standards became the binding obligations for EUMS. This is especially important in relation to some new safeguards which were not present in earlier binding international texts, such as the right of medical examination.[73]

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70 *Blokhin v. Russia* (2016), § 148

71 *Güveç v. Turkey* (2009), § 98

72 For the detailed genesis of the Directive see 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 *Vol.* 2, 2016, pp. 109 – 119. Also Rap, S.E.; Zlotnik, D., *The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused Reflections on the Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings*, European Journal of Crime, Criminal Law and Criminal Justice, *Vol.* 26, 2018, pp. 115 – 118

73 See Duroy; Foussard; Vanhov, *op. cit.* note 6, p. 15

### 4.1. Limitations to deprivation of liberty and alternatives to detention

According to Article 10, the deprivation of liberty of a child at any stage of the proceedings may be imposed only as a measure of last resort and limited to the shortest appropriate period of time, taking into account the age and individual situation of the child, and the particular circumstances of the case.[74]

The Directive follows the wording of the UNCRC and the Guidelines on child-friendly justice requiring the "shortest appropriate time", unlike ECHR which, as a stricter standard, requires the shortest possible time.[75] What amounts to the 'shortest appropriate period of time' and 'the measure of last resort' in a specific case is open to interpretation, which is consistent with the approach taken by ECHR.[76]

In accordance with the *ultima ratio* nature of detention, the Directive calls for the use of the measures alternative to detention, if appropriate,[77] such as the prohibition for the child to be in certain places, an obligation for the child to reside in a specific place, restrictions concerning contact with specific persons, reporting obligations to the competent authorities, participation in educational programmes, or, subject to the child's consent, participation in therapeutic or addiction programmes.[78]

Even though the Directive provides for the right to an individual assessment in order to identify the specific needs of children at the earliest appropriate stage of the proceedings (Art. 7), which may be of use, *inter alia*, for assessing the appropriateness and effectiveness of any precautionary measures, if the child is in the pre-trial detention and his/her waiting for the availability of individual assessment would risk unnecessarily prolonging of such detention, it should be possible to present an indictment in the absence of an individual assessment.[79]

Any detention should be based on a reasoned decision, subject to judicial review by a court. Such a decision should also be subject to periodic review, at reasonable intervals of time, by a court, either *ex officio* or at the request of the child, the child's lawyer, or a judicial authority which is not the court. These decisions must be taken without undue delay.

[74] Directive 2016/800, Article 10

[75] MIPREDET, *op. cit.* note 9, p. 15

[76] Fair Trials, *op. cit.* note 2, note p. 34

[77] Directive 2016/800, Article 11

[78] Directive 2016/800, Recital 46

[79] *Ibid.*, Recital 39

### 4.2. Right to information and right to legal assistance

As regards the right to information, Directive 2016/800 is a step forward in the right direction as it imposes obligation to EUMS to introduce the child-specific provision for the right to information in criminal proceeding, which is presently not the case.[80] When children are made aware that they are suspects or accused persons in criminal proceedings, they have to be informed promptly about their rights in accordance with Directive 2012/13/EU on the right to information in criminal proceedings [81] and about general aspects of the conduct of the proceedings. They must also be informed about the rights set out in this Directive.

Where a child is deprived of liberty, the letter of rights provided to the child pursuant to Directive 2012/13/EU should include clear information on the child's rights under this Directive.[82] That information has to be provided at the earliest appropriate stage of the proceedings, in respect of the right to limitation of deprivation of liberty and the use of alternative measures, including the right to periodic review of detention, as provided for in Articles 10 and 11, and, upon deprivation of liberty, in respect of the right to specific treatment during such deprivation of liberty, as provided for in Article 12.[83] Also, children should receive information in respect of the right to a medical examination at the latest upon the deprivation of liberty.[84]

Furthermore, according to Article 5, EUMS have to ensure that the holder of parental responsibility of the child or, where that would be contrary to the best interests of the child, another appropriate adult, is provided with the information that the child receives in accordance with Article 4. In addition, in accordance with the Directive on the access to a lawyer, they have to be informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto.[85]

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80 Radić, I., *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*, EU and comparative law issues and challenges series, vol 2, 2018, EU law in context – adjustment to membership and challenges of the enlargement, Faculty of Law Osijek, 2018, p. 486

81 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1

82 Directive 2016/800, Recital 21

83 *Ibid.*, article 4. For detailed analysis of right to information under this Directive see Radić, *op. cit.* note 80, pp.483 – 386

84 Directive 2016/800, Recital 20

85 Article 5, 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] OJ L 294/1

As regards the right to legal assistance, the Directive did not prescribe mandatory legal free of charge assistance during all stages of the criminal procedure,[86] whereas EUMS may, according to Article 6 (6), derogate from the obligation to provide legal assistance. Yet, regarding children deprived of their liberty, the safety net was installed, [87]as it requires that children are in any event assisted by a lawyer when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive and during detention.[88]

### 4.3. Right to specific treatment

Article 12 requires from the EUMS to undertake special measures to ensure adequate treatment of children deprived of liberty, including the requirement of separation of children from adults unless it is considered to be in the child's best interests not to do so,[89] health care, education and family life. Hence, EUMS have to take appropriate measures to ensure and preserve their health and their physical and mental development; right to education and training, even when these children have physical, sensory or learning disabilities; effective and regular exercise of their right to family life; access to programmes that foster their development and their reintegration into society and respect for their freedom of religion or belief. Children who are deprived of liberty should meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with the investigative and operational requirements.

Taking into account a particularly vulnerable position of children deprived of liberty, and in order to ensure their personal integrity, the right to a medical examination without undue delay is provided for in Article 8.[90] Medical examination, with a view to assessing general mental and physical condition, should be as non-invasive as possible and carried out by a physician or another qualified professional, either at the initiative of the competent authorities or in response to a request of the child, the holder of parental responsibility or the child's lawyer.

Finally, it derives that the Directive strengthens the existing standards on deprivation of liberty of children, however the EU legislator have not used the entire potential and the benefits that this Directive could have generated. As some com-

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86 See Rap, Zlotnik, *op. cit.* note 72, p. 131

87 Cf. Cras, *op. cit.* note 72, p. 114

88 In the light of the temporal scope of the Directive, such detention means pre-trial detention. *Ibid.*, p. 114

89 Children may be detained with young adults, unless this is contrary to the child's best interests

90 Directive 2016/800, Recital 41

mentators stated, it could have homogenised the EU approach to pre-trial detention issues such as the maximum duration of pre-trial detention by implementing a stricter standard in conformity with the international guidelines.[91]

## 5. CROATIAN LAW ON PRE-TRIAL DETENTION OF MINORS

### 5.1. Legal grounds

Pre-trial detention of minors in the Croatian legislation is regulated by the Juvenile Courts Act (JCA) and the Criminal Procedure Act (CPA).[92] CPA prescribes two substantive conditions for ordering pre-trial detention: the reasonable suspicion that a person committed an offence and the existence of at least one of five grounds for pre-trial detention, which, together with specific conditions under JCA, must be met for the ordering of this measure to children.[93] In comparison, not all EUMS impose special criteria for children; in some jurisdictions, the same criteria apply for children and adults.[94]

According to Article 66 of JCA, when conditions for pre-trial detention exist pursuant to CPA, the pre-trial detention shall be ordered against the minor only as a measure of last resort, in proportion to the severity of the offence and the expected sanction, in the shortest necessary duration and only if its purpose cannot be achieved with precautionary measures, measures of temporary accommodation or home detention.[95] This provision encompasses all the relevant international standards which set up pre-trial detention as a measure of last resort.

In deciding on the pre-trial detention, the judicial authority should be guided by the principle of proportionality,[96] taking into account all the relevant factors with special diligence, not only the gravity of the offence which is reflected through the height of the prescribed sanction, but also the expected sanction in the specific situation. The latter factor is of the utmost importance and should be assessed

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[91] Duroy; Foussard; Vanhov, *op. cit.* note 6, p. 15.

[92] Criminal Procedure Act, Official Gazette 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017

[93] Pre – trial detention may be ordered if there exists reasonable suspicion that a person committed an offence and if there is at least one of five grounds for pre-trial detention described by CPA (*causae arresti*): danger of flight, danger of collusion, danger of repeating the offence, danger of harassment of the public when the offence was committed under especially grave circumstances, disciplinary pre-trial detention. See, Krapac, *op. cit.,* note 2, p. 389.

[94] MIPREDET, *op. cit.* note 9, p. 6

[95] Article 66 (1) JCA

[96] On principle of proportionality and pre-trial detention see Đurđević, Z.; Tripalo, D., *Trajanje pritvora u svjetlu međunarodnih standarda te domaćeg prava i prakse*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), *Vol.* 13, No. 2, 2006, p. 576 – 578

with special diligence in the proceedings towards junior minors who cannot be subjected to juvenile imprisonment, as only correctional and security measures can be imposed upon them. Notwithstanding the fact that the legislator did not exclude the possibility of ordering pre-trial detention to this category of minors, it should be seen as an exceptional situation and used very restrictively in situations where not only the circumstances of the offence are grave, but, in accordance with the purpose of the proceedings towards minors, where personal and all other circumstances indicate that it would be in the best interest of the child.

### 5.2. Formal prerequisites

Pre-trial detention as the most severe measure for securing the presence of a defendant can be ordered only by a court, whose jurisdiction depends on the stage of the procedure.[97] During the preliminary and preparatory proceedings, a juvenile judge can order pre-trial detention upon the motion of the state attorney. After the submission of a proposal for the pronouncement of a juvenile sanction, the juvenile panel decides on ordering, prolonging or vacating the pre-trial detention. The panel is required to examine the existence of legal conditions for the further prolongation of pre-trial detention every month until the final decision is taken. Besides the mandatory *ex officio* control of the soundness of the pre-trial detention, CPA provides judicial control upon the appeal of the parties which may be filed within the term of three days and decided by a juvenile panel of the same or higher-instance court;[98] and optional control upon a motion of defence for the court to vacate the pre-trial detention.[99]

The judicial authority decides on the pre-trial detention after a non-public hearing to which parties may participate and must be summoned thereto. When the arrested minor is brought before a judge, the judge will question the minor in a form of evidentiary action of questioning and afterwards decide on the pre-trial detention.[100] The state attorney and the defence counsel must be present during the questioning.

According to the amended CPA, the statement of explanation of decision on the pre-trial detention must specifically and comprehensively indicate the facts and

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97 Munivrana Vajda, M.; Ivičević Karas, E., *Croatia*, in: Verbruggen, F.; Franssen, V., Alphen aan den Rijn (eds.), International Encyclopedia of Laws: Criminal Law, NL: Kluwer Law International, 2016, p. 182

98 Article 67(4) JCA

99 Munivrana Vajda ; Ivičević Karas, *op. cit.* note 97, p. 183

100 Rittossa, D.; Božićević Grbić, M., *Zakon o sudovima za mladež – reformski zahvati i praktične dileme,* Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), *vol.* 19, No. 2, 2012, p. 663

the evidence supporting reasonable suspicion and reasons for the pre-trial detention, as well as the reasons why the purpose could not be achieved by a less severe precautionary measure and the reasons for justifying further prolongation of the pre-trial detention. These amendments resulted from the ECHR judgements against Croatia where the Court established a violation of Article 5§3 due to the insufficiently reasoned decisions of the national courts who had prolonged duration of this measure against the applicants.[101] This requirement is especially important in the context of the pre-trial detention against minors.

In exercising supervision over the execution of the pre-trial detention, a juvenile judge is required to visit detainees once a week, receive oral and written complaints from them and take appropriate actions in order to remove the irregularities detected.[102]

JCA prescribes special provisions on the duration of pre-trial detention. During the preliminary proceedings, it may last for a maximum of one month, and, for justified reasons, it may be extended for a maximum of one additional month. If a minor is under preparatory proceedings, the pre-trial detention may be prolonged for a further month. In accordance with the *ultima ratio* requirement, the total duration of the pre-trial detention until the finality of the decision cannot exceed one half of the time prescribed for the duration of the pre-trial detention for adults as per the provisions of Article 133 paragraphs 1, 2, 3 of CPA. Hence, the maximum duration of the pre-trial detention against minors until the decision has become final is twenty-two and a half months for criminal offences subject to legally prescribed long-term imprisonment.

### 5.3. Procedural guarantees

According to JCA, the juvenile judge is obliged to immediately inform the parents, custodian or institution responsible for the minor`s education and care, as well as the social welfare centre on the provisional measures, precautionary measures and pre-trial detention in an enclosed institutional facility.[103] This provision reflects the European standards on the right of a suspected and accused child to have a third person informed of their deprivation of liberty,[104] however, in accordance with the Directive 2013/48/EU, our legislator should add the possibility of

[101] E.g. *Margaretić v. Croatia* (2014), app. no. 16115/13, see Konačni prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku, Zagreb, 2017, p. 73, [edoc.sabor.hr/DocumentView.aspx?entid=2004803] Accessed 06.05.2019

[102] Article 66(5) JCA

[103] Article 68 (1) JCA-

[104] See Art 5(2) of Directive 2013/48/EU

informing another appropriate adult if informing of the holder of parental responsibility would be contrary to the best interests of the child.

The right to information for suspected/accused children in criminal proceeding in Croatia is not regulated by special law (JCA), which means that the general provisions of CPA apply to children.[105] Regarding the pre-trial detention, that means that a minor will be served the letter of rights together with the decision on pre-trial detention.[106] JCA does not contain any provisions on the right to information of specific rights, *inter alia,* the rights regarding the deprivation of liberty, as prescribed in Directive 2016/800. Consequently, JCA should be amended in order to transpose the provision of the Directive which provides that the child should be informed of the right to the limitation of deprivation of liberty and the use of alternative measures at the earliest appropriate stage in the proceedings, including the right to a periodic review of detention, as well as the right to a medical examination.

The Croatian legislator prescribes mandatory defence for the minors from the first examination and throughout all the stages of the criminal procedure, which also includes the situations concerning the deprivation of liberty. In that way, the Croatian law is harmonised with the European standards and provides even higher guarantees, whereas Directive 800/2016 allows an exception from that right[107]. The communication of the detained minor with his/her lawyer during PTD is, pursuant to CPA and in accordance with Directive 2013/48/EU, confidential and cannot be subjected to any restrictions.[108]

### 5.4. Placement in an enclosed institutional facility

According to Article 66(2), a minor against whom the pre-trial detention has been ordered should be placed in an enclosed institutional facility. The enclosed institutional facility for the placement of a minor must have a diagnostic department and a department for education and work in small groups. During the placement, the minor should be provided with work and education useful for his upbringing and occupation.[109] By adopting this provision, the conditions for the pedagogi-

105 Radić, *op. cit.,* note 80, p. 480

106 Art 239 (2) CPA

107 JCA provides only one exception in situation when state attorney decides in accordance with principle of opportunity. Article 54(2)

108 Art 139 (5) CPA, for comment on coherence of JCA with Directive see Horvat, L., *Postupovna jamstva za djecu koja su osumnjičena ili optužena u kaznenim postupcima sukladno Direktivi EU/2016/800*, HLJKZP (Zagreb), *Vol.* 25, No. 2, 2018, pp.596 – 600

109 Article 66 (3) JCA

cal treatment of juvenile detainees were created, and thus also the possibility to include the time spent in the enclosed institutional facility within the pronounced correctional reformatory measure.[110] However, this well-conceived idea has yet to be realised, even though it was translated into law in 2011, since enclosed institutional facilities have still not been established, which has seriously brought into question the entire concept of the pre-trial detention focussed on the needs and upbringing of the minors.

In June 2013, the Minister of Justice issued a *Decision on the establishment of special detention units for the enforcement of pre-trial detention of minors* as a temporary solution until the establishment of special enclosed institutional facilities.[111] According to the Decision, special detention units for minors have been established in fourteen prisons. In a special detention unit, the minor is separated from adults, but if he/she is placed in the unit alone and such accommodation appears to have a harmful impact on his/her health, the prison director has to immediately inform the competent court for the purpose of procuring its approval for the placement of the minor with an adult who would not be detrimental to him/her. The minors should be allowed to stay in the open space of the prison separately from adults and they should be allowed up to ten visits per month for at least thirty minutes. However, as it follows from the Report of the Ombudsman for children, apart from the administrative decision and the name suggesting the presence of minors, these special detention units are no different from those for adult detainees.[112] In addition, in 2014 the Committee on the Rights of the Child expressed its concerns regarding the fact that children are subjected to a prolonged pre-trial detention, that they are still detained with adults in some institutions, and that the conditions of detention facilities for children and reformatories are inadequate.[113]

Besides the frequent visits and prolonged stays in the fresh air, other specific requirements of the detention of minors cited by the international documents and JCA have not been systematically provided. Mostly, the minors have not been

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110 Article 66 (4) JCA, see Božićević-Grbić, M.; Roksandić Vidlička, S., *Reforma maloljetničkog kaznenog prava i sudovanja*, HLJKPP (Zagreb), *Vol.* 18, No. 2, 2011, p. 709. See Article 25 (4) JCA

111 Odluka ministra pravosuđa od 22. svibnja 2013. godine o osnivanju posebnih zatvorskih jedinica u kojima se izvršava istražni zatvor određen maloljetniku, KLASA: 730-02/13-01/45, URBROJ: 514-07-01-02-01/5-13/17

112 Izvješće pravobraniteljice za djecu, 2017, Republika Hrvatska Pravobranitelj za djecu, Zagreb, 2018, pp. 96-97,
[http://dijete.hr/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/] Accessed 06.05.2019

113 Committee on the Rights of the Child: Concluding observations on the combined third and fourth periodic reports of Croatia, CRC/C/HRV/CO/3-4, 13 October 2014, p. 16
[https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/HRV/CO/3-4&Lang=En] Accessed 06.05.2019

provided with work or education, continuous psychosocial support, and other standards that would make the deprivation of liberty less stressful and ensure the minimum conditions appropriate to their age.[114] These shortcomings were particularly pronounced in the case of the prolonged detention of a fourteen-year-old girl accused for aggravated murder. As the Ombudsman emphasises, despite the self-initiative proactive work of the prison in attempting to secure education and other standards, the absence of systemic solutions has prevented the proper implementation of international documents and the law of the child's rights and interests.[115]

According to the available data, only the prisons in Zagreb and Osijek contain a greater number of juveniles, therefore the Ombudsman recommends the establishment of enclosed institutional facilities in these two cities for the needs of the entire country.[116] On the other hand, the Government of the Republic of Croatia indicates the need to re-examine the establishment of a separate facility, justifying it with a small number of children in pre-trial detention,[117] which is a standpoint contrary to all international standards.

### 5.5. Case law

In the case law of the Supreme Court of the Republic of Croatia, it has been confirmed in many instances that, in relation to minors, the provisions on the pre-trial detention should be interpreted more restrictively than in relation to adults. Hence, in one decision, the Supreme Court concluded that a continued stay in pre-trial detention (more than three months) would jeopardise the continuation of regular education of the minor accused of drug abuse.[118] In addition, in the recent case of a fourteen-year-old child accused of an aggravated murder of a 3-year-old child, the Supreme Court abolished the ruling of the first-instance court on the prolongation of pre-trial detention due to the lack of sufficient reasoning on decisive facts regarding the possibility of replacing the pre-trial detention as the most severe coercive measure with less severe precautionary measures.[119] However, its later decision in the same case was not so argumentative and was consequently abolished by the Constitutional Court of Republic of Croatia.

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114 Izvješće pravobraniteljice za djecu, *op. cit.* note 112, pp. 96-97

115 *Ibid.*

116 *Ibid.*

117 Izvješće o radu pravobraniteljice za djecu, Republika Hrvatska Pravobranitelj za djecu, Zagreb, 2019, p. 108, [http://dijete.hr/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/] Accessed 06.05.2019

118 Supreme Court of Republic of Croatia, II Kž 145/2006-3, 24 February 2006

119 Supreme Court of Republic of Croatia, II Kž 324/17-4, 14 September 2017

The Constitutional Court concluded that the reasons for the prolongation of the pre-trial detention against the applicant, who was detained for more than seven months at the time, were not sufficient nor relevant to the conclusion on the reasonable justification and necessity of application of the pre-trial detention on the basis of the danger of repeating the offence, especially in the context of the adequacy of the conditions of enforcement of this measure in accordance with Article 66 paragraphs 2 to 4 of JCA and the application of UNCRC.[120] Afterwards, upon a new constitutional complaint by the same applicant, the Constitutional Court concluded that the Supreme Court, in accordance with the decision U-III-170/2018, comprehensively assessed the appeals and adequately explained the reasons for the prolongation of the pre-trial detention, i.e. they adequately elaborated the existence of particular circumstances indicating the danger of repeating the same or similar criminal offence and the reasons for the conclusion that the purpose of pre-trial detention in her case cannot be achieved with a more lenient measure.[121]

In this context, we should refer to the conclusion of the Supreme Court according to which the pre-trial detention of a minor essentially does not constitute deprivation of liberty in the conventional sense of that term as it consists of a "special treatment in controlled conditions adjusted to her needs and oriented towards creation of positive basis for future life."[122] Although all aforementioned factors should indeed be contained in this measure as required by the international standards, we must critically assess this conclusion on a case-specific basis because Croatia has not established a systematic approach to this problem in practice, even though the Decision of Minister of Justice tried to compensate for this shortcoming. In this regard, regrettably the Constitutional Court failed to give a more detailed consideration to the applicant's allegations of inadequate conditions regarding the execution of this measure in relation to the young age of applicant, i.e., to the fact that there was no adequate psychosocial assistance, socio-pedagogical treatment nor education provided. In fact, the lack of these elements can bring into the question the proportionality of the measure in relation to the child's age and the child's best interest.

## 6. CONCLUDING REMARKS

The main principles enshrined within the international and European instruments on children's rights and the ECHR case law can be summarised as follows:

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[120] Paragraphs 8 – 9, Constitutional Court of Republic of Croatia, U-III-170/2018, 18 January 2018

[121] Paragraph 9, Constitutional Court of Republic of Croatia, U-III-801/2018, 9 March 2018

[122] Supreme Court of Republic of Croatia, II Kž 59/2018-4, 9 February 2018

the pre-trial detention of children should be used only as a measure of last resort, for the shortest appropriate time and where it is strictly necessary to detain them; children should have special treatment, be held separately from adults, and appropriate measures should be taken to ensure and preserve their health, physical and mental development, right to education, training and family life. With adoption of Directive 800/2016, these standards have become binding for EUMS, which guarantees a stronger and more effective protection of children deprived of their liberty across the EU, even though the EU legislator failed to set up somewhat stricter standards in that direction.

The analysed national legislation and case law indicate that the Croatian legislative framework is mostly in line with the European standards, although some amendments should be made in order to completely transpose the EU law. This relates to the right on information of specific rights of children in criminal proceedings, especially regarding the deprivation of liberty.

The major problem as regards the pre-trial detention is the fact that the legislation is not adequately implemented in practice, which makes it futile to a certain extent. JCA prescribes the conditions for the pre-trial detention of a minor deriving from the premise that it will be enforced in enclosed institutional facilities under special conditions that recognise the needs of a minor in accordance with Article 66 paragraphs 2 to 4. However, these facilities have not been established and, even though there are efforts in the sense that special detention units within prisons for adults have been established, the conditions in which minors are detained are not completely aligned with the international standards and national provisions as they do not recognise or support the specific needs of children. In this regard, the pre-trial detention of junior minors (14-16 years old) who cannot be subjected to juvenile imprisonment after the trial is perceived as particularly problematic.

However, it should be noted that the pre-trial detention of children of that age is allowed not only in Croatian law, but in the law of all EU Member States. Furthermore, ECHR does not deny the possibility of ordering the pre-trial detention to children of young age, i.e., it does not consider it a violation of the right to liberty *per se*, nor does the Directive set the age limit in that direction. However, it is of vital importance to adapt the content of this measure to the young age of perpetrators and use it in exceptional cases.

Whereas the time spent in an enclosed institutional facility during the criminal proceedings should be included in the pronounced correctional reformatory measures, these two measures, though different by their legal purpose and nature, should be essentially similar in content, i.e., they should both provide adequate

conditions for children. If the national law is unable to ensure these conditions in relation to the pre-trial detention, a more intrusive measure of coercion is imposed on junior minors during the trial than after the trial, which is unacceptable. This has been a well-recognised problem for a while, and instead of resorting to partial and provisional solutions, it is necessary to take a systematic approach which will primarily take into account the child's best interest.

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# DOES THE CRIME PAY OFF – (UN)EFFICIENCY OF CONFISCATION IN CROATIA - NEW PROPOSALS FOR ITS 60TH BIRTHDAY

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***ABSTRACT***

*The authors are addressing in the paper the (un)efficiency of the confiscation in Croatia. In order to fully implement confiscation of proceeds of crime, as the measure that guards property rights of the primary owner, is guardian of the principle of justice, and serves the protection of public interest, the authors are proposing three concrete amendments to existing regulation. In addition, the authors explained what protection of property encompasses, having in mind the sui generis character of this measure.*

***Keywords**: confiscation proceeds of crime, non-conviction confiscation, confiscation from third persons*

## 1. INTRODUCTION

Confiscation of proceeds of crime is the measure that guards property rights of the primary owner, it protects the principle of justice, and serves the protection of public interest. The right to property in Croatia is a Constitutional value[1] (art. 3, 48, 50) protected also by Protocol 1 Art 1 of the European Convention of Hu-

[1] Art. 3, 48 of the Consitution. Art. 50 of the Constitution which regulates the posibility of restiction of property rights -for more see Constitution of Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 08/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014

man Rights and Fundamental Freedoms (hereinafter: ECHR, Convention), [2] and various laws in Croatia.[3]

The similar was underlined by the European Court of Human Rights (hereinafter: ECtHR, the Court), in case of *Veits v Estonia:* [4] *"The Court considers that confiscation in criminal proceedings is in line with the general interest of the community, because the forfeiture of money or assets obtained through illegal activities or paid for with the proceeds of crime is a necessary and effective means of combating criminal activities (see Raimondo v. Italy, 22 February 1994, § 30, Series A no. 281-A). … Thus, a confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities, and also guarantees that crime does not pay …*[5].[6]

Understaning the legal nature of this measure is of paramount importance. There are two possible consequences depending on how the legal nature of confiscation of proceeds of crime is understood. If we consider the confiscation as a measure *ad rem*, we can confiscate the proceeds of crime from the third person and therefore, the measure should be considered as *sui generis* measure. Then, if we look at this measure *ad personam*, it is just another criminal sanction. In any case, since no one should benefit from committing criminal offence, which is one of main principles of the criminal law, the main purpose of this measure is not punishment, but restoring previous state of ownership by protecting property rights of real (primary) owner. Therefore, in this article, the authors argue and provide reason-

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[2] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms; [https://www.echr.coe.int/Documents/Convention_ENG.pdf] Accessed 20.03.2019, and Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Narodne novine, Međunarodni ugovori, br. 6/1999

[3] E.g. Act on Ownership and Other Real Rights, Official Gazette, No 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014 and Criminal Code, Official Gazette, No 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018. One old version of this act is available in English on: [http://pak.hr/cke/propisi,%20zakoni/en/OwnershipandOtherRealRights/EN.pdf] Accessed 20.03.2019

[4] Judgment *Veits v. Estonia* (2015) par. 71 EHRR; [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Veits%20v%20Estonia%22],%22itemid%22:[%22001-150303%22]}] Accessed 03.03.2019

[5] For more see Judgment *Denisova and Moiseyeva v. Russia,* (2010) § 58, EHRR, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Denisova%20and%20Moiseyeva%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-98018%22]}] Accessed 03.03.2019, with further references to Judgement *Phillips v. the United Kingdom*, (2001) EHRR, par. 52., [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Phillips%20v.%20the%20United%20Kingdom%22],%22itemid%22:[%22001-59558%22]}] Accessed 03.03.2019

[6] Vučko, M.; Šamota Galjer, M., *Imovinski izvidi i privremene mjere osiguranja radi primjene instituta oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem-* Priručnik za polaznike/ice, Pravosdna Akademija, Zagreb; 2016, [http://pak.hr/cke/obrazovni%20materijali/Imovinski%20izvidi%20i%20privremene%20mjere%20osiguranja.pdf] Accessed 12.03.2019

ing that the rules on confiscation from third person, or in case of the perpetrator's death, should be the same regradless of the type of implemented confiscation, i.e. ordinary or extended. In addition, in this article it is argued that the same should apply when the offence becomes statute barred, i.e. when staute of limitation elapses (including for privatization and ownership transformation crimes from the transitional period that are statute barred according to art. 31 para 4. of the Croatian Constitution) . In addition, authors argue, by respecting that these rules should be, in principle, in line with civil law regulation (Civil Obligations Act[7]), and protect the third person's property if they acted in *bona fide,* in cases of transferring the proceeds of crime to family members this should not be the case.

Therefore, the confiscation of the proceeds of crime is an instrument that, besides its restorative nature, prevents illegal enrichment of perpetrators in accordance with the principle of justice.[8] However, authors argue in the article that the institute itself must be understood and precisely and comprehensively regulated and effectively implemented in practice in order to satisfy the principle of legality and be in accordance with the rule of law. Hence, *Tanzi, Quirk and Bartlet* pointed out, "the efficient confiscation regime is needed to prevent the erosion of the rule of law."[9]

Furthermore, particular question is what should Croatia do with confiscated and collected proceeds of crime that belong to state budget? The authors argue in the paper that it should be invested in social needs of population and enhancement of their human rights, besides investing in crime prevention.

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[7] Civil Obligations Act, Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018

[8] Horvatić, Ž., *Kazneno pravo, Opći dio* 1, Sveučilište u Zagrebu, Pravni fakultet, Zagreb 2003, p. 249

[9] Cited in Ivičević Karas, E.; Roksandić Vidlička, S., *The Relevence of Asset Recovery Policies in Transitional Societies: The Croatian Perspecitve in Chasing Criminal Money* in: Ligeti, K.; Simonato, M. (eds.), Challenges and Perspectives On Asset Recovery in the EU, Hart, Oxford and Portland, Oregon, 2017, p. 19 referring to the article of Tanzi, Quirk and Boyle cited in van Duyne P., de Zanger W. and Kristen F.H:G., *Greedy of crime-money The realitiy and ethics of asset recovery* in: van Duyne *et al.* (eds), Corruption, Greed and Crme money: Slease and Shady Economy in Europe and Beyond, Wolf Legal Publishers, 2014, p. 235; Galiot, M.; *Oduzimanje imovinske koristi međunarodne pravne stečevine i suzbijanja podmićivanja,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci. *Vol.* 38, No. 1, 2017, pp. 547-572

## 2. PROPERTY RIGHTS AS A PROTECTED RIGHT IN THE ECHR IN LIGHTS OF CONFISCATION AND REDISTRIBUTION OF PROCEEDS OF CRIME[10]

In today's EU member states property is considered to be one of the key concepts of a legal order because "property is vital to society, since property and contracts jointly form the basis of exchange and trade, on which the market economy is built."[11] According to *Lavrysen*, the right to property can actually be considered to be instrumental for the protection of the social right involved. It is listed in the prioritization of the protection of the right to property in cases where this is *instrumental for the protection of other human rights*. Moreover, the right to property is listed in the EU Charter of Fundamental Rights, based on article 1 of Protocol 1 of the ECHR; it is common to all national constitutions and has been recognized on numerous occasions by the case law of the Court of Justice, initially in the *Hauer* judgment.[12] So as to reiterate that judgment,[13] the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the member states, which is also reflected in the First Protocol to the Convention. Based on the judgments, "restrictions should correspond to objectives of general interest pursued by the Community and that with regard to the aim pursued, they should not constitute a disproportionate and intolerable interference with the rights of the owner, such as to impinge upon the very substance of the right."[14]

The right to property is not embodied in the ECHR itself[15] but was added in its First Protocol and is enshrined in article 1 of Protocol 1 of the ECHR.[16] The First

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[10] This Chapter is based upon research as published in Roksandić Vidlička, S., *Prosecuting Serious Econimic Crimes as International Crimes, A New Mandate for the ICC?*, Duncker&Humblot, Berlin, 2017, Chapter: The Protection of Property as a Means to Achieve the Fulfilment of Economic and Social Rights – Some Comparison to other Regional Human Rights Mechanism, pp. 258-280, particulary see pp. 267-273

[11] Icelandic Human Rights Center, The right to property report

[12] Judgment of the Court of 13th December 1979. Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz*. [1979] ECR, Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße, Germany. Prohibition of new planting of vines. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CJ0044&from=EN] Accessed 20.03.2019

[13] Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz*. [1979] ECR, par. 4

[14] Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz*. [1979] ECR, par 5

[15] For more see The right to property – Introduction, [http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/] Accessed 20.03.2019; also see Bates, E., *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, 2010

[16] "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided

Protocol entered into force in 1954. The right to property is among the most frequently violated Convention rights, third only to the right to speedy trial and the right to a fair trial.[17]

Therefore, article 1 of Protocol 1 protects individuals or legal persons from arbitrary interference with their possessions by the state and "is not concerned in general with relationships of a purely contractual nature between private individuals."[18] Nevertheless, by determining the "effects of legal relations between individuals on property, the ECtHR checks that the law did not create such inequality that one person could be arbitrarily and unjustly deprived of property in favor of another".[19] As *Grgić, Mataga et al.* continue,[20] in certain circumstances, the state may be under an obligation to intervene in order to regulate the actions of private individuals.[21]

Regarding the Convention, in the first judgment concerning the property right in *Marckx v. Belgium*,[22] the ECtHR defined the scope of the right as it applies only to existing possessions and does not guarantee the right to acquire more.[23] This means that the protection of article 1 of Protocol 1 does not apply "*unless and until" it is possible to lay a claim to certain property and does not guarantee the right to acquire property*.[24] The notion of a "possession" is broadly interpreted by the ECtHR and

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for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."- The right to property – Introduction, [http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/] Accessed 20.032019

17 "As of 1st January 2010, 14.58% of all judgments in which the European Court of Human Rights found a violation of the ECHR concerned the right to property; 26.37% regarded the length of proceedings and 21.10% the right to a fair trial under article 6. - The right to property – Introduction, Introduction/Overview, Relevance, [http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/] Accessed 20.03.2019

18 Grgić, A.; Mataga, Z.; Longar, M.; Vilfan, A., *The right to property under the Eureopan Convnetion on Human Rights: A guide to the implementation of the European Convnetion on Human Rights and its protocols*. Human Rights Handbooks, No.10, Strasborug, 2007, p. 6

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 By recognizing that everyone has the right to the peaceful enjoyment of his possessions, article 1 is in substance guaranteeing the right of property. "The right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".- Judgment *Marckx v. Belgium* (1979), EHRR, par. 63., [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Marckx%20v.%20Belgium%22],%22itemid%22:[%22001-57534%22]}] Accessed 26.03.2019

23 Underlined by Grgić *et al., op. cit.,* note 18, p. 7

24 Carss-Frisk, M. *The right to property, A guide to implementation of article 1 of the Protocol No.1. to the European Convention on Human Rights*, Human Rights Handbooks, No. 4, The Council of Europe, 2001, p. 6; Grgić *et al., op. cit.,* note 18*,* p. 7

covers a range of economic interests, such as movable or immovable property, tangible or intangible interests (such as shares, patents, an arbitration award, the entitlement to a pension, the right to exercise a profession, etc.).[25] Interesting examples on property decisions in this respect can be found in the jurisprudence of The Human Rights Chamber for Bosnia and Herzegovina, although by 2003, it ceased to function. According to the Chamber, such a right is a "valuable asset" that "constitutes a 'possession' within the meaning of Article 1 as interpreted by the European Commission and Court."[26]

Article 1 "sought to ensure that any interference with property rights pursues the general or public interest."[27] In particular, public authorities can control the use of property to secure the payment of taxes or other contributions, or penalties. Hence, *in order to comply with the test of proportionality between the collective interest and the interests of an individual, interference should be conducted in such a manner which is not arbitrary and which is in accordance with the law*. Regarding its necessity, however, "the ECHR ... has generally accorded states a wide margin of appreciation".[28] As *Grgić, Mataga et al.* continue,[29] although article 1 of Protocol 1 contains no explicit reference to a right to a compensation for having one's property taken or another interference,[30] this is implicitly required in practice.[31]

The content of the right (article 1 of Protocol 1) comprises three distinct rules for protection. This analysis was first put forward in the case of *Sporrong and Lönnroth v. Sweden*,[32] which is one of the most important ECtHR judgments related to this Convention article.[33] The first rule is general and states the peaceful enjoyment of

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25 Grgić *et al., op. cit.,* note 18, p. 7

26 UN Human Rights Office of the High Commissioner Publication on Transitional Justice and Economic, Social and Cultural Rights 2014, pp. 28-29, [https://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf] Accessed 26.03.2019; Grgić *et al., op. cit.,* note 18, p. 7

27 Grgić *et al., op. cit.,* note 18, p. 5

28 *Ibid.*

29 *Ibid.*

30 The same was stated in Harris, D. J.; O'Boyle, M.; Warbick, C.; Bates, E.; Buckly, C., *Law of the European Convention on Human Rights,* Oxford University Press, Oxford 2014, p. 862

31 Referring to the case *Holy Monasteries v. Greece*. Judgment *Holy Monasteries v. Greece* (1997) EHRR 50, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Holy%20Monasteries%20v.%20Greece%22],%22itemid%22:[%22001-58180%22]}] Accessed 26.03.2019. The same was stated in Harris *et al, op. cit.,* note 30, p. 862

32 Judgment *Sporrong and Lönnroth v. Sweden* (1984) EHRR 50, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Sporrong%20and%20L%C3%B6nnroth%20v.%20Sweden%22],%22itemid%22:[%22001-57579%22]}] Accessed 26.03.2019

33 Grgić *et al., op. cit.,* note 18, p. 10

the property. The second rule covers the deprivation of possessions[34] and subjects it to certain conditions. The third rule recognizes that states are entitled to control the use of property in accordance with general interest. The last two rules must be interpreted in light of the general principle laid down in the first one.[35] Each of these rules corresponds to a different type of interference, which includes an interference justified by the need to secure payment of taxes or other contributions or penalties.[36] It must be emphasized that with respect to the control of the property (third rule), the ECtHR sets standards of proportionality at a lower level, consequently allowing for a wider margin of appreciation to states than in cases related to deprivation or expropriation (second rule).[37]

The right to property is not absolute and is subject to restrictions, but interference[38] should only be allowed if it is prescribed by law; this is in the interest of the public and necessary in a democratic society.[39] All three conditions must be fulfilled cumulatively, and "should only one of them not be met, there will have been a violation of the Convention".[40] In contrast to articles 8 to 11 of the ECHR, article 1 of Protocol 1 does not contain a catalogue of objectives to justify interferences. On a case-by-case basis, the Court ascertains whether the interference with the right to property pursues a legitimate aim. Member states enjoy a wide margin of appreciation when deciding which aim is legitimate.

Moreover, as in other cases, the ECtHR has established three main principles for the protection of property. Those are the principle of lawfulness,[41] the principle of

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[34] As stated, 'property and possessions' has a very wide meaning under article 1 of Protocol 1, including, but not limited to, physical goods, land and contractual rights, pension entitlements, shares, and patents. In some circumstances, the protection extends to corporate bodies as well as individuals.- Equality and Human Rights Commission, *The First Protocol The First Protocol to the European Convention on Human Rights contains three further fundamental rights* in Human Rights Review 2012 How fair is Britain? An assessment of how well public authorities protect human rights, p. 424, [https://www.equalityhumanrights.com/sites/default/files/human-rights-review-2012.pdf] Accessed 26.03.2019

[35] Human rights files, No. 11 rev. The European Convention on Human Rights and Property Rights by *Laurent Sermet* Professeur, University of La Réunion, Conceil d'Europe 1999, p. 8, [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11(1998).pdf] Accessed 26.03.2019

[36] Judgment *Sporrong and Lönnroth v. Sweden* (1984), EHRR 50, par. 61

[37] Christophe Golay, C.; Cismas, I; *Legal Opinion: The Right to Property from a Human Rights Perspective* 2010, p. 15, citing Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp *et al*., 2002, p.148

[38] See e.g. Judgment *Beyeler v. Italy* (2000) EHRR

[39] Grgić *et al., op. cit.,* note 18, p. 12

[40] *Ibid*.

[41] Interference with the right to property must satisfy the requirement of legality and legal certainty. "The Act must … contain certain qualitative characteristics and afford appropriate procedural safeguard so as to ensure protection against arbitrary action" (Grgić *et al., op. cit.* note 18, p. 13). For instance, in the case of *James v. The United Kingdom*, the ECtHR reiterated that "it has consistently held that the terms

a legitimate aim in the general (public) interest, and the principle of a fair balance (proportionality). The ECtHR has reiterated as the most important requirement of article 1 of Protocol 1 that any interference by a public authority with the right to peaceful enjoyment of possessions should be lawful.[42] This legal basis has to be sufficiently accessible, precise and foreseeable.[43]

The interference with the right to property has to pursue a legitimate aim in the general (public) interest: deprivations of property are only allowed if they are in the public interest, thus the control and use of the property has to be in accordance with general interest.[44] The limitations on rights foreseen in the Convention may only be used to the ends to which they are prescribed.[45] As stated above, the notion of "public interest" is understood to be an extensive one, and the ECtHR "respects the domestic authorities' judgment as to what is in the "public interest" unless the judgment is manifestly without reasonable foundation."[46]

Last but not least, the principle of proportionality requires that the interests of the affected individual, by measure of interfering with the right to property, has to be acknowledged in the interest of the general public. The interference must not impose an excessive or disproportionate burden on the individual.[47] As already stated, state authorities are "better placed" to assess the existence of both interests, "given their direct contact with the social process forming the country"; but the ECtHR "shall certainly take into account the existence of alternative solutions when ruling whether interference has been proportionate to the aim sought to be achieved as in other applicable cases, as well as in property cases."[48] In any event, "a fair balance between the demands of the general interest of the community

"law" or "lawful" in the Convention (do) not merely refer back to the domestic law but also [relate] to the quality of law, requiring it to be compatible with the rule of law" (Grgić *et al., op. cit.,* note 18, p. 13)

42 Judgment *Saliba et al. v. Malta* (2013) EHRR, par. 37., [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Saliba%20%20v%20Malta%22],%22itemid%22:[%22001-116073%22]}] Accessed 20.03.2019

43 For more see The right to property – Introduction, [http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/] Accessed 20.03.2019

44 Grgić *et al., op. cit.,* note 18, p. 13

45 Judgment *Beyeler v. Italy* (2000) EHRR, par. 111

46 Grgić *et al., op. cit.,* note 18, p. 14

47 Judgment *Valkov et al. v. Bulgaria* (2011) EHRR, par. 79, 80, 84-91., [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Valkov%22],%22itemid%22:[%22001-107157%22]}] Accessed 20.03.2019

48 Grgić *et al., op. cit.,* note 18, p. 14-15

and the requirements of the protection of the individual's fundamental rights"[49] is explored.

As stated, the main purpose of the confiscation of proceeds of crime is not punishment, but restoring previous state of ownership by protecting property rights of real (primary) owner. Therefore, according to the authors' opinion, confiscation of the proceeds of crime protects the rights of rightful (primary) owner.

In addition, particular attention should be given to the proportionality requirement regarding freezing the real estate or other property. In that contexts in case *Džinić v Croatia (2016)* the ECtHR found that there has been a violation of Art. 1. of the Protocol no. 1 to the Convention (Peaceful enjoyment of property rights) in conjunction with Art. 13. of the Convention (Right to an effective remedy).[50] In mentioned case Vukovar's County State Attorney's Office froze and seized the applicant's real property and register that restrain in the land registry, but the value of the restrained real property was disproportionate of the alleged pecuniary gain, so ECHR found that Croatia has violated applicant's property rights.

## 3. CONFISCATION IN CROATIA

In Croatia the confiscation of proceeds of crime is considered as independent and individual *sui generis* measure regulated with two main laws: the Criminal Code (hereinafter: CC)[51] and Criminal Procedural Act (hereinafter: CPA).[52] Additional issues relating confiscation are regulated within several other codes: the Law on the Office for Prevention of Corruption and Organized Crime (hereinafter: LOPC),[53] the Law on the Liability of Legal Persons for Criminal Offenses (hereinafter: LLLPCO)[54] and the Law on Mutual Legal Assistance in Criminal Matters

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[49] Judgment *Tre Traktörer Aktiebolag v. Sweden* (1989), EHRR, par. 46., [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Tre%20Trakt%C3%B6rer%20Aktiebolag%22],%22itemid%22:[%22001-57586%22]}] Accessed 27.03.2019

[50] Judgment *Džinić v Croatia* (2016) EHRR, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22D%C5%BEini%C4%87%22],%22itemid%22:[%22001-162868%22]}] Accessed 27.03.2019

[51] Criminal Code, Official Gazette, No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018. Croatia got its new Criminal Code in 2011, and it entered into force in 2013

[52] Criminal Procedural Act, Official Gazette, No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 521/2014,70/2017 (art 556-563)

[53] The Law on the Office for Prevention of Corruption and Organized Crime, Official Gazette, No. 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013 (art 50-61)

[54] Law on the Liability of Legal Persons for Criminal Offenses, Official Gazette, No. 151/2003, 110/2007, 45/2011, 143/2012

(hereinafter: LMLACM).[55] A special law, the Act on Proceedings of Confiscation of Pecuniary Gain Acquired through a Criminal Offence and Misdemeanors, that entered into force in 2010 and was abolished in 2017, was the main source of regulation of procedural matters. In 2017, CPA took over this task.[56]

The United Nations Convention against Corruption (hereinafter: UNCAC)[57] (art. 51)[58] had influence of the regulation of this institute, especially extended confiscation. As further elaborated by *Moiseienko,* [59] Article 51 of the UNCAC proclaims the return of assets diverted through corruption to be a 'fundamental principle' of the Convention.[60] Furthermore, rules on confiscation found in the UNCAC, the UN Convention against Transnational Organized Crime (UNCTOC)[61] and the (non-binding) Recommendations of the Financial Action Task Force (FATF)[62] as well as other different international conventions,[63] conventions and regulations of

55 The Law on Mutual Legal Assistance in Criminal Matters, Official Gazette, No. 178/2004

56 The Act on Proceedings of Confiscation of Pecuniary Gain Acquired through a Criminal Offence and Misdemeanours Official Gazette, No. 145/2010, 70/2017 which was abolished in 2017, and all of its regulations were placed in Criminal Procedural Code Art. 556-563

57 United Nations Convention against Corruption, 2003., [https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf] Accessed 27.03.2019

58 Also see Article 31(1) UNCAC

59 Moiseienko, A., *The ownership of confiscated proceeds of corruption under the un convention against corruption,* International and Comparative Law Quarterly Q, *Vol.* 67, July 2018, pp 669–694, p. 669, [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2C0108B5CB28B75294D9C10257F17653/S002058931800012Xa.pdf/ownership_of_confiscated_proceeds_of_corruption_under_the_un_convention_against_corruption.pdf] Accessed 27.03.2019

60 „The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard“. -Art 51 UNCAC

61 United Nations Convention against Transnational Organized Crime and the Protocols Thereto, [https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html] Accessed 27.03.2019

62 FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (October 2002, updated June 2017), [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf] Accessed 27.03.2019

63 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, [https://www.unodc.org/pdf/convention_1988_en.pdf] Accessed 27.03.2019; International Convention for the Suppression of the Financing of Terrorism, 1999, [https://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf] Accessed 27.03.2019; United Nations Convention against Transnational Organized Crime, 2000, [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf] Accessed 27.03.2019.; United Nations Convention against Corruption, 2003

the Council of Europe (CoE),[64] and regulations and EU Directive[65] of European Union (hereinafter: EU),[66] have influenced Croatian legislation on confiscation of proceeds of crime.

However, one should be reminded, the confiscation of proceeds of crime as independent and individual measure *sui generis* was not unknown in Croatia before its independence in 1990 and before mentioned EU, CoE and international regulation became incorporated in Croatian legislation. It was introduced as independent, however a security measure already in 1959[67] with amendments of the 1951 Criminal Code. It came into force in 1960.[68] Even until 1959 confiscation existed, but it was regulated in different laws containing particular criminal offences (e.g. active and passive bribery).[69] The status of this measure as security measure lasted until 1977, until confiscation had a character of criminal law sanction and status of security measure.[70] After this period its legal status changed and was no longer considered as a security measure.[71] It got a status as special independent measure *(sui generis).* The confiscation of pecuniary gain was again regulated in the new

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64 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990., [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141] Accessed 27.03.2019; Criminal Law Convention on Corruption, 1999, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173] Accessed 27.03.2019; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198] Accessed 27.03.2019; Council of Europe Convention on the Prevention of Terrorism, 2005, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196] Accessed 27.03.2019

65 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and pecuniary gain in the European Union [2014] L 127/39

66 Council Framework Decision 2001/500/JHA of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime [2001] OJ L182/1.; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, [2003] OJ L-196/45; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] L 68/49. Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] L 300/42

67 Petranović M., *Oduzimanje imovinske koristi ostvarene kaznenim djelom*; [www.vsrh.hr/CustomPages/.../MPetranovic-Oduzimanje_imovinske_koristi_ostv.doc] Accessed 01.03.2019

68 Kaleb, Z., *Novo uređenje instituta oduzimanja imovinske koristi prema noveli Kaznenog zakona s osvrtom na dosadašnju sudsku praksu - usporedba s odlukom o imovinskopravnom zahtjevu*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), *Vol.* 10, No. 2, 2003, p. 450.

69 *Ibid.*

70 *Ibid.*

71 As stated by Horvatić, confiscation of pecuniary gain is not security measure nor criminal sanction, but the consequence of the principle of justice Horvatić, Ž.; Novoselec, P., *Kazneno pravo - opći dio*, Zagreb, 2001, p. 474; also see Horvatić, *op.cit.,* note 8, p. 249

Criminal Code of Croatia in 1997 (hereinafter: CC97)[72],[73] after Croatia ratified the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[74,75] Amendments of 2008 to CC97 introduced additionally new form of extended confiscation.[76]

As stated by *Ivičević Karas and Roksandić Vidlička*[77] among academics, there have been discussions about other possible models of efficient confiscation even prior to 2010 political and legislative initiatives.[78] The reason was that traditional regime of confiscation was not an efficient solution for the new forms of crime particularly serious economic crime, corruption and organized crime. Also in practice, the confiscation was rarely pronounced despite the fact that the main motivation of perpetrators of economic crimes was acquiring unlawful pecuniary gain.[79] Because of all the mentioned above, as well as to comply with European and international obligations, it was necessary to reform the confiscation regime, and, among amendments, introduce the extended confiscation and new models of confiscation. Beside conviction based confiscation, also the non-conviction based confiscation was introduced.

Today we have two main models in Croatian criminal law - conviction based and non- conviction based confiscation. Usually there has to be a conviction for confiscation of proceeds of crime, but in some cases there is also possibility of confiscation when there is no conviction- non-conviction based confiscation (see more in par. 3.2). Both of the models are applicable for both types of confiscation – ordinary and extended.

Therefore, provisions on confiscation of pecuniary gain acquired through criminal offences are among the most frequently amended provisions of former Criminal

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[72] Criminal Code, Official Gazette, No 110/1997, 27/1998, 50/2000, 129/2000, 84/2005, 51/2001, 111/2003, 190/2003, 105/2004, 71/2006, 110/2007, 152/2008, 57/2011, 77/2011

[73] Novoselec, P, *Opći dio kaznenog prava,* Osijek, 2016, p. 458

[74] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. ETS No. 141 i Narodne novine, Međunarodni ugovori 14/1997

[75] See more in Kos, D., *Problematika oduzimanja imovinske koristi*, Hrvatski ljetopisa za kazneno pravo i praksu, *Vol.* 5, No. 2, 1998, str. 757

[76] Art. 82 para 2. CC97- Amenedends of CC97 Official Gazette, No 152/2008 , art. 2

[77] Ivičević Karas, E.; Roksandić Vidlička, S., *The Relevence of Asset Recovery Policies in Transitional Societies: The Croatian Perspecitve,* in: eds. Ligeti, K.; Simonato, M. (eds.), Chasing Criminal Money – Challenges and Perspectives On Asset Recovery in the EU, Hart, Oxford and Portland, Oregon, 2017, pp. 243-244

[78] See generally Elizabeta Ivičević, *Oduzimanje imovinske koristi stečene kaznenim djelom,* Hrvatsko udruženje za kaznene znanosti i praksu, Ministarstvo unutarnjih poslova RH, Zagreb 2004, pp. 170-173

[79] Ivičević Karas; Roksandić Vidlička, *op. cit.* note 77, pp. 243-244

Code, and of the new Criminal code which is in force since 2013.[80] As stated by *Kurtović* in 2000,[81] repeated by *Kaleb* in 2003,[82] the expansion of various forms of crime led to amendments of this institute, however practical application of this measure is far from effective.

On the other hand, applicability and efficiency of this measure is far from perfection, and therefore, the regulation of confiscation of proceeds of crime is always a "contemporary" topic in the Croatian society.[83] Therefore, this measure as an independent measure exists 60 years in Croatia[84] but it seems that its full efficiency and effectiveness is still waited.

Following the EU and the above mentioned international documents (e.g. UNCAC), one of the main principles of Croatian criminal law is that no one can benefit from the committed criminal offense. Croatian Criminal Code explicitly regulated this principle in the Art. 5. of the CC:[85] *no one may retain a pecuniary gain acquired through illegal means,* or that "crime does not pays off."[86]

In any case, at this point, Criminal Code regulates, two main categories of confiscation of proceeds of crime: *ordinary* and *extended* confiscation. Accordingly, CC defines what is considered as *proceeds of crime*, as well as *property* in the criminal law context and has specified the notions of direct and indirect pecuniary gain. Those definitions are harmonized with the relevant international and regional conventions and the EU regulations.[87] Direct pecuniary gain is *"any advantage*

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80 *Ibid.*

81 Kurtović, A., *Zakonska rješenja u svijetlu primjene mjera upozorenja, sigurnosnih mjera i oduzimanja imovinske koristi*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 7, No. 2, 2000., pp. 369-370. Also see Kos, *op. cit.,* note 75, p. 757

82 Kaleb, *op. cit.* note 67, p. 450

83 Bačić, F., *Kazneno pravo -opći dio*, V. izdanje, Zagreb, 1998, pp. 470-471; Kos, *op. cit.* note 75, p. 757; Kurtović, *op. cit.* note 80, pp. 369-370; Ivičević Karas, E., *Zakon o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem: neka otvorena pitanja i moguća rješenja*, Hrvatski ljetopis za kazneno pravo i praksu, 2011, pp. 557-578; Ivičević, E., *Oduzimanje imovinske koristi stečene kaznenim djelom*, Hrvatsko udruženje za kaznene znanosti i praksu Ministarstva unutarnjih poslova Republike Hrvatske, Zagreb, 2004, p. 94; Horvatić, Ž., Novoselec, P., *Kazneno pravo - opći dio*, Zagreb, 2001, p. 463

84 This institute has its roots in the Criminal Code of Norway form 1902, see Galiot, *op cit.,* note 9, p. 559, fn. 59

85 Principle of Confiscation of Pecuniary Advantage (proceeds of crime)- „No one may retain a pecuniary advantage acquired through illegal means"- art. 5 CC

86 Ivičević Karas; Roksandić Vidlička, *op. cit.,* note 77, pp. 243-244

87 See footnote (57, 60-66)

*which occurred by commission of the criminal offense"*[88] and indirect is *"the property in which direct pecuniary gain is altered or turned into, and any other benefit which derives from direct pecuniary gain or property to which direct pecuniary gain is changed or turned into."*[89]

The notion of property is also defined in the CC (Art. 87, § 23): "*property of any kind regardless of whether is tangible or intangible, movable or immovable, or are documents or legal instruments evidencing title to or interest in such property.*" Direct and indirect proceeds of crime, can be confiscated in ordinary way (ordinary confiscation) or through extended confiscation.

Ordinary confiscation is regulated in Art. 77. CC and extended in Art. 78. CC. Ordinary confiscation refers to pecuniary gain which originates from criminal offenses on the basis of a court decision establishing the commission of an unlawful act.[90] Extended confiscation is applied when criminal offences within the jurisdiction of the Office for Prevention Corruption and Organized Crime (subsequently: USKOK)[91] have been committed as well in cases of sexual exploitation of the child and in the cyber-crimes cases.[92] If the proceeds of crime gained from a criminal offence has been merged into legitimately acquired property, total property shall be subject to confiscation up to the estimated value of pecuniary advantage. The advantage gained from property in which the legitimately acquired property was merged with the pecuniary advantage gained from a criminal offence shall also be confiscated in the same manner and in the same ratio.[93] So distinction is not only in conditions, but also in manner of their application, and in the burden of proof.

### 3.1. Burden of proof in cases of the extended confiscation

The characteristic of the extended confiscation is the inversion of the burden of proof to the perpetrator. Once the prosecutor (USKOK) shows (proofs) that property owned by perpetrator is incommensurate with his/her legitimate income, the

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[88] Art 87, § 22 CCC
In 2018 definition of pecuniary gain has been changed, especially definition of direct pecuniary gain and expression "..which consists of any increase or prevention of reduction of property.." has been deleted form the definition. The definition of direct pecuniary gain before the amendnements stipulated "…which occurred by commission of the criminal offense any advantage which consists of any increase or prevention of reduction of property, which occurred by commission of the criminal offense"

[89] Art 87, § 22 CCC

[90] Art 77 § 1 CCC

[91] The Law on Office for Prevention Corruption and Organized Crime, Official Gazette, No 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013, 70/2017

[92] Art. 78 CC

[93] Art 78 § 3 CCC

burden of proof shifts to the perpetrator. He or she must make it probable that the mentioned property is of legitimate origin. If the perpetrator does not succeed, it is assumed his property represents "proceeds of crime:" If the perpetrator of a criminal offence within the competence of the Office for the Prevention of Corruption and Organized Crime owns or owned property that is incommensurate with his/her legitimate income and unless he/she makes it probable that the property is of legitimate origin, it is assumed that this property represents a pecuniary advantage gained from a criminal offence.[94] This legal solution was introduced in the Croatian criminal law under the influence of the international documents, primarily the UNCAC. Since this Convention is widely accepted, what reflects its importance, majority of the member states have introduced into their national legislation provisions of extended confiscation of pecuniary gain (Germany, Italy, Netherland, Spain, Austria, Finland etc.).[95] This legal reasoning was put under scrutiny of the ECHR. ECHR was dealing with the inversion of burden of proof in cases of extended confiscation especially whether it breaches the right to a fair trial (Art 6. ECHR). However, in *Salabiaku v France*,[96] *Phillips v UK*,[97] and *Grayson & Barnham v UK*,[98] ECtHR found no violation of art. 6 of the Convention.

According to the practice of the ECtHR it can be concluded that the inversion of burden of proof as possible reduction of the standard of proof in criminal proceedings as well as in cases of confiscation of proceeds of crime are not contrary *per se* to the presumption of innocence and right to fair trail, but that has to be determine *in concerto,* on case to case basis.[99]

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[94] Art 78 § 2 CC

[95] See Boroi, A., *Elements of Comparative Law on Extended Confiscation*, EIRP Proceedings, *2014* and Vettori, B.; Zanella, M., *Going beyond the confi scation of proceeds from organised crime activities: Stripping away ill-gotten gains from corruption in the enlarged Europe*, Apeldoorn, NL, 2011, pp. 271 – 290

[96] Judgment *Salabiaku v France* (1988) EHRR, par. 26, 27, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Salabiaku%20v%20France%22],%22itemid%22:[%22001-57570%22]}] Accessed 10.03.2019

[97] Judgment *Phillips v UK* (2001) EHRR, par. 33, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Phillips%22],%22itemid%22:[%22001-59558%22]}] Accessed 10.03.2019

[98] Judgment *Grayson & Barnham v UK* (2008) EHRR, par. 37-41, 45-50, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Grayson%20&%20Barnham%22],%22itemid%22:[%22001-88541%22]}] Accessed 10.03.2019

[99] Ivičević Karas, E. (a), *Komentar Zakona o postupku oduzimanjima imovinske koristi ostvarene kaznenim djelom i prekršajem,* Narodne novine, Zagreb, 2011, p. 28, 29; also see Ivičević Karas, E. (b), *Zakon o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem: neka otvorena pitanja i moguća rješenja*, Hrvatski ljetopis za kazneno pravo i praksu Zagreb, *Vol.* 18, No. 2, 2011, pp. 557-578. There was different conclusion of the ECHR in case *Geerings v Netherlands* (2007), EHRR, par. 36, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2230810/03%22],%22itemid%22:[%22001-79657%22]}] Accessed 10.03.2019

### 3.2. Non-conviction based confiscation

As a rule, it is necessary to have a conviction (conviction based confiscation). However, there is possibility of the confiscation of proceeds of crime based on the judgment by which the court established that the defendant committed the unlawful act that is the subject of the charge (e.g. in cases when the mentally incapable person has committed the act, who is not able for guilt).[100] This possibility is known as the non-conviction based confiscation;[101]

There is also special sort of non-conviction based confiscation in relation to proceeds of unlawful acts when criminal prosecution cannot be carried out because of the existence of relevant circumstances, especially if the person against whom the criminal proceeding has been instituted is permanently unfit to plead or unavailable to the authorities participating in the criminal proceeding if it is probable that those proceeds amount to at least HRK 60,000.00.[102]

In such cases so called determining decision is rendered - a judgement determining that the person committed an unlawful act and that that act generated proceeds.[103] Also in cases of non-conviction based confiscation proceeds of crime can be confiscated form third persons as well.[104] This possible is recognized also outside of the EU. In United States (hereinafter: US) when person is fugitive from justice in a criminal case that is pending as *Cassella* notes "to obtain a forfeiture order without being able to obtain a conviction, the government had to file a non – conviction-based confiscation"[105] and the toll which makes it possible is so called 'Fugitive Disentitlement Doctrine'.[106]

#### 3.2.1. *Perpetrators death*

Moreover, another special sort of non-conviction based confiscation is proscribed for extended confiscation in case of perpetrators death (ar. 78 CC). In such cases when the person against whom criminal proceedings have been instituted dies, the proceeds of crime by an unlawful act may be confiscated from his/her successors in

[100] See art. 560 §1 CPA

[101] For similar solutions of non-conviction based confiscation especially in United States see Cassella, Stefan D. *The American Perspective on Recovering Criminal Proceeeds in Criminal and Non-Conviction Based Proceedings*, in: Ligeti, K.; Simonato, M. (eds.), Chasing Criminal Money - Challenges and Perspectives On Asset Recovery in the EU, Hart, Oxford and Portland, Oregon, 2017, pp. 255-269

[102] Art. 560a §1 CPA

[103] Art. 560.d § 1 CPA

[104] art. 560.a § 5 CPA

[105] Stefan, *op. cit.* note 101, p. 264

[106] *Ibid.*

proceedings prescribed in CPC if it is probable that amount of proceeds of crime is at least HRK 60,000.00.[107]

But it is not clear could proceeds of crime be confiscated in cases of perpetrators death when ordinary confiscation is in question. The CC nor CPA are silent on this matter. CC only regulates the situation of perpetrators death when extended confiscation should be imposed.[108]

Therefore, following the legal reasoning based on the argumentum *a maiore ad minus,*[109] if the extended confiscation is possible from perpetrators' successors after perpetrators death, then it should be possible also for ordinary confiscation. However, the strict interpretation of CC provisions in art. 77 and 78 could lead to different solution. Art 77 CC (which regulates ordinary confiscation) does not mention perpetrator's death.

By this reasoning, after perpetrator's death proceeds of crime gained by an unlawful act may not be confiscated from his/her successors if ordinary confiscation is in place.

However, the occurrence of death is not mentioned as such for *non – conviction based confiscation* in the Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and pecuniary gain in the European Union (subsequently: Directive). It is however, proscribed in art. 4 of the Directive that Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings *in absentia*. Where such confiscation is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or

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[107] Art 78 § 6 CC and Art 560.f CPA: "If the person against whom criminal proceedings have been instituted dies, the pecuniary advantage gained by an unlawful act may be confiscated from his/her successors in proceedings prescribed by a special act".- Art 78 § 6 CCC

[108] Art 78 § 6 CC

[109] See Horvatić, Ž; Derenčinović, D.; Cvitanović, L.*, Kazneno pravo opći dio 1., kazneno pravo i kazneni zakon*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 131, also see Novoselec, *op.cit.,* note 73, p. 74

indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.[110]

It must be underlined that provisions of the Directive prescribe only minimum conditions, and every state can in its national law prescribe additional or different conditions for in this case extended confiscation, as long as it is in line with the Directive.

Confiscation is not the conviction of the successors, but it can present the restriction of the successors property rights. On the other hand, the need to balance this right with the principle that no one can benefit from criminal offence and the protection of social interest and the public order.[111] In that regard, in cases of *Silickiene v Lithuania*[112] and *Raimondo v Italy,*[113] the ECtHR did not find the violation of the right to property (art.1 Protocol I to the Convention) because the restriction of property rights was regulated by law for higher social interests.[114] This restriction, however must be proportional to the extent necessary to achieve these protection of the objectives.[115] Also, it should be noted that provisions of the UN Convention against Corruption contain the *non-conviction based confiscation* in art. 54. § 1 c states that the country "*consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.*"[116]

Therefore, according to our opinion, if the person against whom criminal proceedings have been instituted dies, the pecuniary advantage gained by an unlawful act may be confiscated from his/her successors not only when extended confiscation should have taken place but also ordinary one.

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110 See Arcifa, G. *The new EU Directive on confiscation: A good (even if still prudent) starting point for the Post-Lisbon EU strategy on tracking and confiscating illicit money*, May 2014. Università di Catania - Online Working Paper 2014/n. 64, p. 3; [http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_64_2014.pdf] Accessed 01.03.2019

111 Roksandić Vidlička, S.; Šamota Galjer, M., *Političko-gospodarski kriminalitet i prošireno oduzimanje imovinske koristi: Quo vadis, Hrvatska?,* Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 22, No. 2, 2015, p. 550

112 Judgment *Silickiene v Lithuania* (2012) EHRR, par. 63 and point 3 of the judgment, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Silickiene%20v%20Lithuania%22],%22itemid%22:[%22001-110261%22]}] Accessed 15.03.2019

113 Judgment *Raimondo v. Italy*, (1994), EHRR, par. 26-33, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Raimondo%20v.%20Italy%22],%22itemid%22:[%22001-57870%22]}] Accessed 15.03.2019

114 *Ibid.*

115 *Ibid.*

116 Art. 54. par.1. UNCAC

If the courts will not follow our standpoint and interpretation, for the reason of clarity, it is our proposal to amend regulation on ordinary confiscation (Art. 77 CC) to stipulate the possibility of non-conviction based confiscation in cases of perpetrator's death.

### 3.2.2. *Non-conviction based confiscation and statute of limitation*

Interesting question is what happens when the proceeding ends with so called formal decision because the statute of limitations has occurred. In that regard nor CPA nor CC say nothing.

Therefore, our opinion is that CC and CPA should stipulate this situation as well with the same conditions as in case of perpetrator's death for both categories of confiscation (ordinary and extended).

Furthermore, in cases when the person is permanently incapable for the proceeding (in which case the proceeding temporally ends with the decision of the prosecutor in terminating the investigation[117] or postponement of the hearing)[118] or is inaccessible to the authorities, the proceeds of crime will be confiscated. This serves as another legitimate reason for acceptance of our proposal. This solution seems to be possible, especially having in mind Art 4 para 2 of the Directive.[119] As *Arcifa* also underlines, the Directive in this article uses the term 'at least:'[120] the Directive prescribe only minimum conditions, and every state can in its national law prescribe additional or different conditions for in this case extended confiscation, as long as it is in line with the Directive. This openly provides the possibility to introduce such a solution into our legal system.

Furthermore, *Ivičević Karas and Roksandić Vidlička* referred to the importance of application of confiscation of proceeds of crime when analyzing Croatian Law on Exemption of the statute of limitation for war profiteering and privatization and ownership transformation crimes committed during the period of Homeland war.[121] The main purpose of this Law, rendered based on the Constitutional

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117 Art. 223 CPA

118 Art. 406 § 1 CPA

119 Directive 2014/42/EU, *op. cit.,* note 65, par. 13

120 Arcifa, *op. cit.,* note 110, p. 9

121 Ivičević Karas; Roksandić Vidlička, *op. cit.,* note 77, pp. 243-244. For more see Derenčinović, D., Pr*avna priroda instituta oduzimanja imovinske koristi i njegovo značenje u prevenciji organiziranog kriminala,* Policija i sigurnost, No. 3-4, 1999, pp. 163-164. See related articles of confiscation of pecuniary gain in organized crime cases: Ivičević Karas, E., *Oduzimanje imovinske koristi stečene kaznenim djelom u slučajevima organiziranog kriminala - osvrt na problematiku redukcije dokaznog standarda i inverzije tereta dokazivanja*, Hrvatska pravna revija, *Vol.* 4, No. 8, 2004, pp.102-110; Kokić, I., *Oduzimanje*

amendments in 2010,[122] stipulated in details which economic offences occurred in the process of privatization and ownership transformation occurred during Homeland war and peaceful integration have no statute of limitation (1990-1998).

Persons who have taken advantage of their privileged position or have otherwise acted unlawfully to acquire property, as well as their heirs, cannot expect to keep their gain in a society governed democratically through the rule of law. The underlying public interest in such cases is to restore justice and respect for the rule of law.[123] *Brems* goes on that[124] while the ECtHR generally grants a wide margin of appreciation to national authorities in the area of economic policy, it has broadened this margin in the context of a change in the economic and political regime.[125] This does not mean that the ECtHR's concrete legal criteria, let alone their application,

> are necessarily always in conformity with the ECHR. The Court accepts that the general objective of restitution laws, namely to attenuate the consequences of certain infringements on property rights by Communist regimes, is a legitimate aim and a means of safeguarding the lawfulness of legal transactions and protecting a country's socioeconomic development. However, the Court considers it necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs. To that end, it holds that legislation should allow the particular circumstances of each case to be taken into account, so that people who acquired their possessions in good faith are not made to bear a burden of responsibility that is rightfully the burden of the state that once confiscated those possessions.[126]

This reasoning should be applicable in transitional period as well, especially, which included conflict, not only in addressing former totalitarian regimes.

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*imovinske koristi stečene organiziranim kriminalom u nekim europskim zakonodavstvima,* Policija i sigurnost, *Vol.* 8, n. 3-4, pp. 191-195

[122] Constitutional Amendents Official Gazette, No. 89/2010

[123] An often-cited case is here Judgment *Velikovi et al. v. Bulgaria*, (2007) EHRR, par. 162-194, 222, 228, and points 2. and 3. of the judgment, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Velikovi%22],%22itemid%22:[%22001-79790%22]}] Accessed 15.03.2019

[124] Brems, E., *Transitional Justice in the Case Law of the European Court of Human Rights*, International Journal of Transitional Justice, *Vol.* 5, No, 2, 2011, p. 292

[125] See the Judgment *Jahn et al. v. Germany* (2005) EHRR, par. 1, 2, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Jahn%22],%22itemid%22:[%22001-69560%22]}] Accessed 15.03.2019. See more about the *Jahn case* in e.g. *Lebeck* 2006, 359–365

[126] Brems, *op. cit.*, note 124, pp. 292-293. See the judgment *Pincova and Pinc v. Czech Republic* (2002) EHRR,
[https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Pincova%20and%20Pinc%22],%22itemid%22:[%22001-60726%22]}] Accessed 15.03.2019

Ultimately, in Croatia this resulted in passing constitutional amendments in 2010, which allow for the retroactive prosecution of all transitional economic crimes. The Decision Proposal to Amend the Constitution of Croatia passed for this purpose specified that transformation and privatization do not have the expected economic outcome, i.e. no significant positive impact on the economic development of Croatia[127]

> Quite contrary, the implementation of transformation and privatization resulted in the increase of domestic and foreign debt, caused a significant increase in unemployment, disproportionate and fast enrichment of individuals, and unjust impoverishment of many. Also, on the other hand, this implementation caused the fall of wages and pensions in real terms in comparison to costs of living and a number of other consequences. It is just and in the spirit of international law to deny the perpetrators of such grave crimes the possibility to avoid criminal liability by application of the statute of limitations. The basis for the statute of limitations is the guarantee of legal certainty to citizens, but it is certain that this institute should not be the benefit for the perpetrators enabling them to practically legalize the effects of such acts through the statute of limitations.[128]

With regard to the violation of the right to property, the ECtHR concentrates on whether the interferences have clearly fallen within the scope of the legitimate aim of transition and whether the hardships suffered by the applicants have surpassed a certain "threshold of hardship that must be crossed in the condition of transition to find a breach of the right to property." [129]

So having in mind todays regulation we don't see why provisions of non-conviction confiscation in CPA shouldn't be amended on cases when criminal proceeding ended with formal decision when statute of limitation has occurred. Also it should be expanded to the cases on which Law on Exemption applies. Taking all of the above, it is our proposal that art. 77 and 78 of the CC should be amended to include the possibility to confiscate the proceeds of crime in cases when the statute of limitation occurs in non-conviction based confiscation.

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127 Roksandić Vidlička, S., *Prosecuting Serious Economic Crimes as International Crimes- A New Mandate for the ICC?,* Duncker & Humbolt, Berlin, 2017, pp. 115-116

128 Decision Proposal to Amend the Constitution of Croatia 2009, p. 8

129 Varju, M., *Transition as a Concept of European Human Rights Law,* European Human Rights Law Review, *Vol.* 14, No. 1, 2009, pp. 175-176. Also in Roksandić Vidlička, S., *Tranzicijsko zakonodavstvo i tranzicijska pravda kao metoda ostvarenja Ustavnih vrednota kroz praksu Europskog suda za ljudska prava*, (forthcoming, still unpublished paper), 2019

### 3.3. Property rights and confiscation from the third persons in Croatia

In cases of ordinary confiscation proceeds of crime can be confiscated only from the third persons who were not in good faith. Then again, in cases of extended confiscation proceeds of crime can be confiscated from family members no matter of the ground of the acquisition, and from third persons if they did not acquired in good faith and at a reasonable price.[130] The extended confiscation makes difference between family members and other persons, while ordinary confiscation does not.

We do not support this distinction. Sometimes a great amount can come from ordinary crimes on which extended confiscation cannot apply. For example, someone steals the car, a Porsche, and makes a gift to his daughter for eighteen birthday who acquires it in good faith. By current solution, it could not be confiscated.

Then again if someone commits the crime on which the extended confiscation applies, for example someone receives the bribe, the car (Porsche) and gives it to his daughter for eighteen birthday, then it can be confiscated. In what way those two situations are different having in mind above mentioned principles that nobody can benefit from the crime, what also protects the principle of justice and guards property rights?

Again, we are of opinion that the regulation when proceeds of crime are transferred to family members should be the same for ordinary and extended confiscation. The rules prescribed for extended confiscation should prevail.

### 3.4. Legal nature

Today, as it was stated, confiscation of proceeds of crime is considered a measure *sui generis*.[131,132] Its primary purpose is to restore the state of property as it was prior to the crime (*restitutio in integrum*), and not to punish the perpetrator. This is also the position of the Croatian Supreme Court. The Supreme Court of the Croatia has taken the stance that confiscation of pecuniary gain has restorative function,[133] and it is not a sort of punishment.[134] However, confiscation of proceeds of crime contains repressive elements as well and has to satisfy conditions of proportionality. Today's opinion is that it is not applied *ad personam*, but *in rem.* Although declared as a restorative measure, confiscation of pecuniary gain acquired through

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[130] Art 78 § 4, 5 CCC

[131] Developed under the influence of German legal doctrine

[132] see Ivičević Karas; Roksandić Vidlička, *op. cit.,* note 77, pp. 243-244

[133] Contributes to the earlier financial status of the victim and the perpetrator

[134] Ivičević Karas (a)*, Komentar…, op. cit.* note 99, p. 7

a criminal offence also fulfills the preventive purpose, special and general prevention. As it was mentioned earlier, measure is imposed by a court usually following the judgment the courts should apply it *ex officio*, regardless of the existence of the proposal of the prosecutor.[135]

*Novoselec[136] and Kos*[137] considered that previous regulation of this measure deemed this measure more as a punishment, than the measure.[138] *Derenčinović (1999)* was also debating about legal nature of this measure and indicated at its importance, and significance in prevention of organized crime (as *Kos, 1998; Roksandić Vidlička & Šamota Galjer, 2015).*

### 3.3.1. *Legal nature of confiscation depending on model of confiscation (conviction based or non-conviction based)*

Conviction based confiscation is actually measure of hybrid nature, primarily *ad rem,* but it has some elements of sanction, and in that regard is also measure *ad presonam*. This is in line with ECtHR practice. Issue of the legal nature of the measure of confiscation was the subject of interest of: ECHR, particularly in the case *Welch v United Kingdom.[139]* ECHR concluded that, in this case, confiscation should be considered as punishment: "*Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty. Accordingly, there has been a breach of Article 7 para. 1 (art. 7-1)*".[140] This case is a landmark case for establishing differences between legal nature of the measures and punishments since the ECHR determine criteria for its discernment. According to ECHR, „*...there are several aspects of the*

135 Roksandić Vidlićka; Šamota Galjer, *op. cit.,* note 111, p. 544

136 Novoselec, *op.cit.,* note 73, p. 455

137 See Kos, *op. cit.,* note 75, p. 753-759

138 For more see Novoselec, *op.cit.,* note 73, p. 454-459

139 Judgment *Welch v United Kingdom,* (1995) EHRR, par. 22, [https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Welch%22],%22itemid%22:[%22001-57927%22]}] Accessed 15.03.2019. "The applicant complained that the confiscation order that was made against him amounted to the imposition of a retrospective criminal penalty, contrary to Article 7 (art. 7) which reads as follows: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." He emphasized that his complaint was limited to the retrospective application of the confiscation provisions of the 1986 Act and not the provisions themselves ". - par. 22

140 Judgment *Welch v United Kingdom,* (1995) EHRR, par.35

*making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act."*[141] It also concluded *"…that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise (see paragraph 12 above);"*[142] and that it actually has a regime of punishment which can be seen in

1. *the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit (see sections 1 and 2 of the 1986 Act in paragraph 12 above);*
2. *the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused (see paragraph 13 above);*
3. *and the possibility of imprisonment in default of payment by the offender (see paragraph 14 above)".*[143] *Those "are all elements which, when considered together, provide a strong indication of, inter alia, a regime of punishment".*[144]

When it is of hybrid nature, *ad rem* and *ad presonam*, that it has elements both of the sanction and a measure (see Table 1).

**Table 1.** Legal nature of confiscation of proceeds of crime

| | conviction | non-conviction |
|---|---|---|
| *ad personam* | + | - |
| *ad rem* | + | + |
| | sanction and measure | measure |

As it can be seen from the Table above, conviction based confiscation of proceeds of crime has hybrid legal nature. Non-conviction based confiscation, is a measure and is applicable *ad rem*.

Similar stand point has *Arcifa* when underlying that "the Directive 2014/42/EU aims to harmonize their legislation. At a conceptual level, recovery systems of the proceeds and instrumentalities of crimes can be classified into two broad categories: the non-conviction based confiscation, typical of common-law countries (in this case, confiscation is a measure against property) and the confiscation based on the conviction (here confiscation is a sanction against the person) ".[145]

[141] *Ibid.,* par. 33

[142] *Ibid.*, par. 33

[143] *Ibid.*, par. 33

[144] *Ibid.*

[145] Arcifa, *op. cit.,* note 110, p. 3

This means it can be imposed on everybody, and proceeds of crime can be confiscated from perpetrator and from third persons to whom is transferred to. Furthermore this reasoning is in line with the main principle that no one can benefit from criminal offence. This also is one of the main arguments for our above mentioned proposals.

### 3.5. The question of (financial) efficiency of confiscation of proceeds of crime

Various studies have indicated that confiscation of pecuniary gain in practice is rare, and inefficient regardless of *ex officio* obligation of the court to impose this measure.[146] The research of final judgments in cases of economic crimes, conducted by *Novosel*, that covered the period between 1998 and 2006, ended with the “disastrous results”.[147]

It is important to underline that the success of confiscation could be followed from statistical reports. Discrepancies exist between adjudicated and actually confiscated proceeds of crime. According to data of State Attorney’s Office, in 2015 in the first instance judgements, adjudicated amount of confiscated pecuniary gain was 160.381.355,32 HRK (cca 21.102.809,91mln €).[148] The largest percentage of the confiscated pecuniary gain 45,7% (73.292.372,80 HRK; cca 9.643.733,26 mln €) was for economic criminal offences.[149]

In 2016 (192.270.016,85 HRK – cca 25.298.686,42 mln €),[150] from which for economic criminal offences confiscated amount was 131.432.881,00 HRK (cca 17.293.800,13 mln €),[151] which constitutes 68, 36 % of all confiscated proceeds of crime in that year.

In the first instance judgements in 2017, adjudicated amount was 299.633.535,31 HRK (cca 39.425.465,17 mln €),[152] and frozen amount was 198.295.528,60

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[146] Ivičević Karas (a), *Komentar… op. cit.,* note 99, p. 3, 13

[147] Novosel, D., *Financijske istrage i progon počinitelja gospodarskog kriminaliteta*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 14 No. 2, 2007, p.743

[148] State Attorney’s Office, *Report of the State Attorney’s Office (DORH) for 2015* (p. 53), Zagreb, 2016; available at: [http://www.dorh.hr/IzvjesceDrzavnogOdvjetnistvaRepublikeHrvatske] Accessed 01.03.2019

[149] *Ibid.,* p. 85

[150] State Attorney’s Office, *Report of the State Attorney’s Office (DORH) for 2016* (p. 48*),* Zagreb,2017; available at: [http://www.dorh.hr/IzvjesceDrzavnogOdvjetnistvaRepublikeHrvatskeZa] Accessed 01.03.2019

[151] *Ibid.,* p. 86

[152] State Attorney’s Office, *Report of the State Attorney’s Office (DORH) for 2017* (p. 50*),* Zagreb, 2018; available at: [http://www.dorh.hr/dorh07062018] Accessed 01.03.2019

HRK (cca 26.091.516,92 mln €).[153] For economic criminal offences which has the largest percentage in adjudicated amounts, the confiscated (the adjudicated) amount was 193.272.983, 91 HRK (cca 25.430.655, 77 mln €).[154] It seems how collected proceeds of crime resulting from economic offenses (especially Art. 246 and 247. CCC) for which the convictions were made, is considerably higher.[155] However, not so much of adjudicated amounts were really collected, most probably the collected amounts were the frozen ones. Unfortunately, there is no available statistical data on how much of mentioned amounts was actually collected and transferred into the State budget.

One must be aware that perpetrators often do not have the money or other assets which they might be forced to pay if the amounts have not been frozen before.[156] This is particularly evident in ordinary property crimes (theft, grand larceny, etc.) where the motive for committing a criminal offense is just to acquire resources for everyday life, and even with the attempt of enforced collection, the confiscation of property gain from the perpetrator remains unsuccessful.[157] But, confiscation of proceeds of crime does not have statute of limitations and the amount could be confiscated in any time, when the perpetrators subsequently acquire property that can be enforced.[158]

## 4. CONCLUSION

As stated in the introduction, confiscation of proceeds of crime is the measure that guards property rights of the primary (rightful) owner, is guardian of the principle of justice, and serves the protection of public interest. This measure is *sui generis* measure that still awaits to be integrated as an efficient measure in the Croatian legal system. Its legal nature is twofold, depending on model of confiscation – conviction based or non-conviction based (see Table 1). In any case, the regulation of this measure must be consistent, regardless whether it is regulated as ordinary or extended measure. Therefore, the authors propose the following amendments,

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153 *Ibid.,* p. 50

154 *Ibid.,* p. 92

155 The amounts which we are mentioned in State Attorney's Office Report are the amount adjudicated from the first instance courts, so we don't know what percentage of this amounts are adjudicated in final decisions

156 For forzen proceds of crime two regulations the Regulation on the Conditions and Procedures for Managing the temporarily seized Property in Criminal Proceedings Official Gazette, No. 103/2018 and the Rulebook on Procedure with Temporarily Seized Objects, Domestic or Foreign Means of Payment, on Securities and Documentation Official Gazette, No. 39/2017

157 *Ibid.,* p. 50

158 *Ibid.*

based on the fundamental principle that no one should benefit from committing criminal offence and taking into consideration that the main purpose of this measure is not punishment, but restoring previous state of ownership by protecting property rights of real (primary) owner. Due to that reason, rules on confiscation from third person, or in case of the perpetrator's death, should be the same regardless of the type of implemented confiscation, i.e. ordinary or extended. The same should apply, in our opinion, when the offence become statute barred, i.e. when statute of limitation elapses. Therefore,

1. according to our opinion, if the person against whom criminal proceedings have been instituted dies, the pecuniary advantage gained by an unlawful act may be confiscated from his/her successors not only when extended confiscation should have taken place but also ordinary one. If the courts will not follow our standpoint and interpretation, for the reason of clarity, it is our proposal to amend regulation on ordinary confiscation (Art. 77 CC) to stipulate the possibility of non-conviction based confiscation in cases of perpetrator's death.

2. Art 77 and 78 of the CC should be amended to include the possibility to confiscate the proceeds of crime in cases when the statute of limitation occurs in non-conviction based confiscation. Also it should be expanded to the cases on which for war profiteering and privatization and ownership transformation crimes committed during the period of Homeland war[159] applies.

3. the rules prescribed for extended confiscation should prevail (in cases of extended confiscation proceeds of crime can be confiscated from family members no matter of the ground of the acquisition, and from third persons if they did not acquired in good faith and at a reasonable price).

Moreover, in our opinion, the collected proceeds of crime should be invested in social needs of population, e.g. kindergartens, schools, hospitals, for compensating victims of the offences, etc. as well as in investing in crime prevention.[160]

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[159] Ivičević Karas; Roksandić Vidlička, *op. cit.,* note 77, pp. 243-244. For more see Derenčinović, D., Pr*avna priroda instituta oduzimanja imovinske koristi i njegovo značenje u prevenciji organiziranog kriminala,* Policija i sigurnost, No. 3-4, 1999, pp. 163-164. See related articles of confiscation of pecuniary gain in organized crime cases: Ivičević Karas, E., *Oduzimanje imovinske koristi stečene kaznenim djelom u slučajevima organiziranog kriminala - osvrt na problematiku redukcije dokaznog standarda i inverzije tereta dokazivanja*, Hrvatska pravna revija. *Vol.* 4, No. 8, 2004, pp. 102-110; Kokić, I., *Oduzimanje imovinske koristi stečene organiziranim kriminalom u nekim europskim zakonodavstvima,* Policija i sigurnost, *Vol.* 8, No. 3-4, pp. 191-195

[160] How some other countries have this reguated see Radha, I., *Asset Recovery in Four Dimensions: Returning Walth to Victim Countries as a Challenge for Global Governenc*e, in: Ligeti, K.; Simonato, M. (eds.), Chasing Criminal Money – Challenges and Perspectives On Asset Recovery in the EU, Hart, Oxford

It should be considered to form special fund or special account in State budget on which major part of confiscated assets would be deposited and used for fight against crime.[161] In this vain, the other problem that one must be aware of, are costs of managing confiscated property, especially costs of managing the real estates. The body in charge of managing and maintaining confiscated property is the Ministry of State Property,[162] and it is of outmost importance for the mentioned institution to behave like "good entrepreneur and keep or even increase the value of the confiscated property.

One special question which was not elaborated in this paper is why provisions of the extended confiscation (Art 78. CCC) should be applicable to other serious criminal offences such as economic crimes that are not under the scope of USKOK, or other serious crimes like crimes against humanity and human dignity (genocide, crime against humanity, crime of aggression, war crime). But this will stay open as the theme for further research.

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[161] Also proposed in the article Roksandić Vidlićka; Šamota Galjer, *op. cit.,* note 111

[162] Art. 563. CPA

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# EUROJUST AND EPPO ON THE CROSSROADS OF THEIR FUTURE COOPERATION[*]

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***ABSTRACT***

*On 19 June 2018, the Bulgarian Presidency of the Council, the European Parliament, and the European Commission agreed on the new Eurojust Regulation. The EU ambassadors confirmed the agreement on 20 June 2018 followed by final adoption of the Regulation in November 2018. This paper refers to the novelties introduced by the new Regulation as well as to the projection of relations between agencies after the finalization of OLAF and EPPO competencies. The authors are analysing current modalities for their cooperation on institutional, operational and administrative levels. Will Eurojust become obsolete and possibly a department in the European Public Prosecutor's Office or two differentiated bodies that have a future with separated competencies, independent of each other? What role will OLAF play in relation to both agencies, and what impacts will this have on national criminal justice systems? The authors analyse possible scenarios and point to perceived overlapping in competencies.*

***Keywords***: *Eurojust, EPPO, mutual cooperation, Regulation (EU) 2017/1939, Regulation (EU) 2018/1727*

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## 1. INTRODUCTION

Since its inception in 2002,[1] to date,[2] the European Union Agency for Criminal Justice Cooperation (hereinafter: Eurojust) has moved to an important EU body whose basic task is to improve and coordinate cooperation between judicial bodies of EU member states when these bodies conduct prosecution of criminal acts related to terrorism and organized crime.[3] In that sense, Eurojust has become an inevitable meeting point for national judicial bodies that coordinates their joint actions and helps solve practical problems arising from everyday practice.[4] Therefore, it can be pointed out that Eurojust has profiled and positioned itself as an EU body which, on the one hand, ensures a secure exchange of information between EU countries involved in the prosecution of criminal offenses that threaten organized life in the community and on the other hand enhances effective cooperation among them by facilitating the implementation of some instruments of judicial cooperation such as the European Arrest Warrant, joint investigative teams and the seizure and freezing of property.[5]

Eurojust has been intensively building its position as a body responsible for systematically supporting the EU member states in combating various forms of cross-border and organized crime and terrorism for more than fifteen years.[6] At the same time, the idea for establishing a special EU body responsible for systematic

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1 2002/187/JHA: The Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32002D0187] Accessed 15.04.2019

2 This was primarily demonstrated by strengthening the powers of national representatives and the college, strengthening the relationship between Eurojust, the European Judicial Network, and other bodies in the field of judicial cooperation in criminal matters. 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. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0426] Accessed 15.04.2019

3 See: Suominen, A., *The Past, Present and the Future of Eurojust*, Maastricht Journal of European and Comparative Law, *Vol.* 15, No. 2, 2008, pp. 217-234

4 Coninsx points out that Eurojust's most powerful tool is coordination meetings. Coninsx, M., *Eurojust*, in: Mitsilegas, V.; Bergström, M.; Konstadinides, T., (eds.), Research Handbook on EU Criminal Law, Elgar, 2016, p. 448

5 On problematic issues of the initiation of criminal investigations as well as proposing the initiation of prosecutions and the coordination of investigations and prosecutions according to Art. 85 para 1 subpara 2, (a) and (b) see: Weyembergh, A., *Coordination and initiation of investigations and prosecutions through Eurojust*, ERA Forum, *Vol.* 14, No. 2, 2013, pp. 179–185

6 This development was followed intensive cooperation with other EU agencies active in the fight against serious cross-border crime like Europol and the European judicial network. Weyembergh, A., Armada, I., Brière, C., *Competition or Cooperation?: State of Play and Future Perspectives on the Relations between Europol, Eurojust and the European Judicial Network*, New Journal of European Criminal Law, Vol. 6, No. 2, 2015, pp. 261–283.

prosecution of criminal offenses committed to the detriment of EU financial interests was also raised on the EU level.[7] The long-awaited result of the EPPO saga has received its final epilogue on 12 October 2017 with the adoption of the Regulation on enhanced cooperation from 21 EU member states (hereinafter: EPPOReg).[8] After many years of demanding negotiations, the groundwork and normative framework at the EU-level were created for the effective investigation and prosecution of criminal offenses committed to the detriment of EU financial interests.[9] The final embodiment of this supranational body of criminal prosecution was greeted with great relief, but at the same time, it has left open a number of institutional questions and procedural concerns that will have to be dealt with on the fly because the first real temptation and answers to serious theoretical and practical issues arise only when the EPPO really starts to live in a conglomerate between national legal orders and decisions that will be made at the European level.[10] Starting from the good experiences that Eurojust has had in its cooperation with the national judicial bodies so far, the question of its relationship with the EPPO and future cooperation with regard to a certain set of criminal offenses to which it will be responsible can rightly be raised.[11] This issue became particularly important when the European Parliament, wisely awaiting the completion of the EPPO procedure, adopted a new Eurojust Regulation aiming to prescribe the powers and tasks of Eurojust in the context of its cooperation with the EPPO.[12]

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7 The first idea of establishing the EPPO saw the light of day in the 1997 Corpus Juris, which resulted in a mini criminal code for the protection of the Community's financial interests, and then in the 2001 Green Paper on criminal law protection of the financial interests of the community and the establishment of a European Prosecutor. See: M. Delmas-Marty, M.; Vervaele, J.A.E., (eds.), *The Implementation of the Corpus Juris in the Member States*, *Vol.* 1, Intersentia, Antwerp-Oxford, 2000

8 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). [https://eur-lex.europa.eu/eli/reg/2017/1939/oj] Accessed 09.04.2019

9 Following the original proposal of 2013, a series of discussions evolved between the member states, Comission, Council, and the Parliament resulting in numerous amendments. See: Weyembergh, A.; Brière C., *Towards a European Public Prosecutor's Office (EPPO)*, Study for the LIBE Committee, Brussels, 2016

10 Herrnfeld rightly points out that the EPPO would be a new milestone in the development of the areas of freedom, security, and justice, raising new issues of the right balance between the prosecution and defence once when it assumes responsibility for the prosecution of PIF offences. Herrnfeld, H. H., *The Draft Regulation on the Establishment of the European Public Prosecutor's Office – Issues of Balance Between the Prosecution and the Defence*, in: Weyembergh, A.; Brière, C., (eds.), The Needed Balances in EU Criminal Law. Past, Present and Future, Hart, 2018, p. 411

11 It must be ensured that there is no duplication in mandates and that the law is clear on who is doing what. Csonka P.; Juszczak, A.; Sason, E., *The Establishment of the European Public Prosecutor's Office. The Road from Vision to Reality*, EUCRIM, No. 3, 2017, p. 131

12 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/

Therefore, this paper first examines the procedure for the adoption of the new Eurojust regulation with an emphasis on the consequences for the definite design of the relationship between Eurojust and the EPPO, bearing in mind the simultaneous "double track" procedure of discussion and adoption of EPPO and Eurojust regulations. Then, it analyses the new institutional framework of Eurojust by studying the new provisions of the Eurojust regulation, which opens up space for future cooperation between Eurojust and the EPPO. The central part of the paper critically considers the new relations between the EPPO and Eurojust, taking into account the current provisions of the regulation which regulate the normative framework of their powers and duties, examines the real possibilities of their cooperation, and tries to answer some of the issues that arise in the European and national context due to the potential overlapping of their competencies.

## 2. NEW EUROJUST REGULATION – LEGISLATIVE PERSPECTIVE

Along with the proposal of the EPPO regulation,[13] the European Commission has quite ambitiously presented a new proposal for the Eurojust regulation.[14] This has introduced a kind of "double track" procedure simultaneously discussing and deciding on the normative regulation of two different EU bodies, which should perform disparate functions but pursue a common goal.[15] This line of reasoning of the European Commission at first seems to be justified taking into account the role of Eurojust and its primary focus: "to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the member States' authorities and by Europol" (Art. 85. TFEU). An additional motive for such a procedure was probably found by the Commission in Art. 86 TFEU, which explicitly prescribes: "In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted

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EurojustRegulation/Eurojust%20Regulation%20(Regulation%20(EU)%202018-1727%20of%20the%20European%20Parliament%20and%20of%20the%20Council)/2018-11-21_Eurojust-Regulation_2018-1727_EN.pdf] Accessed 14.04.2019

13 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2013:0534:FIN] Accessed 14.04.2019. Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) COM (2013) 535, [https://eur-lex.europa.eu/procedure/EN/2013_256] Accessed 18.04.2019

14 Luchtmann, M.; Vervaele, J., *European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)*, Utrecht Law Review, *Vol.* 10, No. 5, 2014, pp. 134–135

15 In this regard see: Monar, J., *Eurojust's present and future role at the frontline of European Union criminal justice cooperation*, ERA Forum, *Vol.* 14, No. 2, 2013, pp. 198–199

in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust."[16] In addition, one of the key objectives of such a parallel reform was to ensure that Eurojust can cooperate closely with the EPPO upon its establishment. Here, the notion "cooperate" should be understood as the intention of the Commission to avoid any overlapping in jurisdiction between the EPPO and Eurojust since it is expressly provided for in the Regulation that Eurojust will not carry out his competences for those crimes under the jurisdiction of the EPPO. This, on the other hand, means that the Commission has conceived the role of Eurojust as a service that will supply the EPPO with all the necessary information and data that EPPO is going to need in order to successfully conduct investigations under his jurisdiction.

Interestingly, such a proposal from the Commission has not undergone significant changes during the debate in the Council. Moreover, the outcome of the negotiations was such that on 13 March 2015, the Council established a kind of general approach to the Eurojust regulation excluding its future relationship between Eurojust and EPPO.[17] The underlying reason for this was the fact that the EPPO debate had not advanced to the extent that the Council could make concrete conclusions regarding the future relations between the two bodies. Such a state of affairs merely confirms that the Commission's plan on the parallel double track system of discussion was rather ambitious. Namely, since both regulations address the same issues, i.e., the forms of future cooperation between such important bodies, it is clear that any delay in negotiations regarding the establishment of the EPPO inevitably prolonged the final agreement on the future functioning of Eurojust.

When the Eurojust regulation proposal, with such focal and practical difficulties, reached the Parliament, further progress in the negotiations was not possible. Therefore, further negotiations were blocked by the Committee on Civil Liberties, Justice, and Home Affairs (LIBE) until the issue of the future cooperation of Eurojust and EPPO is resolved. It is obvious that the Commission's decision on the double-track procedure for adopting such important regulations led to a certain degree of congestion in the proceedings since the actual institutional setting of the EPPO should have a key role in framing the operational relationship between the EPPO and Eurojust. Taking into account all the above-mentioned, the European Parliament recalled the importance of Eurojust's role in improving the judicial cooperation and coordination of the relevant judicial authorities of the member

16 Spiezia, F., *The European Public Prosecutor's Office: How to Implement the Relations with Eurojust*, EUCRIM, No. 2, 2018, p. 132

17 See: Mitsilegas, V., *EU Criminal Law After Lisbon. Rights, Trust and Transformation of Justice in Europe*, Hart, 2016, p. 101

states and in supporting investigations involving non-EU countries. It called on the Council to clarify the relations between Eurojust and the EPPO as well as, in particular, the implications of the collegiate structure and the EPPO's relation with OLAF in order to differentiate between their respective roles in the protection of the EU's financial interests.[18]

Consequently, further debates on the establishment of the EPPO lasted for the next two years before final completion when, on 5 November 2017, the European Parliament ultimately adopted a regulation implementing enhanced cooperation on the establishment of the EPPO.[19] This new momentum in the development of the EPPO has unblocked the Eurojust file in the Parliament with the LIBE Committee adopting a draft report on 19 October 2017 amending the original proposal of the Commission, which, among other things, discusses the future relations between the EPPO and Eurojust.[20] Basically, it has been decided that Eurojust will be responsible for the criminal offenses prescribed in the Annex 1 to the Regulation except for those criminal offenses that will be solely the responsibility of EPPO within the framework of enhanced cooperation between member states. At the same time, it was decided that the practical issues of their cooperation would be governed by a working arrangement between them. The decision making process between the Commission, Council, and Parliament on the new Eurojust regulation was finally completed by reaching an agreement on 10 July 2018 and formally adopted on 14 November 2018. The new Eurojust regulation came into force in December 2018, but the application was postponed for a period of one year to allow Eurojust and member states to prepare for the successful implementation of the new rules.[21]

[18] European Parliament resolution of 5 October 2016 on the European Public Prosecutor's Office and Eurojust (2016/2750(RSP)), [http://www.europarl.europa.eu/doceo/document/TA-8-2016-0376_EN.html?redirect] Accessed 15.04.2019

[19] On 8 June 2017, 20 EU member states reached a political agreement on the establishment of EPPO under enhanced cooperation. On 1 and 7 August 2018, the Commission gave its approval for the Netherlands (Commission Decision (EU) 2018/1094 of 1 August 2018) and Malta (Commission Decision (EU) 2018/1103 of 7 August 2018) to join the EPPO Regulation, so up to date 22 member states are involved in EPPO enhanced cooperation. Denmark, Hungary, Ireland, Poland, Sweden, and the United Kingdom do not participate in the EPPO

[20] On future relations of the EPPO and EUROJUST see: De Amicis, G.; Kostoris, R.E., *Vertical Cooperation*, in: Kostoris, R.E., (ed.), Handbook of European Criminal Procedure, Springer, 2018, p. 244

[21] The regulation entered into force on the twentieth day following that of its publication in the Official Journal of the European Union and shall apply from 12 December 2019 (Art. 82 Regulation)

## 3. RELATIONSHIP BETWEEN EUROJUST AND THE EPPO ACCORDING TO THE NEW REGULATIONS

Talking about future relations between EPPO and Eurojust is not an easy task. One reason is the very demanding provision of Art. 86 TFEU from which it derives that the "EPPO should be established from Eurojust".[22] Despite strong connotations transmitted to the outside, this provision has not been prominent in the true sense of the word. Thus, Spiezia points out that "the formula 'from Eurojust' marked one of the most delicate points for the European legislator and for everyone who tries to construe the treaty."[23] Weyembergh and Brière emphasize that "the exact meaning of such expression is far from clear and its concretisation has been extensively debated, concluding at the same time that regardless of the outcome of the debate, two entities will have a privileged partnership."[24] On the other hand, the current texts of both regulations emphasize administrative, managerial, and operational links between the EPPO and Eurojust.[25] Therefore, it should be noted that the relationship between the EPPO and Eurojust should not be viewed from the substantial but rather from the operational level observing the picture of mutual relations in future everyday work that will require good communication and cooperation regarding issues that will be appearing on a daily basis.

This, above all, operational way of cooperation between the EPPO and Eurojust is visible from the EPPOReg text, which explicitly emphasizes that the relationship between the EPPO and Eurojust should be founded on a close relationship between them based on mutual cooperation (Recital 10). Furthermore, guided by the principle of sincere cooperation, Eurojust should actively support the investigations and prosecutions of the EPPO as well as cooperate with it from the moment a suspected offense is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case (Recital 69). Therefore, it could be argued that the practical relationship between the EPPO and Eurojust should be based on concrete operational issues within their competencies. It means that the EPPO and Eurojust should develop a partnership that will include active cooperation in the areas of their jurisdiction. This will typically involve the

[22] See further: Ruggieri, F., *Eurojust and the European Public Prosecutor's Office After the Lisbon Treaty*, in: Ruggeri, S., (ed.), Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings, Springer, 2013, pp. 223–225

[23] Spiezia, *op. cit.,* note 16, p. 133

[24] Weyembergh, A.; Brière, C., *Relations Between the EPPO and Eurojust—Still a Privileged Partnership?*, in: Geelhoed, W.; Erkelens, L.H.; Meij, A.W.H., (eds.), Shifting Perspectives on the European Public Prosecutor's Office, Springer, 2018, pp. 172–173

[25] See: Espina Ramos, J.A., *The Relationship Between Eurojust and the European Public Prosecutor's Office*, in: Bachmaier Winter, L., (ed.), The European Public Prosecutor's Office. The Challenges Ahead, Springer, 2018, pp. 92–95

investigations conducted by the EPPO wherein an exchange of information or coordination of investigative measures in respect of cases within the competence of Eurojust is considered to be necessary or appropriate (Recital 102).

The aforementioned guidelines interpreted in EPPOReg received the confirmation in the recently adopted EurojustReg. In this respect, it is important to point out that Art. 50 (1) EurojustReg explicitly envisages the establishment and maintenance of close relationships with the EPPO based on mutual cooperation within their respective mandates and competences and on the development of operational, administrative, and management links between them. This provision has been supplemented by the requirement that Eurojust, in its operational procedure which is relevant to the EPPO, shall inform the EPPO of and, where appropriate, associate it with its activities concerning cross-border cases, including the following: (a) sharing information on its cases, including personal data, in accordance with the relevant provisions in this regulation; (b) requesting the EPPO to provide support (Art. 50(4)). Finally, the EPPO may rely on the support and resources of the administration of Eurojust. To that end, Eurojust may provide services of common interest to the EPPO (Art. 50(6)). Since the regulation expressly states criminal offenses[26] for which Eurojust is competent, a potential overlap in competences between the EPPO and Eurojust may arise. In order to address this problem already in the inception, EurojustReg explicitly stipulates that Eurojust will not exercise its competence in relation to criminal offenses for which the EPPO will undertake investigative and prosecutorial tasks and measures (Art. 3 (1)).[27]

Taking into consideration the presented ideas of cooperation between the EPPO and Eurojust, we should agree with Spiezia that their relationship can be seen in the operational-functional sense.[28] Although their mutual relations will be explicitly determined by the conclusion of a special working agreement, it should be emphasized that their future relationship should be viewed through the prism of their concordant activities in the context of achieving a common goal, i.e., the effective prosecution of perpetrators of criminal offences within their respective mandates. This can only be achieved if the starting points of their cooperation are mutual respect, assistance and cooperation, whether it is about the exchange of information, facilitating the EPPO's requests for judicial cooperation, or joint participation in judicial cooperation instruments.[29]

[26] See Annex 1 of the Eurojust Regulation

[27] Eurojust will act only exceptionally if member states which do not participate in enhanced cooperation on the establishment of the EPPO are also involved and at the request of those member states or at the request of the EPPO (Art. 3(1))

[28] Spiezia, *op. cit.*, note 16, p. 134

[29] *Ibid.*, p. 135

# 4. NEW AND IMPROVED EUROJUST UNDER THE INFLUENCE OF THE EPPO

## 4.1. Relationship of trust as a basis of cooperation

In order to understand the relationship between Eurojust and the EPPO, as envisaged by the new regulations, it is necessary to analyze both legal documents simultaneously. It is already clear from the introductory recitals of the regulations that the cooperation between Eurojust and the EPPO is described in both of them in the context of the competences of the agency to which the regulation relates. This is probably the result of the "double track" methodology in which regulations were made. It is generally stipulated that the European Public Prosecutor's Office should work closely with other institutions, bodies, offices, and agencies of the Union in order to facilitate the performance of its functions.[30] Specifically, it describes the cooperation of the two bodies and emphasizes mutual cooperation and respect.[31] Except for this general provision stated in the EPPOReg, and because of the importance of its work, in EurojustReg, it is stated that the EPPO should become a partner with Eurojust, particularly with regard to operational issues pertaining to their competencies.[32] What the EPPO Regulation calls "a partnership", the Eurojust Regulation calls "close relationship" between the two bodies.[33] This can be perceived as an additional guarantee that their cooperation will be at the expected level. The equivalence of their functions, taking into account the diversity of the mandate of each body, is reflected in the fact that the request for a meeting can be equally granted by the President of Eurojust and the European Chief Prosecutor. It is expected that the representatives of the two bodies will have to meet regularly to discuss and deal with questions of common interest.[34] Eurojust has so far shown itself to be a very useful partner in facilitating communication, real-time contacts, and coordination of judicial bodies of member states. Therefore, it is to be expected that this kind of cooperation from Eurojust will also be required in relation to the EPPO. Especially at the beginning of its mandate, the EPPO will have to use those benefits in terms of operational issues from Eurojust,[35] taking into account the experience and practice of Eurojust as well as the cooperation and trust that this agency has achieved with EU member states and partner countries.

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30 For further reference see EPPOReg, Recital 100

31 Marletta A., *Inter-institutional relationship of European bodies in the fight against crimes affecting the EU financial interests*, EUCRIM, No. 3, 2016, p. 142

32 For further reference see EurojustReg, Recital 102

33 For further reference see EurojustReg Art. 50 (1)

34 Spiezia, *op. cit.*, note 16, p. 132

35 Operational functions of Eurojust are set out under the Art. 4 of the EurojustReg

The trust between two bodies operating in the area of so-called enhanced cooperation should, at the very beginning, be at the level that goes beyond the original—given the bodies of the European Union—but it should certainly not be forgotten that the EPPO, in its mandate and responsibilities, is significantly different from Eurojust's. As has been established earlier[36] and confirmed by the EurojustReg, national representatives in Eurojust act in specific cases primarily on the basis of their national legislation, which allows them to do so and have no vertical responsibility towards the President of Eurojust in the sense of failing to comply with something that is inconsistent with national legislation. On the other hand, the EPPO is independent in its work, and after accepting the function, it is no longer vertically responsible towards the member state government. Therefore, a concrete definition of their relationship is expected in the forthcoming period. Particularly, an answer on how their cooperation will be idyllic in the situations where specific interests of an involved member state will be addressed through a specific subject. It is already noted in the work of Eurojust that national representatives, if they deal with the matter of national interest for the country they are coming from, will not act on the request of another member state if it is in conflict with the interests of their native state.

### 4.2. Certain aspects of the future interaction of Eurojust and the EPPO

In the regulation, Eurojust's competences are now clearly set out,[37] and the forms of serious crime for which Eurojust is competent are now listed in an Annex 1 of the regulation.[38] The EurojustReg also defines the categories of related offences for which Eurojust is competent. It also outlines that, in general, Eurojust shall not exercise its competence with regard to crimes for which the EPPO is competent. The practical details of Eurojust's exercise of competence, however, shall be governed by an additional working arrangement.[39] Ultimately, when requested by a competent authority of a member state, Eurojust may also assist with investigations and prosecutions for forms of crime other than those in Annex 1. It is true that Eurojust is set up to "combat serious crimes" in order to refer Eurojust's jurisdiction to the criminal nomenclature to more complex criminal offenses, but

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36 Weyembergh; Brière, *op. cit.,* note 24, pp. 172–173

37 Without referring to the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), as it was previously set in the 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

38 Eurojust regulation Annex 1

39 See also: Deboyser C, *European Public Prosecutor's Office and Eurojust: Love Match or Arranged Marriage?*, in: Erkelens, L.H.; Meij, A.W.H.,; Pawlik, M., (eds.), The European Public Prosecutor's Office. An extended Arm or a Two-Headed Dragon, Springer 2014, p. 82

in reality, this is not the case at all. Therefore, regardless of whether it is necessary to make delivery of some documents, to determine the address of a witness or defendant or to make a decision to freeze a property, it is always possible, without hesitation, to contact Eurojust.[40]

In cross-border cases, the exchange of information is particularly important. In that sense, Eurojust proved to be a very useful mediator in such exchanges through the organization of meetings for that cooperation and contacts between the judicial bodies of the EU member states.[41] There is no reason for this role of Eurojust not to be realized in relation to the EPPO. Both regulations envisage data exchange through IT systems. In this regard, we believe that it is of great importance to enable joint usage of specific technologies, i.e., through the Case Management System (hereinafter: CMS) already used by Eurojust, which would also contribute to increased trust. Although, it has been set by the regulation[42] that the CMS of Eurojust will be available to the EPPO, time will show whether it will be in the form of using the same system with additional user data or by linking a CMS with an autonomous system that would only be used by EPPO.[43] An additional barrier to such data exchange could be that not all EU member states participate in a system of intensified cooperation through the EPPO for which reason it is expected that it will not be willing to share all information from that system. Although the EPPO will take over the organizational dimension to achieve its full operational incentive, it still has room for improving the capacity of Eurojust in accordance with Art. 85 TFEU in particular in the field of the fight against terrorism, where more extensive information exchange is needed.[44]

Judicial cooperation in criminal matters at Eurojust is achieved through the work of national members. A national member may directly contact the competent authorities of his member state. This has been done to ensure full functioning of the work of national members so that they can contact the competent judicial authorities in their respective countries without any delay and to respond to the request of other national members at any time in the appropriate database. Issues concerning a national member and its powers are also regulated by the national legislations in all member states. In the Croatian Act on Judicial Cooperation in

[40] Eurojust Annual Report for 2018 p. 28, via [http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202018/AR2018_EN.pdf] Accessed 05.04.2019

[41] *Ibid.*, p 9

[42] EPPOReg Art. 100 (3)

[43] Deboyser, *op. cit.*, note 39, p. 89

[44] See also: Spiezia, *op.cit.*, note 16, p. 134

Criminal Matters with EU Member States (hereinafter: AJCCM),[45] it is regulated by the provisions of Art. 12. a.–12. d. Presumably, the same operational tactics will be used for the EPPO. When referring to national members, and in particular their tasks and powers, it is obvious that they must have the appropriate support in their "native states". That is why the formation of the National Coordinating System is foreseen in the EurojustReg as stipulated by the provision of Art. 12 f. of the AJCCM.

One of the most interesting mechanisms of judicial cooperation established in Eurojust, which proved to be very successful in the application, is its joint investigation team.[46] It is expected that the national members in Eurojust and the European Public Prosecutor will be members of a joint investigation team. That way, evidence-gathering actions can be carried out at the same time in several countries; for performing these actions, there is no need for standard requirements for international legal aid, and the actions that are being implemented in this way and the results obtained thereby (as a rule) are acceptable as evidence for all those participating states of the joint investigative team. In accordance with the domestic legislation, a national member of the Republic of Croatia is a co-signatory of the Joint Investigation Team Agreement. If this has been discussed and agreed upon during the coordination meeting, the national members of the participating states at Eurojust will organize a coordination center. The Coordination Center[47] is organized on Eurojust's premises, which are especially equipped for this purpose, primarily with a different type of IT device. National members or other officials at national offices are invited to participate in the work of the coordination center, and representatives of the judicial bodies of the involved countries may also be invited. The Coordination Center is held during "Action Day", when all Coordination Center participants in real-time track what is happening in their countries (arrests, interception of consignments, searches, etc.). Considering the fact that the EPPO will have access to all the benefits of Eurojust, it is expected that all this will greatly facilitate its work—especially since it is expected to deal with complex cases, where it is particularly important to have logistical support during the gathering of evidence. Experience in cooperation on the national level with agencies such as OLAF and Europol that has been developed so far—in which Eurojust has been involved, mainly as a facilitator of communication—should also be imple-

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[45] Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union, Official Gazette of the Republic of Croatia 91/10, 81/13, 124/13, 26/15, 102/17, 68/18

[46] In detail about the nature and legal nature of joint investigative teams see: Rijken, C., *Joint Investigation Teams: principles, practice, and problems Lessons learnt from the first efforts to establish a JIT*, Utrecht Law Review *Vol.* 2, No. 2, 2006, pp. 99–118

[47] For more about the Eurojust coordination centre, see the following: [http://www.eurojust.europa.eu/Practitioners/operational/Pages/eurojust-coordination-center.aspx] Accessed 15.04.2019

mented by the EPPO operational work. OLAF will probably no longer be able to perform all current functions.

This means that when it comes to full alignment with the EPPO and Eurojust, its competence will be changed. For example, instead of carrying out its own administrative investigations alone, it will have to comply with the EPPO before taking such actions. In this way, duplication of treatment or investigation will be avoided. More active involvement of OLAF is also expected in meetings between the EPPO and Eurojust. In order to truly have the functioning of the three bodies, further harmonization of their actions will need to be made through special working agreements and internal acts.[48]

### 4.3. Practical Projections of Cooperation between Eurojust and the EPPO

If a hypothetical situation is set in which the EPPO could seek specific assistance from Eurojust, we would consider it possible for three types of relations to occur when working on the case under its jurisdiction. The first case would refer to the situation in which the EPPO would seek the participation of Eurojust in the case of a member state that is a member of the EPPO. Let's call it a case of complete cooperation. In this case, the preconditions for cooperation will be at the highest level since the EPPO will, through Eurojust and its national members, be able to contact the domestic judiciary of that state and the delegated EPPO prosecutors who will be able to participate in coordination meetings with Eurojust national members and in all the operational permutations that have been introduced in the practice of Eurojust. It is even expected that the European delegated prosecutor could ask the judge to issue a European arrest warrant[49] to be executed in a state where the intervention of the national member of Eurojust could facilitate or support the enforcement. In the second case, where the EPPO will seek cooperation with the non-EPPO EU member state, there should be no bigger problems, but in this case, a greater involvement of Eurojust, i.e., the activation of mechanisms that nowadays function in the daily work of the agency, is expected. This means cooperation with the EPPO will only be facilitated through national members and the domestic judiciary of non-EPPO member states. It is expected that in this case, the EPPO will have to give more arguments in favour of its requests, i.e., that it will not have additional assistance through the European delegated prosecutors

[48] In detail see: Proposal for a Council Regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM (2018) 338 final, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A338%3AFIN] Accessed 15.04.2019

[49] Art. 33 of the EPPOReg

and will cooperate with national judicial officials. The contact points of the European Judicial Network could, in that situation, be a significant source of the additional facilitation of communication with a non-EPPO member state.[50] In the third alternative, there would be a situation in which the EPPO would seek the assistance of Eurojust in contact with non-EU countries that were partner countries of Eurojust. In these situations, it may be the most useful for the EPPO as it is at this stage still unclear how the requests for international legal aid issued by it will be interpreted by non-EU countries. The relationship between these countries with Eurojust and their steadfast trust in such situations could be of the greatest benefit to obtaining some evidence or providing any other form of international cooperation required by the EPPO.

## 5. CONCLUSION

By prescribing Eurojust and the EPPO in the form of a regulation, the European legislator has shown that both actors are considered to be particularly important for the future development of European criminal law. By confirming Eurojust, which is a continuing success story, and introducing a new European judicial body, it is a unique opportunity for a step ahead towards a concept of federal Europe in the area of criminal justice. Obviously, the simultaneous adoption of both regulations, which contain many links for the various fields concerned, allow them different forms of cooperation and further development of their cooperation in the future. From the perspective of both bodies, it is evident that the vision of the European Commission was obviously to form the EPPO as a completely separate body from Eurojust and to lay the foundations for their coexistence on the European stage. Despite formal separation, apparently knowing that such assistance would be needed, Eurojust was enabled to provide the EPPO functional support in its first years of operation. In addition to economic savings, this will surely contribute to the final redefinition of the division of their tasks, which was not provided in the text of the regulation because there was no suitable template to follow. This support will not undermine the guaranteed independence of the EPPO. It should be considered that many issues pertaining to jurisdiction or modality of action will also finally be defined when the coexistence and cooperation of the two bodies really begins to exist. In this context, the future working agreement of the EPPO with Eurojust must establish criteria that will make it possible to smoothly define the limits of their cooperation.

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[50] The main role of the EJN Contact Points is to facilitate judicial cooperation in criminal matters between the EU Member States, particularly in actions to combat forms of serious crime, [http://www.eurojust.europa.eu/Practitioners/European-Judicial-Network/Pages/European-Judicial-Network.aspx] Accessed 15.04.2019

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# CERTAIN WAYS OF PROVING THE CRIMINAL OFFENCE OF AGGRAVATED LARCENY, WITH SPECIAL REFERENCE TO THE SUSPECT'S INTERROGATION PURSUANT TO ARTICLE 208A OF THE CODE OF CRIMINAL PROCEDURE*

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***ABSTRACT***

*According to available data (statistical data, data from investigations, professional and scientific papers) property crime represents about two thirds of total crime in the Republic of Croatia. Proof of committing is very often based on personal sources of evidence and a significant number of criminal charges filed by the police with these criminal offenses are submitted to the State Attorney's Office. This article presents the state of affairs and trends of property crime, the way of proof, and analyzes the police's success in detecting and proving serious offenses (Article 229. of the Criminal Code). The work is based on the collected data from the police records of Aggravated Larceny crimes, with special emphasis on the suspect's interrogation based on Article 208a of the Criminal Procedure Act and the significance of the evidence thus obtained for proving the perpetration of the criminal offense. The research was conducted with the aim of determining the effects of the recently transposed 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) into the criminal justice system of the Republic of Croatia.*

***Keywords****: aggravated larceny, dismissal of criminal charges, evidence, interrogation of the suspect*

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## 1. INTRODUCTION

According to the data of the Ministry of the Interior of the Republic of Croatia for 2018, property crimes amount to 68.6% of the general crime. The criminal offense of aggravated larceny is the most common criminal offense in the field of general crime (29.3%) and in these criminal offenses, in 95.7% of cases the perpetrator is unknown at the time of reporting. The feature of this criminal offense is that it was the most widely reported criminal offense in 2018, as well as the third most resolved criminal offense, after the criminal offence of threat and theft.[1]

The criminal offence of aggravated larceny is described in art. 229. of the Criminal Code (Official Gazette of the Republic of Croatia, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, hereinafter CC). The research conducted in this paper shows, that in the Republic of Croatia, in the year 2018, the majority of incidences of aggravated larceny were committed in the manner described in art. 229. para 1. pt 1. CC (by breaking open, burglary or overcoming major obstacles) and then in the manner described in para. 1. pt. 2. of the same Article of the CC ("in a particularly dangerous" or "particularly impudent manner"). The third most common way of perpetration of aggravated larceny was by exploiting a situation caused by fire, flood, earthquake or other accident (Art. 229. para. 1. pt. 3. CC), and then, aggravated larceny where the value of the stolen property is small (Art. 229. para. 3. CC). The least common, with equal relative shares, was aggravated larceny committed in the manner that is described in art. 229. para. 1. pt. 6. and para. 2. of the CC.

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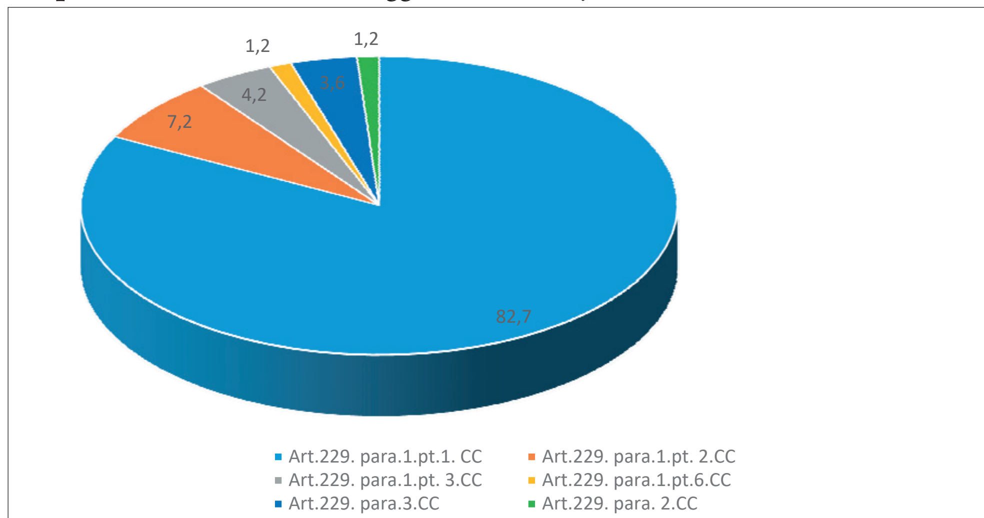
[1] Ministry of the Interior of the Republic of Croatia, General Secretariat, Department for Strategic Planning, Analysis and Development, Survey of Basic safety Indicators for year 2018., [https://mup.gov.hr/UserDocsImages/statistika/2018/Statisticki%20pregled%20temeljnih%20sigurnosnih%20pokazatelja%20i%20rezultata%20rada%20u%202018.%20godini.pdf] Accessed 18.03.2019, p. IX, XXIV and 69

**Graph 1.** Criminal offense of aggravated larceny




Source: authors' research

In the cases of criminal offenses against property, and thus in the criminal offence of aggravated larceny, relatively often the filing of criminal charges against the perpetrator was based on personal sources of evidence[2]. In the context of collecting information from the suspect there was a significant turnover that came about in 2017, specifically via the last Amendments of the Criminal Procedure Code (Official Gazette of the Republic of Croatia, No. 70/17) that has transposed 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, hereinafter referred to as Directive 2013/48/ EU)[3], into the Croatian procedural law. From 1th december 2017, police officers can no longer conduct informal interrogations of suspects. Therefore, in all situations where there is reasonable doubt that a criminal offense has been committed by a particular person, the police officers can only formally interrogate them. Thus, art. 208a of the Criminal Procedure Code

[2] The division of evidence into personal and material, is one of the older divisions that is encountered in criminal investigation. In this paper we use it to highlight the significance of the suspect's testimony for criminal proceedings. About criminal evidence and different categorisation see: Karas, Ž.; Štrk, D., *Izdvajanje nezakonitih materijalnih dokaza u poredbenom kaznenom postupovnom pravu*, Zagrebačka pravna revija, *Vol.* 2, No, 2, 2013, p. 185 – 212; Deljkić, I. *Heurističke i silogističke determinante istraživanja alibija u Kantonu Sarajevo*, Kriminalističke teme 3-4, 2010, p. 99. – 117.

[3] [http://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32013L0048&from=HR] Accessed 01.03.2019

(Official Gazette of the Republic of Croatia, No. 152/08, 76/09, 80/11, 91/12 - Decision Constitutional Court of Croatia, 143/12, 56/13, 145/13, 152/14 and 70/17, hereinafter CPC) formalizes the interrogation of suspects by determining the content of the instruction sent to the suspect regarding prior interrogation, the contents of the instruction that is given before the interrogation, clear warnings about the right to a defense attorney, the course of the interrogation and the information about recording of such interrogation, as well as the consequences arising from the violation of this prescribed manner of interrogation of the suspect (Gluščić and Kondor-Langer, 2018).

After the transposition of Directive 2013/48 / EU into the Croatian procedural law, the question arises as to whether the number of criminal reports dismissed by the State Attorney's Office has increased if the application does not give rise to a grounded suspicion that the suspect has committed the reported criminal offense (Art. 206. para. 1. pt. 4. CPC).

According to the data of the Ministry of the Interior of the Republic of Croatia for the year 2017, it is clear that in the territory of the Republic of Croatia in that year, 3011 cases of aggravated larceny were solved. In the same year there were 796 dismissals for the mentioned criminal offense, while the relative share of the dismissal on the basis of art. 206. para. 1. pt. 4. The CPC in relation to the total number of cases of committed aggravated larceny was 10.8%[4].

In 2018, the total number of solved cases of aggravated larceny amounted to 2626, with a total of 620 dismissals for the mentioned criminal offense. Relative share of dismissal under art. 206. para.1. pt. 4. The CPC in relation to the total number of cases of committed aggravated larceny was 11.1%.[5] From the data for these two years, in relation to the total number of cases of committed aggravated larceny for each particular year, it is evident that in 2018 there was a slight increase in the number of dismissals based on art. 206. para. 1. pt. 4. CPC. However, in order to make relevant conclusions in this area, it is necessary to cover a longer period of time, and it is necessary to wait for another year of application of the CPA *de lege lata*.

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[4] Ministry of the Interior of the Republic of Croatia, General Secretariat, Department for Strategic Planning, Analysis and Development, Survey of Basic safety Indicators for year 2018, [https://mup.gov.hr/UserDocsImages/statistika/2018/Statisticki%20pregled%20temeljnih%20sigurnosnih%20pokazatelja%20i%20rezultata%20rada%20u%202018.%20godini.pdf] Accessed 18.03.2019, p.115

[5] Ministry of the Interior of the Republic of Croatia, General Secretariat, Department for Strategic Planning, Analysis and Development, Survey of Basic safety Indicators for year 2018, [https://mup.gov.hr/UserDocsImages/statistika/2018/Travanj/Statisticki%20pregled%202017.pdf] Accessed 08.05.2019, p.111

Just prior to the entry into force of the last Amendments of the Criminal Procedure Code, Ivičević Karas, Burić and Bonačić (2016 and 2016a) dealt with the improvements of the procedural rights of suspects and defendants in criminal proceedings, through the prism of European legal standards and defense rights, at various stages of Croatian criminal proceedings. Furthermore, both Burić and Karas (2017) discussed the dilemmas linked to the new definition of the suspect and the conduct of their interrogation.

After the entry into force of the last Amendments to the Criminal Procedure Act, Novokmet and Vinković (2018), elaborated upon the interrogation of the suspects in the Republic of Croatia after the implementation of Directive 2013/48/EU, and Glušćić and Kondor-Langer (2018) conducted a study of the impact of the Amendments to the Criminal Procedure Act on detection, clarification and prosecution of criminal offenses in the area of general criminality, while Klier, Kondor-Langer and Glušćić (2018) conducted a research into police and state attorney's practices regarding interrogation of the suspect.

In order to gain a better insight into certain practical aspects of the investigation of criminal offenses of aggravated larceny, this paper presents some specific actions conducted by the police officers during the investigation of those criminal offences. In addition to the particular evidentiary actions that are being conducted after learning of the perpetration of the criminal offense of aggravated larceny, in the paper, the interrogation of the suspect on the basis of art. 208a CPC, as well as the evidentiary actions that police officers conduct during the interrogation of the suspect, are specifically emphasized.

## 2. METHODOLOGY OF RESEARCH

### 2.1. The goal of the research

The aim of the conducted research is to gain insight into certain ways of proving the criminal offenses of aggravated larceny, with special reference to the suspect's interrogation, based on art. 208a of the CPC and the significance of such evidence to prove the perpetrated criminal offense. The research was started based on the following two hypotheses:

H1: In the case of the commission of aggravated larceny, other than the suspect's interrogation pursuant to art. 208a CPC, there is little other material evidence

H2: A relatively small number of suspects consume their right to a defense attorney during the interrogation pursuant to art. 208a CPC.

### 2.2. Sample

Secondary sources of data were used for the survey sample, as well as the collected police records of the criminal acts of aggravated larceny committed on the territory of the Republic of Croatia during 2018.

During the research, a simple random sample was used and a total of 167 criminal offenses of aggravated larceny were analyzed, and a sample for the survey included 193 perpetrators and 174 victims, the reason being that several individuals participated in the commission of certain criminal offenses, and there were more victims in some cases.

### 2.3. Instrument

The data necessary for the realization of this research were collected using, for this purpose, a specially prepared questionnaire. The survey questionnaire contained a total of 67 variables that were divided into 3 units: general data on the criminal offense, evidentiary actions conducted during the investigation of the criminal offense, the suspect (examination under art. 208a of the CPC and information on the suspect) and the variables related to the victim.

The following variables were used in making this research:

1. Conducted on-site investigation during criminal investigation of aggravated larceny,
2. Temporary confiscation of items in criminal investigation of aggravated larceny,
3. Temporary seizure of surveillance camera videos - useful information about the perpetrator,
4. The type of expertise conducted in the criminal offense of aggravated larceny,
5. Checking for the establishment of electronic communication and telecommunications contact,
6. Collecting information from a person in their capacity as a citizen prior to her/his becoming a suspect (Art. 208. CPC),
7. Consuming the rights to a defense attorney by the suspects,
8. The suspect's defense and their answers to the questions,
9. The statement of the suspect,
10. The search of the suspect's home and other places - the finding of objects and leads referring to the suspect,
11. The search of the suspect's movable property - the finding of objects and indications referring to the suspect,

12. Identification of the suspects as a conducted evidentiary action,

13. Decision of the competent state attorney.

These variables have been selected for the purpose of realizing the aim of the research, moreover, for the purpose of gaining insight into certain ways of proving criminal offenses of aggravated larceny, with particular reference to the interrogation of the suspect under art. 208a of the CPC and the significance of the evidence thus obtained, for proving the committed criminal offense.

### 2.4. Method of conducting research

In February 2019, the Ministry of the Interior of the Republic of Croatia had given consent to conduct the research, i.e. to collect and use the collected data from the areas of all County Police Administrations in the Republic of Croatia. A special consent of the Ethics Commission was not required, although it usually is for research that involves people as respondents, since it was a research based on the analysis of secondary data. In terms of general ethical principles in scientific research, the anonymity of perpetrators and victims was respected, in that the identification data were not included in the questionnaires. The survey was conducted in March 2019, in a way that survey questionnaires were filled based on insights into police records.

### 2.5. Data processing

After completion of data collection, the data from the survey questionnaires were entered into the database in the SPSS statistical software program (version 16.0), and after the completion of data entry, the logical control was performed. Descriptive statistics were used for the purpose of the defined research goal.

## 3. RESULTS OF RESEARCH

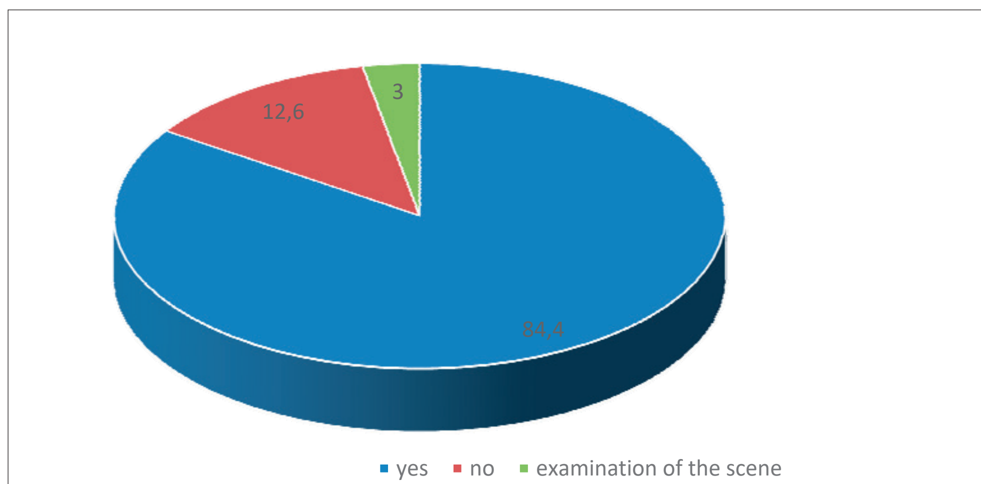
### 3.1. Specific evidentiary actions conducted during the inquiry into the criminal offense of aggravated larceny

In the chapter of "Specific evidentiary actions conducted during the inquiry into the criminal offense of aggravated larceny", the authors will use a descriptive method to explain which evidentiary actions were conducted by the police officers, after learning about committed criminal offence, in order to find the perpetrator.

Thus, one of the first evidentiary actions undertaken after learning about the committed criminal offense, is the inquiry. During inquiry, the facts are determined or clarified by observation using one's own senses or by using aids (Art. 304. CPC).

In the analyzed cases, it is evident that the on-site investigation was conducted in 84.4% of cases. If an evidentiary action of on-site investigation was not conducted by the investigative team, the scene of the event was examined, and in 3% of the cases, neither the on-site investigation, nor the examination of the scene was conducted.

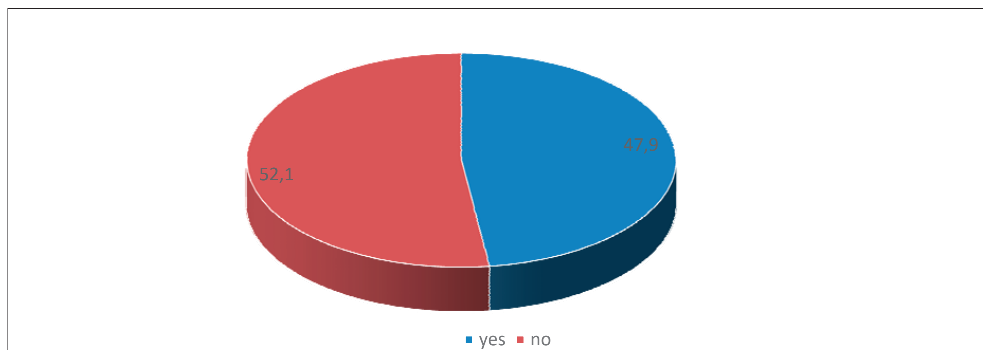
**Graph 2.** Evidentiary action of on-site investigation of criminal offence of aggravated larceny




Source: authors' research

Temporary seizure of objects is also directly related with the evidentiary action of on-site investigation. In addition to objects being temporarily seized during the conduct of on-site investigation, they are also temporarily seized during criminal investigation. Thus, during the course of the criminal investigation, the police officers will temporarily seize objects that are to be confiscated as pursuant to the criminal law or are objects that may serve to determine the facts in the procedure (Art. 261., para. 1. of the CPC). From the results of the survey it is evident that police officers during the course of conducting on-site investigation, as well as during the criminal investigation, in 47.9% of the cases temporarily seized the items.

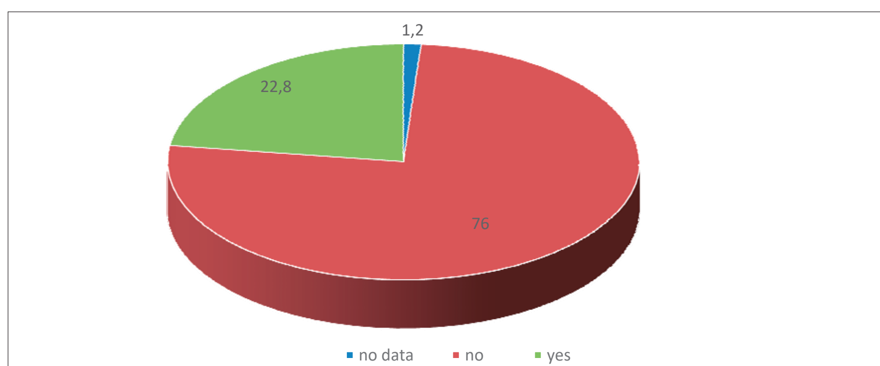
**Graph 3.** Temporary seizure of objects in criminal investigation of criminal offence of aggravated larceny




Source: authors' research

In the context of the evidentiary action of temporary seizure of an object, it should be noted that the police officers, during the course of the criminal investigation of aggravated larceny, conducted fieldwork inquires, during which they collected information from citizens who were likely to have knowledge of the circumstances of the perpetration of the criminal offense (Art. 36 para. 1., the Police Duties and Powers Act, Official Gazette of the Republic of Croatia, No. 76/09, 92/14, hereinafter PDPA). From the results of the research, 86.8% of police officers conducted fieldwork. Furthermore, surveillance camera videos were temporarily seized during conduct of fieldwork inquiries. The relative proportion of cases in which police officers temporarily seized surveillance camera videos, in total number of cases (N=167), was 29.3%. The results of the survey show that, in the total number of cases observed, the relative proportion of those cases in which useful information about the suspect was obtained via videos of temporarily seized video cameras was 22.8%.

**Graph 4.** Temporary seizure of surveillance camera videos – useful information about the perpetrator



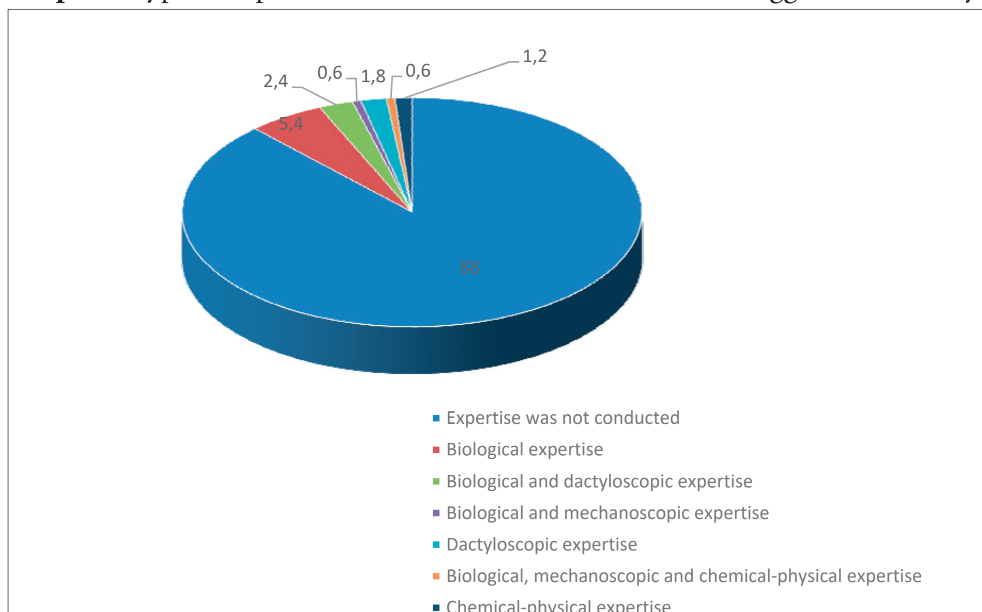
Source: authors' research

In addition to the evidentiary action of on-site investigation, ie primarily the temporary seizure of objects and traces, the evidentiary action of expertise is conducted. Expertise is conducted when it is necessary, for determination or examination an important fact, to gain an opinion or an assessment of a person who has the necessary expertise or skill in determining or evaluating such s fact (Art. 308. CPC).

From the conducted research it is evident that in most cases no expertise was conducted (88.0%). Of the total observed criminal offenses (N=167), in 12.0% of the cases the expert's opinion was sought out. Given the found objects and traces during the conduct of the evidentiary action of on-site investigation, but also during the inquiry, in relation to the total number of committed criminal offenses, biological expertise was most commonly conducted (5.4%), followed by biological and dactyloscopic expertise (2.4%) and only dactyloscopic experise (1.8%). In one case, three experts' opinions were sought out (including biological, dactyloscopic and chemical-physical expertise) and in one case, two experts' opinions were sought out (both biological and mechanoscopic). In two cases only mechanoscopic expertise was conducted.

Of the total of 20 cases in which expertise was conducted, in 50% of those, the expertise led to information about the particular perpetrator of the criminal offense, while only in one case, no data were found, on whether the results of expertise resulted in gaining information about the perpetrator.

**Graph 5.** Type of expertise conducted for criminal offence of aggravated larceny



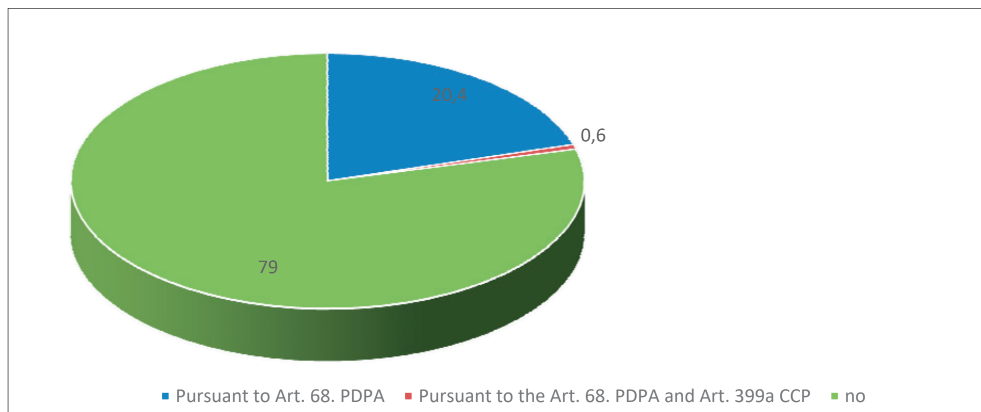

Source: authors' research

One of the police powers is to verify the establishment of electronic communications. Police officers may, for the purpose of preventing and detecting criminal offenses prosecuted *ex officio* and perpetrators of such criminal offences, request verification of the identity, duration and frequency of communication with certain electronic communication addresses from the communication service provider (Art. 68. para. 1. PDPA). In addition to this police authority, police officers may, if the conditions set out in art. 339a CPC[6] are met, request verification of establishment of telecommunication contact. From the results of the research, it is apparent that the police officers had, in 20.4% of cases under art. 68. PDPA, requested verification of electronic communication establishment. In 0.6% of cases, in addition to art. 68., based on a court order of the judge of investigation, the police officers had also requested the verification of the establishment of a telecommunication contact (Art. 339a CPC). Out of the total number of cases analyzed,

[6] Art. 68. PDPA prescribe the powers of verification of establishing electronic communications, while Art. 339a of the CPC provides for the verification of the establishment of a telecommunication contact. The aforesaid actions are similar in substance but they are differentiated in so that the action referred to in art. 68. The PDPA can be undertaken without a warrant and towards the users of telecommunication services who are not registered, while the action referred to in art. 339a CPC requires a court order, it is undertaken towards the registered users and it's results can be used as evidence in the process. The results of the action under art. 68. of the PDPA remain mainly operational

in 10.8% of cases, police officers gained useful knowledge of the perpetrator of aggravated larceny.

**Graph 6.** Verification of establishment of electronic and telecommunication communication




Source: authors' research

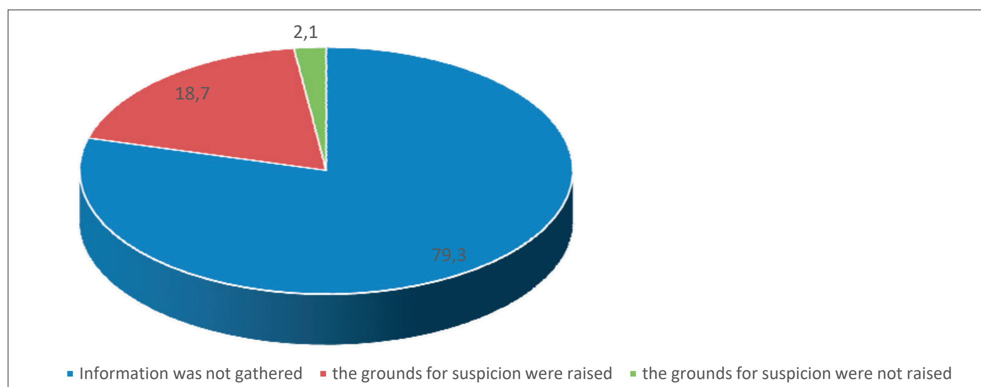
### 3.2. Specific actions taken against a person for whom there are grounds for suspicion of having committed a criminal offense of aggravated larceny

In this chapter, the authors will, using a descriptive method, present the results of the research regarding particular police actions, as well as the evidentiary actions that police officers applied toward the person for whom there were grounds for suspicion that they were the perpetrator of a particular criminal offense of aggravated larceny. Considering that a number of persons participated in the perpetration of aggravated larceny in certain cases analyzed in this chapter, the results of the research are compared with the total number of persons involved in the commission of the criminal offense (N=193).

Considering that police officers, based on art. 208. CPC, may collect information from citizens in the course of the inquires, from the data obtained by the conducted research it is apparent that the police officers collected the information from a citizen in 20.7% of cases, before they became a suspect. From the obtained data, it is evident that in the total number of perpetrators, the relative proportion of those for whom the grounds for suspicion that they are a person who committed or participated in the perpetration of a criminal offense were raised during collection of information from a citizen (Art. 208., para. 5. CPC), amounted to 18.7%. Other suspects, from the analyzed sample, of the investigation were either called as suspects (Art. 208a, para. 1. of the CPC) or were arrested at the place of perpetration of a criminal offense under the art. 107. CPC.

Klier, Kondor-Langer, Gluščić (2018, 462) on a sample of Zagreb County Police Administration (N=141) cases, in which an interrogation of a suspect was conducted, pursuant to art. 208a of the CPC, found that police officers had collected information from only 5% of persons before them becoming suspects.

**Graph 7.** During collection of information from a citizen, the grounds for suspicion that the person comitted or was involved in commission of aggravated larceny, were raised

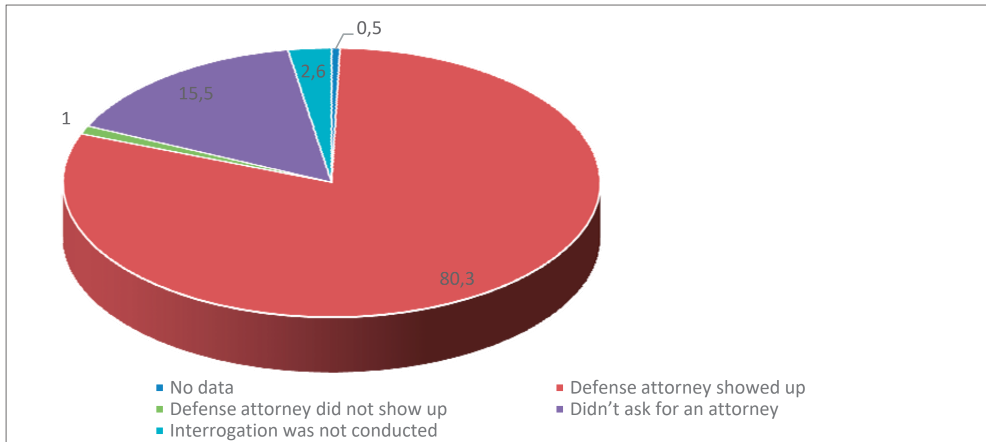



Source: authors' research

Considering that the suspect prior to the interrogation, pursuant to art. 208a CPC, must understand and receive a written instruction on their rights set forth in art. 208a para. 2. of the CPC, which contains, amongst other things, the right to a defense attorney, the results of the conducted research show that 32 suspects have used their right to a defense attorney. Out of 32 cases, the defense attorney did not show up in 2 cases. Out of a total of 32 cases, in half of the cases the defense attorney was selected by the suspect by their own choice, while in the second half the suspects hired the defense attorney from the list of attorneys at the Croatian Bar Association. In the majority of cases, the suspects did not consume their right to a defense attorney after being given an instruction (80.3%). From the obtained data, it is apparent that 5 suspects were not interrogated under art. 208a of the CPC, and in 1 case there is no information on the suspect's consumption of right to a defense attorney. It should be noted here that the 20 suspects were obliged to have a defense attorney since they were underage. During the interrogation of only one suspect, a competent state attorney was present.

In their research, Klier, Kondor-Langer, Glušcic (2018) found that 19.4% of suspects consumed their right to a defense attorney during the interrogation pursuant to art. 208a CPC.

**Graph 8.** Consumation of the suspect's right to a defense attorney

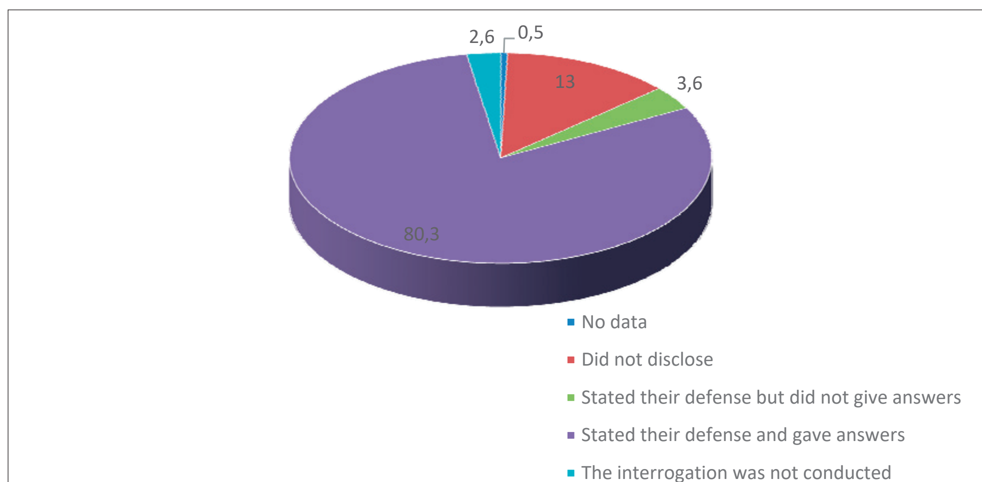



Source: authors' reserch

Given that the suspect, during the interrogation pursuant to the art. 208a of the CPC, should be enabled to disclose, in an unobstructed manner, all the circumstances regarding the charges against them and to present all the facts that serve for their defense, regardless of whether they wish to answer the questions (Art. 276. para. 3. and 4. of the CPC), such data were also analyzed during the research. From the data obtained, it is evident that the relatively largest number of suspects put forth their defense claims and had answered questions (80.3%), then 13% who did not answer the questions. This is followed by 3.6% of the suspects who stated their defense claims, but did not answer the questions asked.

Concerning the defense claims and answering the questions, Klier, Kondor-Langer, Gluščić (2018,463) on their sample survey, found that 47.5% of the suspects actively stated their defense and answered the questions, while 25.5% of the suspects actively gave their defense claims, but did not answer the questions.

**Graph 9.** Suspects defense claims and answers to the questions

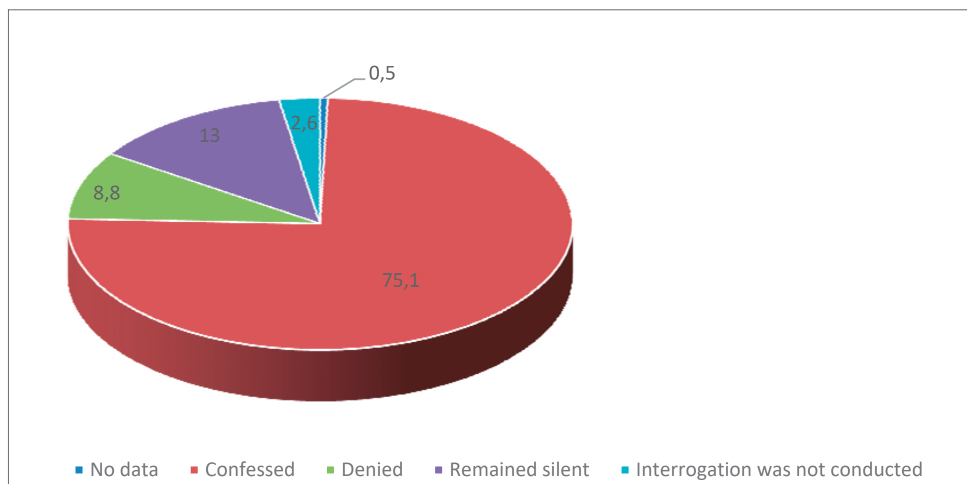



Source: authors' research

During an interrogation, a suspect can defend themselves by remaining silent, that is, by not responding or can deny the criminal offense he is charged with, or can confess. From the obtained data, it is apparent that the relatively high number of suspects, during the interrogation pursuant to the on art. 208a of the CPC, confessed to committing of aggravated larceny (75.1%). After the suspects who confessed the perpetration of the criminal offense, the suspects who defended by remaining silent or by not responding (13.0%) are followed by suspects who denied committing aggravated larceny (8.8%). It should be noted here that 5 suspects were not questioned under art. 208a CPC, and in one case there was no information about the way the suspect conducted their statement. In all cases where a suspect's interrogation was conducted, pursuant to art. 208a CPC, in all instances the interrogation was recorded by an audio video device (Art. 208a para. 6. of the CPC).

Klier, Kondor-Langer, Gluščić (2018, 466) found that in the criminal offense against property, the highest proportion of suspects are those who did not respond (34.2%) and those who confessed (34.1%), as well as those who denied committing the offence (37.3%). Such results were expected as the largest share of the observed sample regarded criminal offenses against property.

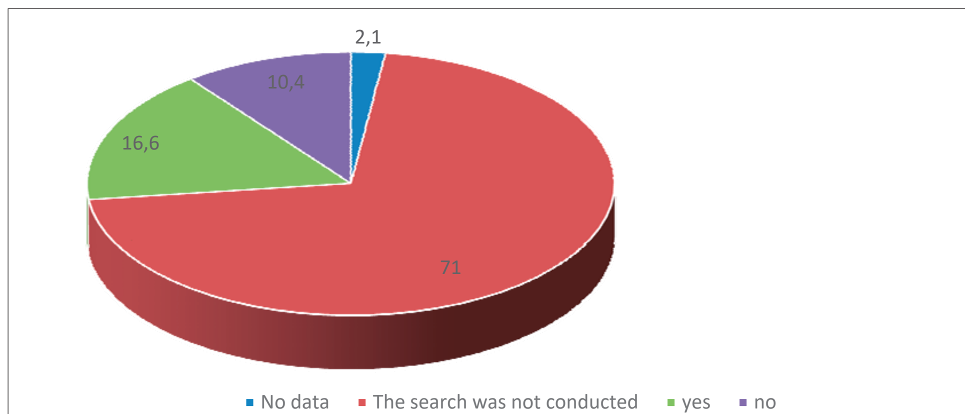
**Graph 10.** Suspect's statement




Source: authors' research

Where it is probable that the objects or marks relevant to the criminal proceedings are in a certain area, a search of a home or other place, vehicles and other movable property of that person will be conducted, as well as a search of a particular person (Art. 240., para. 2. CPC). From the analyzed data, it is evident that police officers or investigators conducted searches of the suspect's home and other premises during the investigation in 27.5% of cases. If the obtained data related to the search of the suspect's home and other premises are viewed in relation to the total number of suspects (N = 193), it is evident that in 16.6% of the cases where the search of the home and other premises was conducted, objects and traces found, indicated that the suspect indeed committed the criminal offense of aggravated larceny, due to which the search was ordered by the investigation judge. In a somewhat smaller number of cases, in which the search of the suspect's home and other premises, was conducted, no objects and traces that would connect the suspect with the committed criminal offense were found (10.4%). Here it is necessary to note that in 2,1% of cases no data were found to confirm or deny that the found objects and traces could link the suspect to the criminal offense of aggravated larceny.

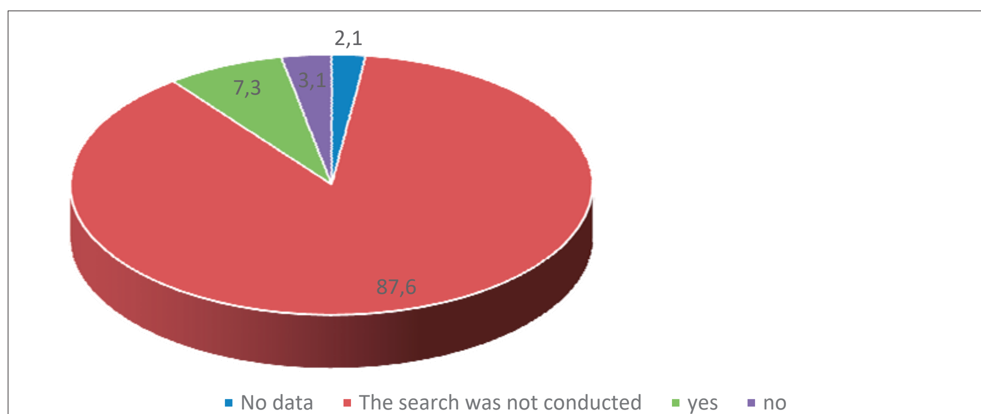
**Graph 11.** Evidentiary action of search of the suspect's home and other premises – instances of found traces and marks that point to the suspect




Source: authors' research

In addition to the evidentiary action of the search of the suspect's home and other places, police officers also conducted the search of movable property in the 10.4% cases. In all cases where the search of a moving property was conducted, the suspect's personal vehicle was searched. In the relatively large number of cases in which the search of a suspect vehicle was conducted, police officers or investigators found the objects and traces connecting the suspect with the criminal offense of aggravated larceny (7.3%).

**Graf 12.** Evidentiary action of search of suspect's mobile property - instances of found traces and marks that point to the suspect

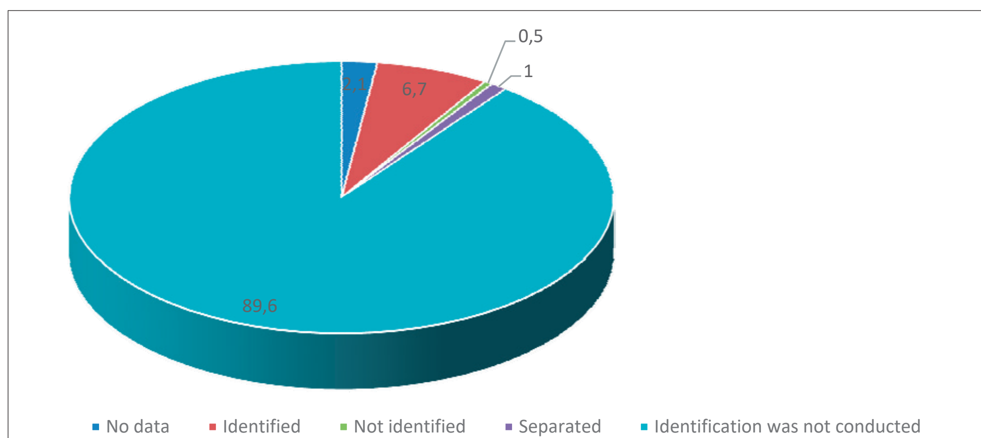



Source: authors' research

In addition to conducting search during the criminal investigation, based on the order of the competent state attorney, if, for example, a witness or a victim have seen the suspect, the identification of the person or the suspect may also be conducted. Identification is the recognition of the identity of a person, object, space, sound, movement or other features observed by the defendant or witness, which is then determined by comparison to another person, object, space, sound, movement or other feature (Art. 301. para. 1. CPC).

From the obtained data in the research, the evidentiary action of identification of suspects was conducted in 8.3% of cases. The results of identification can be positive, which means that the person has identified the suspect, or may be negative, which means that the person did not recognize the suspect. In addition to these two results, in the criminalistic sense, it is also necessary to mention the result of the identification, i.e. a separation. We are talking about such result in cases where the witness is not completely sure that he recognizes or does not recognize the person shown. This result in the evidentiary sense does not have any value, however it can give some identification to police officers for further investigation. The obtained results showed that in 6.7% of cases witnesses identified suspects as perpetrators of aggravated larceny. In 0,5% of cases, the suspect was not recognized while in only 1% of the cases separation occurred.

**Graph 13.** Evidentiary action of identification of the suspect



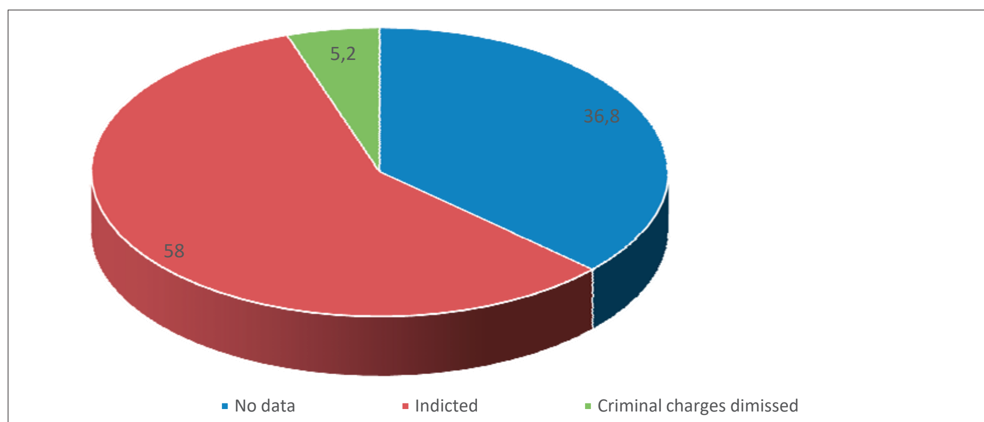

Source: authors' research

Upon completion of the criminal investigation, the police officers, if they have sufficient evidence against the suspect, file a criminal report to the competent state prosecutor's office. Upon receipt of the criminal report, the State Attorney's Office may dismiss the criminal charges for one of the reasons set out in art. 206. para. 1. of the CPC or in further proceedings, when the state of affairs is sufficiently

resolved, indict the suspect. The results of the conducted research showed that in 58.0% of the analyzed cases the perpetrator was indicted. For 36.8% of the cases there is no data on the indictment or rejecting criminal charges while 5.2% of criminal reports have been dismissed.

If the suspect's interrogation, from the conducted survey, is considered in relation to the obtained data related to the indictment, ie the dismissal of the criminal charges, it can be seen that, in a relatively large number of cases, the State Attorney's Office filed an indictment in those cases where the suspect, during a police interrogation, pursuant to art. 208a of the CPC, confessed the criminal offense (58.6%). In only 5.5% of cases, the State Attorney's Office dismissed the criminal complaint, even though the suspect had confessed to the criminal offence during police interrogation, as pursuant to art. 208a of the CPC. In the other 35.9% of cases there is no information as to whether the indictment was raised in the concrete case, which is actually one of the limitations of the conducted survey.

**Graph 14.** The decision of the competent state attorney




Source: authors' research

## 4. CONCLUSION OF RESEARCH RESULTS

The authors of this paper have divided the results of the research into two units. The first encompasses police officers' actions, primarily evidentiary actions undertaken during the inquires, and after learning of the perpetration of aggravated larceny. The second part covers the results of the interrogation of the suspect pursuant to art. 208a CPC, but also the evidentiary actions conducted against the suspect, as well as the data relating to the decision of the competent state attorney regarding the filed criminal charges.

The limitations of this research are related to the lack of particular data in some analyzed cases, which is why the category "no data" was formed.

The aim of the conducted research is to gain insight into certain ways of proving criminal offenses of aggravated larceny, with special reference to the suspect's interrogation based on art. 208a of the CPC and the importance of such evidence to prove the perpetrated criminal offense.

Both hypotheses set for the purpose of this research; H1: In the commission of offenses of aggravated larceny other than the suspect's interrogation based on art. 208a CPC there is little other material evidence and hypothesis H2: Relatively small number of suspects consume their right to a defense attorney during the interrogation pursuant to art. 208a CPC, have been confirmed.

This is supported by the following:

- Among all evidentiary actions conducted by the police officers after the perpetration of the criminal offense of aggravated larceny, an urgent evidentiary action of on-site investigation has to be mentioned. It was undertaken in 84.4% of the cases. On-site investigation is followed by expertise which has been conducted in 12% of the cases, among which the most commonly conducted was biological expertise (5.4%),
- in the course of conducting an on-site investigation, but also during inquires, in 47.9% of the cases, the police have temporarily seized objects. In 86.8% of cases, fieldwork was conducted during which police officers temporarily seized surveillance cameras videos (29.3%). In the total number of cases observed, the relative proportion of cases in which, by means of temporary seizure of surveillance camera videos, in 22.8% cases it resulted in obtaining useful facts about the perpetrator,
- police officers have sought verification of the establishment of electronic communications in 20.4% of cases under art. 68. PDPA, and from the total number of cases analyzed, in 10.8% of cases, it resulted in obtaining useful facts about the perpetrator of the criminal offense of aggravated larceny,
- the police officers collected the information from a citizen in 20.7% of cases before they bacame a suspect. In 18.7% of the cases, there were grounds for suspicion that the person committed or participated in the commission of a criminal offense,
- in most cases, the suspects did not consume (80.3%) their right to a defense attorney after being instructed about the said right. It is evident that 32 suspects have used their right to a defense attorney, of which, 2 attorneys did not show up. It should be noted that 20 suspects were obliged to a defense attorney since

they were underage suspects. In half of the cases, the suspects chose a defender in their own choice, while the second half the suspects hired the defense attorney from the list of attorneys at the Croatian Bar Association. In 2.6% of the cases an interrogation pursuant to the art. 208a CPC was not conducted. In only one case during the interrogation, a state attorney participated,

- during the interrogation pursuant to art. 208a CPC, the relatively large number of suspects stated their defense and has answered questions (80.3%), while 13% of the suspects did not respond. They are followed by 3.6% of the suspects who stated their defense, but did not answer the questions,
- the relatively large number of suspects confessed the perpetration of aggravated larceny (75.1%). After those suspects who confessed the perpetration of the criminal offense, the suspects who defended by remaining silent or who did not respond followed (13.0%), while in 8.8% of cases the suspects denied the accusation of aggravated larceny,
- during the criminal investigation, police officers or investigators conducted a search of the suspect's home and other premises in 27.5% of cases. Compared to the total number of suspects (N=193), it is apparent that in 16.6% of cases, items and traces were found that indicated that the suspect committed a serious offense of aggravated larceny. In 10.4% of cases, a search of movable property was conducted, and in all cases it was a search of the suspect's personal vehicle. In the relative majority when a a search of the suspect's vehicle was conducted, police officers or investigators found objects and traces linking the suspect with the offense of aggravated larceny (7.3%).
- the identification of the suspect was conducted in 8.3% of the cases and witnesses have identified suspects as perpetrators of aggravated larceny in 6.7% of cases.

Also, the results of the conducted research showed that 58.0% of the analyzed cases resulted in an indictment against the perpetrator. For 36.8% of the suspects there is no data on the indictment or on rejecting criminal charges, while 5.2% of the criminal charges have been dismissed.

If the suspect's interrogation, from the conducted survey, is considered in relation to the obtained data related to the indictment, ie the dismissal of the criminal charges, it can be seen that, in a relatively large number of cases, the State Attorney's Office filed an indictment in those cases where the suspect, during a police interrogation, pursuant to art. 208a of the CPC, confessed the criminal offense (58.6%). In only 5.5% of cases, the State Attorney's Office dismissed the criminal complaint, even though the suspect had confessed to the criminal offence during police interrogation, as pursuant to art. 208a of the CPC. In the other 35.9% of

cases there is no information as to whether the indictment was raised in the concrete case, which is actually one of the limitations of the conducted survey.

Finally, it should be mentioned that this work is primarily intended for the employees of the Ministry of the Interior, but also to all other practitioners and theorists who deal with the suspects. From a practical point of view, the work should give a certain amount of input for consideration of possible improvements of conduct of certain actions during the investigation of aggravated larceny crimes.

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# PUNISHMENT OF ATTEMPT IN EU “CRIMINAL” INSTRUMENTS

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***ABSTRACT***

*Taking into account the continuous changes regarding the definition of attempt, a “magic formula” for distinguishing preparatory actions from attempts has not been found yet. Some suggest looking at the matter from objective observer’s standpoint, considering the circumstances the third party must be aware of, as well as the existing causal line. The objective observer fiction is the main point in the observation mode of attempt. This thesis can be applied by analysing two stages to “filter” the actions that represent attempt. In the first stage, it is necessary to decide whether and which prohibited activities may possibly be the result of a criminal offence attainment (in abstracto). In the second stage, it is necessary to ascertain whether these activities really are true, and if they are, whether or not they have reached the beginning of attempt by the CC, taking into account the perpetrator’s plan (in concreto). If a criminal offence cannot be completed, either due to natural or legal circumstances, we are referring to impossible attempt. With impossible attempt, a perpetrator needs to believe that he or she can complete a criminal offence. There are different types of impossibility, like attempt on impossible object, attempt with impossible means and double impossibility. This paper also analyses gross lack of understanding, imaginary offence and supernatural attempt as important institutes for impossible attempt. Punishment of these types of attempts is analysed in European Union instrument in the field of criminal law and related texts.*

***Keywords***: *possible attempt, impossible attempt, EU legislation*

## 1. INTRODUCTION

When analysing the complexity of attempt and types of attempt, it is necessary to discuss crime policy and threat. The fundamental question is to which degree illegality has to be present in order for something to be qualified as an attempt. Impossible attempt illegality is significantly different from possible attempt illegality, hence there are different definitions of these two types of attempts.[1] It is necessary to see if there is a disturbance of legal order and if it is necessary to find actions which would be encompassed by a definition of attempt. Possible

[1] Bloy, R., *Unrechtsgehalt und Strafbarkeit des grob unverstandigen Versuchs,* Zeitschrift für die gesamte Strafrechtswissenschaft, *Vol.* 113, No. 1, 2001, p. 78

attempt is dangerous while impossible attempt is not, and as such, it should not be punished.[2] Dangerous attempt presents real danger because there is a risk of consequence mentioned in a definition of criminal offence.[3] But with impossible attempt there is no such danger.[4] Impossible attempt with gross lack of understanding presents abstract danger since it does not include a possibility of criminal offence completion, so the action of impossible attempt cannot be perceived as abstract endangering.[5] Criminal nature of taken action can be determined only if we analyse a definition of criminal offence in Special part of Criminal Code (further: CC). Objective attack of the impossible attempt does not pose an objective threat. Here we are talking about illegality of an attempt, and not attempt of illegality, because illegal achieves significance only when put in correlation to legal provision. Missing causality must be subsumed under legal provision of impossible attempt, and not subjectively by looking only at a perpetrator's aspect of thinking of what is possible. From this aspect of special prevention, that analyses danger of perpetrator as a person, impossible attempt should be punished because the perpetrator who started a criminal offense but failed to complete it, poses a threat and will probably continue with his or her criminal action after his or her failure.[6] The endangerment of legal goods[7] is not necessary for the impossible attempt, but it is important to see if there are any acts in furtherance of the crime towards the realization of the elements of the offense and if the means for committing or object were impossible.[8] False perception can be found in criminal offence situation or due to dangerous way of conducting it. Impossible attempt exists if a person intrudes building, not knowing there are no wanted counterfeit means.[9] Possibility for punishment exemption exists in Croatian CC for an attempt, but only with gross lack of understanding. That means that perpetrator's perception needs to be completely different from the usual causal chain for causing criminal offence consequence. So, impossible attempt is equal to regular attempt with consequence of mitigation of punishment, but impossible attempt with gross lack of understanding enables a possibility of punishment exemption. This provision in Croatia has a role model in German and Swiss CC. As The Supreme Court of the

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2 *Ibid.*, p. 80

3 Hillenkamp, T,*Leipziger Strafgesetzbuch Kommentar*, De Gruyer (on-line), 2007, p. 1579

4 Mintz, S. J., *Die Entwicklung des sogenannten untauglichen Versuchs im 19. Jahrhundert unter dem besonderen Aspekt der Einordnung als Wahnverbrechen*, 1994. p. 137

5 Bloy, *op. cit.* note 1, p. 81

6 *Ibid.*, p. 97; Hirsch, H. J., *Untauglicher Versuch und Tatstrafrecht*, Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001., p.723

7 Hirsch, *Ibid.*

8 Hillenkamp, *op. cit.* note 3, p. 1582

9 *Ibid.*

Republic of Croatia states, for determining the impossible attempt, it is enough to establish that with used means of commission towards the existing object in a specific moment and situation, no one, even a skilled perpetrator, could complete a criminal offence.[10] It is incorrect to say that a criminal offence could not be completed under any other circumstances. If different conditions were given, perhaps a criminal offence could be completed. However, in the existing situation, it is not possible.[11] Therefore, it is necessary to distinguish possible attempt, impossible attempt and impossible attempt with gross lack of understanding. Due to this explanation, it is necessary to analyse types of attempt in EU documents since all European states recognize attempt as a form of criminal offence or as one of the stages in criminal offence.

## 2. EU LEGISLATION

European documents state some actions where attempt is punishable. Analysis of complexity of attempt reveals various types of attempt; attempt can be possible or impossible. Possible attempt involves intent, immediate verge of committing offence and incompletion of criminal offence. Legal consequences for impossible attempt are usually the same as those for possible attempt, if not prescribed differently. There are different Directives and Framework decisions that regulate this matter. This paper uses only one Directive as an example. Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA prescribes common table of offence categories referred to in Article 4 on attempt or preparation which is marked as A. There are many EU legal documents, so, for example, Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA prescribes that attempt to commit the main counterfeiting offences, including the misuse of legal facilities or material and including the counterfeiting of notes and coins not yet issued but designated for circulation, should also be penalised where appropriate. This Directive does not require member states to render punishable attempt to commit an offence relating to an instrument or component for counterfeiting. Intentional attempt is punishable if it consists of immediate verge that includes any fraudulent making or altering of currency, whichever means are employed, the fraudulent uttering of counterfeit currency, the import, export, transport, receiving or obtaining of

[10] Novoselec, P., Bojanić, I., *Opći dio kaznenog prava*, Zagreb, 2013, p. 309

[11] Turković, K. (ed.), *Komentar Kaznenog zakona*, Zagreb, 2013, p. 53

counterfeit currency with the aim of uttering the same and with knowledge that it is counterfeit. Member states have a duty to take necessary measures to ensure that such conduct is punishable also in relation to notes and coins which are not yet issued, but are designated for circulation as legal tender. Main question is how to interpret the term of attempt in EU documents. EU consists of member states that include common law and continental law system. The definition in The Rome Statute can be of great help, where the attempt to commit such a crime starts by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions get in the way. The definition of attempt in The Rome Statute has its roots in French and American law. The International Law Commission wondered whether there was a distinction between the definition of an attempt in French and German law and concluded that the difference does not exist and that both definitions under the notion of the attempt implied not necessarily the realization of the elements of definition of criminal offense in Special part of CC.[12]

## 3. INTERPRETATION OF A TERM *ATTEMPT*

The analysis of legal systems in EU shows case law and continental law influence. According to that assumption, definition of *attempt* needs to be analysed from aspects of both of these legal systems.

### 3.1. Possible attempt

#### 3.1.1. *Intent*

Some authors[13] believe that "initial intent" or "intent to try to commit" is sufficient to define attempt, while completion presumes the intention to finish the criminal offence. With this assumption, until the attempt is completed, i.e. while the act of perpetration is being committed, the perpetrator cannot act with the intention of completing the act. This viewpoint gains practical significance in the case of a premature appearance of result, involuntarilly of the perpetrator's intentions. Should consequences occur during an action that represents an attempt and perpetrator at that moment does not want it, it will not be attributed to his intent. The perpetrator who decided to counterfeit money, but then inadvertently

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12 Ambos, K., General principles of ciminal law in the Rome statute, Criminal Law Forum No. 10, 1999, p. 15

13 For critics of those attitudes see Roxin, C., *Strafrecht, Allgemeiner Teil, Band II*, München, 2003, p. 351; Also Novoselec P., *Razgraničenje pripremnih radnji i pokušaja*, Zbornik radova Pravnog fakulteta u Rijeci, *Vol.* 29, No. 2, 2008, p. 723; Vukušić, I., *Razgraničenje pripremnih radnji i pokušaja u teoriji i sudskoj praksi*, Zagreb, 2014, pp.160-161

completed the criminal offence, would not have caused result with intent, but only with negligence, and would not be responsible for result with intent. Such conclusion is unacceptable[14]. The perpetrator wanted to counterfeit money and he succeeded in it. The fact that the action was completed before he wanted it, is just a deviation of realistic causal course of events from the imaginary one and as such has no legal effect.[15] The perpetrator's intent was directed at his aim all the time and that aim was achieved. It is therefore unjustifiable to conceptualise the "intent to try to commit" as different from "the intent to commit the offense" because they are reduced to the same. [16]A distinction between *intent oriented to attempt* and *intention oriented to completition* has drastic consequences regarding voluntary abandonment. When a person wants to commit ac ounterfeiting act in periodic actions (for example, 7 actions in 7 days), and gives up after two actions, despite believing that the action needs to be taken five more times in order to finish the act, he or she cannot be punished for counterfeiting since the intent of completing the action is missing. If taken the opposite way, believing that the perpetrator initially had the intent to counterfiet, a finished crime should not be negated only because the result occured after two times. Involuntarily premature completion of an offence should be percieved as a consequence of an insignificant diversion of planned causalty course of events from the realistic one.[17] In real life partial damage can serve as a reason to suspect the aim of the perpetrator's intent.[18] One of the reasons why the intention is punishable at attempt is that it is a fundamental and grave form of guilt. If the base form of guilt is negligent, then the responsibility for an impending attempt could also be considered.[19] In case law attempt entails a special intent. It is necessary to prove that the perpetrator has a special intent to commit a particular criminal offence. General intention to engage in some criminal offence is insufficient. There are three tests to determine the existence of a special intent. *Probable desistance test* refers to determination of intention from an aspect of facts and circumstances which indicate whether the perpetrator decided to abort the criminal offence. *Equivocality test* constitutes the existence of intent in the act of the perpetrator, it indicates the existence of intent directed to the perpetration of a particular criminal offence. *Indispensable element*

[14] Eser in Schönke, A.; Schröder, H., *Strafgesetzbuch Kommentar*, München, 1997, p. 343

[15] Roxin, *op. cit.* note 13, p. 352; Novoselec, *op. cit.* note 13, p. 723

[16] Novoselec, *Ibid.*

[17] Roxin, *op. cit.* note 13, p. 351; Eser, *op.cit.* note 14, p. 343; Hillenkamp, *op. cit.* note 3, p. 1474

[18] Enker, A.N., *Mens rea and criminal attempt*, American Bar Foundation Research Journal, *Vol.* 2, No. 4,1977, p. 865

[19] Klee, K., *Wille und Erfolg in der Versuchslehre*, Breslau, 1898, p. 6

*test***,** however, focuses on the perpetrator's ability to complete the criminal offense concerning the means of perpetration or his or her capability.[20]

### 3.1.2. Immediate verge of committing offence

When distinguishing preparatory actions and attempt, there are many different theories. The most appropriate theory in continental law is individual-objective theory.Taking into account different changes of the definition of attempt, "magic formula" for distinction between preparatory actions and attempt has still not been found. Giese suggests observing the situation from an objective observer's viewpoint. However, the question regarding the circumstances which the third party must be aware of, as well as the causal chain that exists, has to be taken into consideration. The objective observer fiction is the leading point in the observation mode of the attempt. Thus, for example, an objective observer can wrongfully conclude that a person has not commenced the action of counterfeiting. Also, due to his imprecision, an objective observer can conclude that the perpetrator will not complete the criminal offence.[21] *Ex ante* evaluation cannot be started by requiring the impossible and his or her knowledge must include all the circumstances that necessarily prevent the occurrence of the result. There is an objective tendency to the course of action being taken. Since the danger is impossible feature of distinction between preparatory actions and attempts, we come to unlawfulness as the criterion for distinction, which by itself is an objective element.When we have decided to qualify attempt as a threat of a criminal offence (objective view) and not as a threat of a perpetrator (subjective view), then we conclude that the concept of a perpetrator's plan may also be observed through Frank´s formula in some cases. Giese states that some actions are inseparable and act in natural sense as well as from the aspect of the perpetrator's plan.[22] However, according to individual-objective theory[23], simultaneous assessments of such circumstances, firstly from the perpetrator's and secondly from the objective observer's aspect, cannot be conducted.[24] Existence of attempts should be determined by objective criteria, but on a subjective basis. This thesis can be applied by analyzing two stages to "filter" the actions that represent attempt.[25] In the first stage, it is necessary to decide

[20] Carlan, P.E.; Nored, L.S.; Downey, R.A., *An introduction to Criminal law*, Massachusetts, 2010, p. 134

[21] Giese, D., *Zur Abgrenzung von Vorbereitung und Versuch*, Frankfurt a.M., 1961, p. 39; Eser, *op. cit.* note 14, p. 343

[22] Giese, *Ibid.,* p. 55

[23] *Ibid.,* str. 43

[24] *Ibid.,* str. 43

[25] Papageorgiou-Gonatas, S., *Wo liegt die Grenze zwischen Vorbereitungshandlungen und Versuch?: Zugleich eine theoretische Auseinandersetzung mit dem Strafgrund des Versuchs*, München, 1988, p. 185

whether and which prohibited activities may possibly precede the realization of a concrete criminal offence (*in abstracto*). In the second stage, it is necessary to ascertain whether these activities really exist, and if the answer is affirmative, have they reached a limit point of attempt definition, defined by the CC taking into account the perpetrator's plan (*in concreto*). Whether the same action will be percieved as preparation or attempt is dependant upon the perpetrator's plan. The perpetrator's individual plan, as a criterion for distinguishing preparatory actions and attempts, is objective in nature because it is viewed and estimated from reasonable and neutral viewpoint. Therefore, the plan to execute the act is a part of objective rather than subjective theory.[26] This is so because the perpatrator's real subjective perception can encompass the awareness of the immediate realization of the criminal offense, although he or she objecitvely may still be in the preparatory action stage. How perpetrator himself or herself perceives this immediacy is irrelevant. Roxin is right to point out that the reason for the punishment of immediate act should not be seen through the prism of immediacy of the endangerment of legal goods, but through the immediacy of the definition of the criminal offence as is pointed in the CC. The main focus should be on the will of a criminal offence and not on legal goods. This is important because there can either be a case of apreparatory action or an attempt even if they are distant from protected legal property. For example, an attempt to counterfeit money, according to Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against counterfeiting by criminal law is punishable when a perpetrator commits a counterfeiting act, while the protected legal good - the currency of the member state - is infringed only by putting the counterfeit money into circulation.[27] The word "start" implies that the perpetrator has taken action on the object of the action. German verdicts state that there must be a physical connection with the object of the attack.[28] Attack criterion cannot serve as a legal standing for criminality of an attempt when a perpetrator needs to take substantial steps or when, after establishinga connection with a criminal offence, there is an intermission in criminal offence completion.[29] But the object of an attack is not synonymous with the sphere of the victim. In a legal sense, the sphere of a victim is defined by the criminal offence, while in the laic sense it is defined by the object of action. Common law also recognises the substantial step theory which aims to reduce the rigidity of the unequivocal test. Proximity doctrine, represented in common law, requires space and time proximity as well as possibility

[26] *Ibid.*

[27] Vukušić, I., *Teorijski aspekt razgraničenja pripremnih radnji i pokušaja*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 19, No. 2, 2012, p. 684

[28] Kühl, K., *Strafrecht-Allgemeiner Teil, Band II*, München, 2008, p. 456

[29] *Ibid.,* p. 457

of action. Although the preparatory actions are insufficient to establish the probability of an attempt, no evidence of the last proximate act is required.[30] The two most important proximity tests are physical proximity and dangerous proximity tests.[31] The former aims to determine which actions the perpetrator still must do in order to complete the criminal offense while the later analyses whether or not the accused seriously approached the criminal offence completion. According to these theories there has to be a high risk of offence completion. The emphasis is more on the perpetrator's behaviour and not on the perpetrator's aim. It is necessary to examine whether an act from a physical and probable effect leads to the commission of a criminal offence. There must be an apparent, not actual possibility. Duff often criticizes the forgetfulness of a timeframe that limits the existence of proximity.[32]

### 3.2. Impossible attempt

Impossible attempt exists if a criminal offence can not be completed, either due to physical or legal circumstances.[33] If a perpetrator knows that under the existing circumstances a criminal offence can not be completed, than he or she has no will focused on completion.[34] With impossible attempt, the perpetrator needs to believe that he or she can complete the criminal offence.[35] A case in which a modification of perpetrator's act is of such nature that leaves no possibility for criminal offence completion because of the nature of object, is referred to as *attempt on impossible object*. Such cases are often in jurisprudence.[36] This is a case when a perpetrator tries to provide transport for counterfeit money, with intention, not knowing that the potential driver will not do any action with the car. In this case, nature of object for transport is impossible. Sometimes there is no possibility of completing a criminal offence due to the nature of means that are used for transport and completion of criminal offence. This situation is called *attempt with impossible means*. Attempt with impossible means on impossible object can also exist, in which case an attempt is impossible in double way. In this case perpetrator

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30 Lehmann, B., *Die Bestrafung des Versuchs nach deutschem und amerikanischem Recht*, Bonn, 1962, p. 80-81

31 Carlan; Nored; Downey, *op. cit.* note 20, p. 134

32 Duff, R.A., *Criminal Attempts*, Oxford, 1996., p. 46 - 47

33 Sometimes authors use term putative crime in case of impossible attempt. Toma, M. E., *Killing a corpse - a putative crime, Logos Universality Mentality Education Novelty - Section: Law*, *Vol.* 6, No.1, 2018, 31-36

34 Hillenkamp, *op.cit.* note 3, p. 1573

35 *Ibid*.

36 Roxin, *op. cit.* note 13, p. 446

is in mistake (error) and wrongfully[37] tries to make a profit with false blank checks, not knowing that the monetary value is not in force in that country. Action at impossible attempt needs to represent immediate step towards the realization of the elements of the offence.[38] This type of attempt is punishable because basic ground for punishing impossible attempt is the image of a perpetrator, and the perpetrator's act needs to represent immediate step towards completion even though there is no possibility of completing the criminal offence.[39] The most severe case of attempt is attempt of impossible subject. In this case we usually speak about imaginary offence that is not punishable. This involves a case when a person, due to false interpretation of legal provision, thinks that he or she is committing something illegal, and considers himself or herself a perpetrator. This is a case of reversal subsumption mistake that is always unpunishable. This is a case when the accused thinks that he or she commits perjury. Here we are speaking about imaginary offence because there is no legal obligation for a person to tell the truth in court. It is different with a witness who is obligated to tell the truth in front of the court. On the other side, impossible attempt exists also when impossible subject is a product of impossible object. If the intention of a perpetrator encompasses impossible object then we are talking about attempt, and not about imaginary offence. If a person provides immediate verge of committing counterfeiting offences, wrongfully thinking that other accomplices will make a counterfeit action, he or she commits an attempt and not imaginary offence if he knows this action is punishable. Punishable impossible attempt exists because all elements of definition of some criminal offence in Special Part of CC have equal value. The most important thing is to establish required quality of a perpetrator prescribed in a definition of a criminal offence (clerk, doctor); this quality of perpetrator can be a result of existing circumstances (obligation to prevent result - garant obligation). If a person is garant toward legal provisions, then he or she is obliged to eliminate and prevent danger in the moment when this danger occurs and becomes actual. If a person wrongfully thinks that he or she put to risk the integrity of the financial markets because he or she did not take action of "rescue" even though he or she was aware of his or her obligation, then that person is responsible for impossible attempt of result that occurred. Stratenwerth correctly claims that the attempt is punishable only if it is illegal, which means that the person plans to breach some demand or prohibition. It is important to note that the action of attempt due to circumstances actually exists.[40]

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[37] *Ibid.*

[38] Hillenkamp, *op.cit.* note 3, p. 1578

[39] Roxin, *op. cit.* note 13, p. 447

[40] *Ibid.*, p. 449

### 3.2.1. *Attempt with gross lack of understanding*

Attempt with gross lack of understanding refers only to an attempt that is from the beginning completely safe. There are difficulties when distinguishing between dangerous and non-dangerous attempts. Safety of attempt must be obvious to everybody.[41] This is a case when someone tries to fraud a cashier with child toy money. It is not enough that the third person considers situation circumstances and facts as impossible, but it is also necessary to analyse the perception of a perpetrator about possibility or impossibility of a situation. Also, it is necessary to see if the perpetrator acted sloppy/messy without gross lack of understanding or reckless with gross lack of understanding.[42] CC from 1962, in Germany, defined impossible attempt with gross lack of understanding as imagination of perpetrator that deviates from generally known causal chain. This is an action of attempt that no person takes seriously because the perpetrator fails to recognize that the attempt could not possibly lead to completion due to the nature of the object on which, or the means with which it is to be committed.[43] General meaning of causal relationship is interpreted through every person with average experience and knowledge. Safety of attempt must be known and visible as „special foolishness". This mistake should be described as nomological (error about causal chain) and ontological (error about physical status). It is hard to conclude whether gross lack of understanding exists because of the attitude of many others. It is possible that some conduct referred to as impossible attempt is considered possible by a large circle of people.[44]. As Jakobs states, if some opinion about the appropriateness of an action to cause consequence is accepted by many people, it does not mean that the action is possible. Subjective element of this type of attempt punishes volition and false perception, and certain safe behavior.[45] If we are speaking about the perception of a way to commit a criminal offence, we need to analyse physical causal chain, because in supernatural attempt, perpetrator believes in his ,,supernatural" power. It is crucial to determine whether a perpetrator in his perception connects his behavior to circumstances while taking action, does he or she it match them with reality. How could such a perpetrator be justly held responsible for this consequence? It is necessary to combine rules of experience with normative elements of criminal offence definition, which means that it is important to analyse both subjective and objective elements of impossible attempt. Subjective element of impossible attempt with gross lack of understanding is related only to a

[41] *Ibid.*, p. 452

[42] Brockhaus, M., *Die strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im europäischen Vergleich : unter Einbeziehung der aktuellen Entwicklungen zur "Europäisierung" des Strafrechts*, Hamburg, 2006, p. 182

[43] Roxin, *op. cit.* note 13, p.452

[44] *Ibid*. p. 453

[45] Bloy, *op. cit.* note 1, p. 86

perpetrator's perception that his or her action is possible. These actions are not reasonable from the aspect of scientific and rational criteria. Quantity and insufficient reach of means for committing are criteria for relative or absolute attempt.[46] Real impossible means of committing implies quality that presents probability of causing consequence (for example as low degree of means for committing).[47] Taking into consideration the result of an impossible attempt, it is important to analyse gross lack of understanding.[48]Such danger can be considered only by ex ante approach. It is irrelevant what occurred later.[49]Attack on a money printing office is not necessarily an impossible attempt with gross lack of understanding if papers were, as planned, transferred to another place a day before. Perpetrator's action needs to be put into context of a real situation. With impossible attempt there is no threat or assault on legal good that is protected by constitution. Possible attempt defects legal good of criminal law, while impossible attempt defects legal order. If a perpetrator, according to his or her opinion, uses "dangerous" means of committing, he acts with gross lack of understanding.[50] From the objective observer's viewpoint, completion of a criminal offence was not possible.[51] Some authors analyse danger from the victim's viewpoint, but sometimes ex ante view of the victim is not important because the victim can or cannot expect attack.[52] That means that we need to compare the perpetrator's idea of how he considers to complete the criminal offence and assessment of a third objective person – observer.[53]

### 3.3. Imaginary offence

If there is a false interpretation of legal provisions, than we are speaking about imaginary offence.[54] There is no gross lack of understanding in a case in which a person transports blank paper only because paper can be by its shape mistaken for counterfeiting money. A distinction between impossible attempt and imaginary offence depends on a type of mistake. If a person takes action and makes a mistake about causal chain, thinking that he or she is completing a criminal of-

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[46] *Ibid.*, p.103

[47] Mintz, *op. cit.* note 4, p. 106

[48] Timpe, G., *Untauglicher Versuch und Wahndelikt*, Zeitschrift für die gesamte Strafrechtswissenschaft, *Vol.* 125, No. 4, 2014, p. 755

[49] *Ibid.*, p. 758; Brockhaus, *op. cit.* note 41, p. 179

[50] Timpe, *op. cit.* note 47, p. 775

[51] Hillenkamp, *op.cit.* note 3, p. 1573

[52] *Ibid.*, p. 1577

[53] Zaczyk in Kindhäuser, U.; Neumann, U., Paeffgen, H. U., *Strafgesetzbuch*, Nomos, 2005, p. 773

[54] Brockhaus, *op. cit.* note 41, p. 484; Gillies, P., *The law of criminal conspiracy*, Australia, 1990, p. 152. For imaginary offence is also used term putative offence

fence, then we are speaking about impossible attempt.[55] If a person is aware of all circumstances, wrongfully thinking that by action he is doing something that is forbidden, then that person is committing imaginary offence. If a person is picturing circumstances that are defined as criminal in CC criminal offence definition, then we are speaking about impossible attempt and not imaginary offence. We are speaking about imaginary offence if a person acts by mistake. This happens in a case when person pays with legal paper bills thinking they are false.[56] If a criminal offence does not exist in legal system, then such action is treated as a imaginary offence. Perpetrator's mistake about elements of penal norms (definition of criminal offence in Special Part of CC) presents imaginary offence and imaginary offence could not be considered as mistake about possibility of object or means of committing.[57] It is possible to pay car with real paper money today with intention to pay tax after one month with false paper money. This is an unnecessary action if paper money is real and attempt of counterfeit has not started yet.[58] This is imaginary offence. Reverse mistake on elements of penal norm is impossible attempt and reverse mistake of law is imaginary offence[59].

### 3.4. Supernatural attempt

With gross lack of understanding, perpetrator is unfamiliar with natural causal law of some action[60], while with supernatural attempt perpetrator uses methods to commit criminal offenses that are unreal not analyzing them through natural causal law.[61] For example, using magic to get real paper bills. Impossible attempt is unpunishable because of safety of it. With impossible means for committing criminal offence there is a possibility of causing consequence. With supernatural attempt, there is no such possibility.[62]

## 4. CONCLUSION

The EU documents analysis shows that attempt is prescribed as punishable in many cases. For the purpose of example of criminal actions, paper analyzes Direc-

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55 Roxin, *op. cit.* note 13, p. 458

56 *Ibid.*, p. 459.

57 Mintz, op. cit. note 4, p. 146

58 Roxin, *op. cit.* note 13, p. 462

59 Hillenkamp, *op. cit.* note 3, p. 1573

60 Brockhaus, *op. cit.* note 41, p. 484; Bochlanger, M., *Principles of German Criminal law*, Oregon, 2009, p. 145-146

61 Roxin, *op. cit.* note 13, p. 455

62 *Ibid.*

tive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against forgery by criminal law. All those actions are listed in this paper so it is not necessary to analyse them again. It is important to note that EU documents prescribe attempt as intentional criminal offence and not negligence criminal offence.

When considering which theory should be applied to establish immediacy of attempt act, it is shown that proximity test or individual objective theory, certainly with the help of perpetrator's plan, answer the question where preparatory action ends and where attempt begins. Another attempt element is that criminal offence is not finished yet. In EU documents attempt is prescribed as punishable, but without specific reference to which type of attempt. It can be concluded that it encompasses all types of attempt that national legislation recognizes. It is important to state that impossible attempt includes a possibility to cause consequence in other conditions, while imaginary offence and supernatural attempt elude such possibility. EU has restricted jurisdiction in criminal matters, therefore each member state will judge according to its national legislation. In order to unify the complexity of attempt, this paper also examines provision of attempt prescribed in The Rome Statute and its common elements with definition of attempt in case law and in continental law. It can not be concluded that EU has unique definition of attempt on EU level and the question is whether that really is necessary since The Rome Statute aims to unite all definitions of attempt in the world. As for the Europe is concerned, there are no major differences in definition. It can be stated that attempted criminal offences in EU documents should be interpreted and applied similarly in each state.

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# THE CHALLENGES OF EXTENDED CONFISCATION. DIRECTIVE 2014/42/EU AND TRANSPOSING DIFFICULTIES IN ROMANIA

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***ABSTRACT***

*A relatively new institution in Romanian criminal law, adopted in 2012 as a result of the imperative of transposing the international and European legal instruments of the last decades, the institution of "extended confiscation" has hardly found its place in the Romanian legal system, and it can be said that it conflicts with some traditional constitutional principles from which it is not possible to derogate. Thus, on the one hand, Romania has to respect its international commitments and, on the other hand, it must avoid violating some of the rights that have been hard-earned by Romanian young democratic constitutionalism.*

*That is why the extended confiscation, this "necessary evil", or compromise of modern criminal law, has already begun and we are sure it will generate in the future a lot of theoretical discussions and controversies, but it also encounters a certain retention of the practice, specific to all the innovative criminal law institutions.*

*In the Romanian criminal system, extended confiscation is situated among the "safety measures", near the "hospitalization based on mental illness" or "prohibition of practicing a profession". As said in the legal text, the purpose for these measures, developed in the early 20th century by the Italian Positivist school, is the „social defence". More precisely, it is about removing an existing "state of danger" and preventing the commission of future crimes. However, the extended confiscation is different. The goods so-called "proceeds of crime" do not have to be obtained directly from an offence for which the accused is convicted, but from a general unlawful conduct similar to that crime.*

*I will observe, therefore, in the first chapter of my paper, the international context of fight against organized crime and its proceeds. After that, I will present the actual situation of the extended confiscation in Romania and its place between the criminal measures. In the next chapters I will insist on the concept of dangerousness and also observe the very little difference between the extended confiscation and a criminal punishment, because here we do not talk about the danger of some goods (as in the "classic" or the "common" confiscation, like drugs, guns), but about the danger of the detainer of those things.*

*In the last chapter I will present the recent challenges in transposing the Directive 2014/42/EU, especially regarding the standard of proof (beyond any doubt) and the recent unconstitutional decision in this case.*

***Keywords:*** *"crime do not pay", special confiscation, extended confiscation, social defence, state of danger, punishment.*

## 1. PRELIMINARY REMARKS

It can be said that the institution of extended confiscation is new in the Romanian criminal law, being adopted only as a result of the imperative of transposing the numerous legal instruments of international and community law in the last decades. Sometimes called inexactly "non-conviction based confiscation" (this is because the conviction, which is requested, refers to other proceeds), it has hardly found its place in Romanian legal system, and one can say that it is in contradiction with some constitutional principles, from which it is difficult to derogate.

This "necessary evil" of modern criminal law has, and will continue to generate a series of theoretical discussions and controversies, also encountering a certain retention of the practice specific to all innovative institutions. Of course, we will try, within the limits of our study, given the fact that the topic is particularly generous, to point out some aspects of the issue of positioning the extended confiscation at the limit between the two criminal law sanctions, punishments and security measures. We will start by placing the fight against profit criminality in an international and European context, then we will take a look at the discussions in the thirties of the last century about the legal nature of confiscation, and then we will identify elements that bring the extended confiscation closer to the punishments. In the end, we have made some critical remarks of the proposals to amend the Romanian Criminal Code in the matter of standard of proof regarding the measure under analysis.

The study does not refer to civil orders of confiscation ("civil forfeiture" in the US)[1], which can be found in numerous common-law systems, existing also in Romanian system and based on a previous civil control of the wealth of public officials. We will refer only to the special situation of extended confiscation related to criminal offences and ordered in criminal procedures.

## 2. THE INTERNATIONAL CONTEXT OF FIGHT AGAINST THE PROCEEDS OF CRIME

Confiscation of criminal assets has become a necessity in the fight against organized crime in the late eighties of the twentieth century, in the context of an explosion of profit-driven crime. Traditional "repressive" criminal law is no longer

[1] In a non-conviction based forfeiture proceeding in the US, there is no requirement of a criminal conviction or even of a criminal investigation. The government brings the action against the property as the defendant *in rem*, and any person seeking to oppose the forfeiture must intervine to do so. Cassella S., *Civil Asset Recovery*, in: Rui, J.P., Sieber, U. (eds), Non-conviction based confiscation in Europe. Possibilities and limitations on rules enabling confiscation without a criminal conviction, Duncker and Humblot, Berlin, 2015, p. 17

sufficient to deal with the new threats posed by the global risks and information society. Money is the glue that holds criminal organised enterprises together: they have to recycle the money, to buy more drugs, to finance acts of terrorism, to pay bribes to officials[2].

The magnitude of criminality also called "entrepreneurial" has caused the interest in seizure and recovering illicitly-acquired wealth to become one of the main objectives of global criminal policy. Criminal organizations have the ultimate goal of economic profit and prosperity due to illegal financial flows[3]. The proceeds of the crime had become, on the one hand, a constant part of the purpose of the criminal activity and, on the other hand, a central objective of the authorities. International law as a system has become aware of the danger and started to react[4].

The first signs that the member states of the international organizations intend to fight to recover the proceeds obtained as a result of the illicit activities were, however, older, as there were discussions in the years between the two world wars[5]. In this sense[6] it is worth mentioning the works of the 1926 International Congress in Brussels, the International Conference on the Unification of Criminal Law in Rome, 1928, the Congress of the International Criminal and Penitentiary Commission in Prague, 1930. Some of the discussions were at the level of principle and, even though they took place under the League of Nations, an organization that proved ineffective in the context of fragile collective security[7], they had the role of inspiring the criminal codes that many European states have adopted in the thirties of the last century.

Comparative Law scholars[8] refer to traditional forms of confiscation and to modern forms of the institution. Among the forms of tradition are the general confiscation (corresponding to the complementary punishment of confiscation of wealth in the old Romanian communist system of law, almost completely abandoned by modern laws) and the special confiscation (which is regulated in the current

[2] *Idid.,* p. 15

[3] Corvi, P., *La confisca nei reati di criminalita organizzata*, in *Sequestro e confisca, a cura di Mariangela Montagna*, G.Giappichelli Editore-Torino, 2017, p. 432.

[4] Sigursteinsson, B. H. *The Globalization of Crime Control: The Use of Non-criminal Justice Responses for Countering Organized Crime*, p. 2, at: [https://www.mobt3ath.com/uplode/book/book-48543.pdf] Accessed 15.03.2019

[5] In the US, forfeiture laws are older, since the late 1700s, when the pirate ships and cargo could be seized

[6] Ionescu-Dolj, I, în G. Constantin Rătescu, Asnavorian, H., Pop, T., Dongoroz, V., *Codul penal "Regele Carol II" adnotat*, vol. I-III, Editura Socec & Co S.A.R., Bucureşti, 1937, p. 169

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[8] Pradel, J., *Droit pénal comparé*, 4 édition, Dalloz, Paris, 2016, pp. 598-599

Criminal Code in article 112). Special confiscation refers, *lato sensu*, to things produced, acquired, obtained or used to commit the criminal offence (products and proceeds of crime). Modern forms of confiscation refer to equivalent confiscation when the confiscation of the above-mentioned goods is not materially possible.

Extended confiscation is certainly something more than the aforementioned classic forms of the measure. This is because on the one hand it concerns different goods than the object of ordinary confiscation, and on the other hand the accused has to be convicted[9] for committing a crime (with all its elements), and not just for committing an act provided by criminal law.

Then, this exceptional security measure imposes a certain degree of conviction of the judge regarding the criminal origin of the goods. The conviction has to be based on a "unlawful conduct", even in the absence of bringing to trial the alleged facts which have generated them. So, the conviction of the judge is formed on the basis of a presumption of perpetuating a criminal behaviour of the accused. This is raising a series of questions about the nature of the measure, the burden of proof and the presumption of innocence of the person subject of it.

In order to accelerate the fight for the confiscation of proceeds of crime and of illicit property, the United Nations took the first step in 1988 in Vienna, adopting the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Subsequently, the Council of Europe Convention on laundering, detection, seizure and confiscation of the proceeds of crime (Strasbourg, 1990), the International Convention for the Suppression of the Financing of Terrorism (UN), New York, 1999, the UN Convention against Transnational Organized Crime (2000), the UN Convention against Corruption (New York, 2003), the Council of Europe Convention on laundering, detection, seizure of the proceeds of crime and terrorist Financing (adopted in Warsaw on 16 May 2005).

Financial crime is frequently committed in business relations. Considering the efforts of the EU to tackle various forms of financial crime, efforts which have definitely intensified since the 2008 financial crisis, it would not come as a surprise that the EU had also sought to strengthen its grip on national law in order to combat corporate (financial) crime.[10]

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9 Except for other ways to individualize the punishment provided by the Romanian new criminal code, such as waiving the punishment or postponing the punishment

10 Franssen, V., *The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential*, German Law Journal, no. 5, 2018, at : [https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/5bb17002f4e1fcbd8b2b47c2/1538355202984/Vol_19_No_05_Franssen.pdf ] Accessed 19.03.2019

Thus, initially in connection with organized crime and especially with drug trafficking, over the years, extended criminal confiscation has witnessed a progressive amplification. It is now covering a number of other crimes and became an incisive tool in the "attack" on illicit property. For example, in Italy there is "confisca penale allargata", in Spain "decomiso ampliado" in Germany and Austria "Erweiterter Verfall" in the United Kingdom "confiscation order"[11].

## 3. SHORT BRIEF ON IMPLEMENTATION OF EXTENDED CONFISCATION IN ROMANIAN CRIMINAL LAW

Taking on with delay the obligations undertaken following the accession to the European Union in 2007, Romania only amended the Criminal Code to introduce the new form of confiscation by Law no. 63/2012[12]. The exposure of reasons[13] of the law is relevant. The reason for the drafting the act was the transposing of art. 3 of the Framework Decision no. 2005/212/JAI on the confiscation of crime-related products, instrumentalities and other property[14].

Thus, it appears that although at that time (2012) Romania benefited from a coherent and comprehensive legislative framework, developed in accordance with the international standards in the field of confiscation of crime proceeds, this framework had certain gaps in relation to the European requirements in this field. More specifically, at the level of internal legislation, the Framework Decision was not fully transposed. The national legislation was lacking the transposition of Art. 3 of the Community act on extended confiscation. In all cases, it is also stated that it allows the confiscation of goods obtained from criminal activities that are not directly related to the offence for which the person is convicted, namely, the direct connection between the crime leading to the conviction and the goods that are confiscated is not proven.

The legislator, arguing the necessity of the new measure, also notes that not in all cases is it possible to prove the direct connection between the crime for which the person has been convicted and certain assets, even if the illicit origin of the goods is obvious.

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11 Furcinitti, G., Frustagli, D., *Il sequestro e la confisca dei patrimoni illeciti nell'Unione Europea*, Wolters Kluwer, CEDAM, 2016, pp. 10-11

12 Published in the Official Journal no. 258, 19 April 2012

13 [http://www.cdep.ro/proiecte/2011/700/80/5/em785.pdf] Accessed 21.02.2019

14 Adopted at Brussels on 24 February 2005 and published in the Special Edition of the *Official Journal of the European Union* no. 0, 1 January 2007

Introduced in the old Criminal Code (adopted in 1968) in art. 118, after the entry into force of the current Criminal Code in 2014, the provisions were assumed in art. 112[1]. We will not insist on all the elements of the "safety measure" as they have been extensively dealt with in the literature[15]; however, we will analyse its controversial legal nature, which is rather closer, in our opinion, to the idea of punishment than to the classical security measures.

Thus, the Romanian legislator in 2012 opted in the regulation of the special measure for the possibility of ordering the extended confiscation of other goods than those that could be subjected to the classical measure of special confiscation (we are talking, *lato sensu*, about the proceeds of the crime). As will be shown below, these proceeds, object to extended confiscation, are not directly related to the offence for which the defendant is tried and convicted, but they must be obtained only from similar activities.

The Romanian law enumerates a series of offences presumed to generate illicit proceeds, where the extended confiscation of property of the convicted may be involved (e.g. drug trafficking, money laundering, human trafficking, corruption, tax evasion, border-related offences etc.). In addition, the law also sets a minimum four-year limit punishment for these offences. It could be said that duplication would be without sense, because, as a rule, these offences are serious. However, when talking about offences against property, by reference to the limit of punishment, acts of simple theft, without aggravating circumstances (where the maximum sentence is 3 years) will be excluded from this measure.

Another condition provided by the Romanian law is that the judge compares the value of the property acquired lawfully by the accused 5 years before and, if necessary, after the moment of committing the offence. If the disproportion is obvious, manifest, it will be possible to order extended confiscation.

But the most important criterion in the option for the special measure is left to the magistrate. It is about his subjective appreciation of ordering or not the extended confiscation. The law speaks of "the conviction that the acquired goods come from criminal activities such as those listed above". We believe that the difference between "criminal activities" and "crimes" should be noted. And this because the person will only be tried and convicted for a "pretext-offence", as the activities that generated the goods that will be confiscated are not considered offences, as defined by the Criminal Code. So, we can observe that the extended confiscation can be ordered only subsequently to a criminal trial. The rules of criminal procedure should apply, excepting only the standard of proof.

15 Streteanu, F., *Considerații privind confiscarea extinsă*, Caiete de drept penal, nr. 2/2012, pp. 11-28

It has been shown by the Romanian scholars that, in practice, the text of the law establishes here a legal presumption based on the following elements of the factual situation already proven: *firstly*, the perpetration of the offence (for which the conviction is ordered), *secondly,* the existence of goods that cannot be justified by the convict's legal income, *thirdly*, other factual elements which are demonstrated and can be shown to be relevant to the case. These clues lead to the Court's conviction (simple presumption), that the goods that cannot be justified have been obtained from criminal activities of the nature of the one(s) for which the conviction sentence is pronounced[16].

In conclusion, in Romanian law, the extended confiscation is a "preventive" or "security measure", not a punishment. Also, it requests necessarily a conviction for a serious criminal offence, but the proceeds confiscated may be only related to that offence. The standard of proof is the "intimate conviction", but based also on presumptions and factual elements.

## 4. REMOVING THE STATE OF DANGER OR PUNISHING THE OWNER? THE CONCEPT OF DANGEROUSNESS OF THINGS

In general, safety measures are related with the concept of *social defence* and they were developed in Europe at the beginning of the last century, particularly during the years 1920-1930. Emanuele Carnevale[17] defines the safety measure as "a means of defence, not a criminal one, as a result of an offence committed or only of a behaviour having the external characteristics of the offence and for which one takes into account subjectivity and the dangerousness characteristic of the agent, due to which the punishment cannot be applied or is unsuitable".

Extended confiscation, sometimes viewed as a distinct measure and other times as a type of special confiscation, the central object of our brief analysis, presents a number of specific elements that, on the one hand, assimilate it to the safety measures that we can call "classical" but on the other hand delimitate it considerably from them, bringing it closer to punishments.

First of all, we note that it has been said[18] that extended confiscation was mistakenly qualified in Romanian system as a distinct safety measure, whereas in reality it is a modality, a variation of the special confiscation. It is further said that this

[16] Nițu, D., *Confiscarea extinsă. Confiscarea specială. Confiscarea de la terți*, *Caiete de drept penal*, nr. 4/2017

[17] Carnevale, E., *Rapport présenté au Congres penal et péniténciaire international de Berlin*, 1935, în revista penală, an. III, nr. 3, Craiova, 1936, *apud*. M. Georgescu, *op.cit.,* p. 40

[18] Pașca, V., *Drept penal. Partea Generală*, Ed. Universul Juridic, București, 2015, p. 535

interpretation also results from the provisions of Law no. 63/2012 (by which, as shown, the institution was adopted by Romania), according to which whenever reference is made to confiscation as a safety measure, it will also be considered to be made to extended confiscation. If the latter had been considered only a type of the former, this clarification of the law would no longer have been necessary.

In regard to the real difficulty of identifying the place of the measure among criminal law institutions, the Italian doctrine[19] notes that its inclusion among safety measures is being challenged by some authors who consider it to be a *sui generis* sanction. The main argument in this respect we find the concept of the "dangerousness of things". We are dealing with a concept that is not to be understood as an attitude of a person to cause an offence. This is as an aptitude of a thing, if left in the sphere of a person, to constitute by itself an element of incitement, a provocation to commit in the future unlawful actions to the extent that the person would be certain that the proceeds of the crime would not be confiscated[20].

In fact, the goods are not dangerous[21], but the person holding them will be encouraged to commit unlawful acts. Therefore, could it not be said that it is rather the person that is "punished", under the assertion that an abstract state of danger is being prevented?

The Italian scholars define the situations as follows: confiscation refers to: the dangerousness of the thing by its nature, the dangerousness of the thing by reference to the offence, the dangerousness of the thing in relation to the person, the punishment of guilt-*colpevolezza*.[22] The picture is complicated and blurred by three factors: the multi-faceted shape of prevention in and outside the system of criminal justice, the thin dividing line between prevention and repression, and the recent number of special provisions difficult ro reconciliate with the general framework[23].

In German criminal system[24], extended confiscation is neither a punishment nore a safety measure, it is a *sui-generis* „measure". This specific criminal law institution

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19 Fiandaca, G., Musco, E., *Diritto penale. Parte generale*, *Settima edizione ristampa,* Ed. Zanichelli, Bologna, 2018, p. 890

20 Massa, M., *Confisca*, Enc. Diritto, VIII, Milano , 1961, p. 983; *ibid.* Fiandaca; Musco, p. 890

21 In older cases in US, the rationale of forfeiture was that the property itself had done something wrong, see Cassella, *op.cit,* note 1, p. 18

22 Epidendio, T.E., *La confisca nel diritto penale e nel sistema delle responsabilita degli enti*, CEDAM, 2011, p. 69

23 Panzavolta, M.; Fluor, R., *The Italian „non-criminal system" of asset forfeiture*, in: Rui, Sieber, *op. cit.* note 1, p. 111

24 For a comparative study regarding confiscation in German Criminal law, see Rübenstahl, M, *Der Umfang der Vermögensabschöpfung beim Unternehmen in Deutschland und Italien*, in DPC, 2/2012, rivista

is defined in Section 11 of the Criminal Code, as: „measure means the rehabilitation and incapacitation, confiscation, deprivation and destruction”[25].

According to Section 73d of the Criminal Code (St.GB), extended confscation is to be ordered if the circumstances justify the assumption that the objects were aquired as a result of an unlawful act. This has been interpreted as requiring the judge to be convinced having considered all the evidence of the illicit origin of the assets in question [26].The German Federal Supreme Court (*Bundesgerichtshof*) concluded that the extended confiscation is compatible with German Constitution so that the trial judge has to be „completely convinced” of the ilicit origin of the assets.[27] In Germany, the extended confiscation is always connected to the conviction of a person (similar in Romania and Italy) or at least to the declaration of an unlawfull act that has been committed. It is not the property itself that is the focus of the proceedings, it is the person[28].

Considering that it applies to other assets than those which are subject to confiscation under ordinary law (improperly called, we believe, special [29]), extended confiscation refers in a more abstract way to the dangerousness of things. This is because, while some of them are subject to confiscation from the point of view of the danger they denote themselves (such as drugs, weapons, counterfeit money or explosives), extended confiscation refers to other goods, that are not dangerous. An expensive car, a real estate or gold are not dangerous. From this perspective, this measure concerns a person more than its possessions. So, we believe that the essence of criminal personal punishment is more pronounced, and the inclusion of extended confiscation in some criminal systems among “security measures” is just a purely formalistic deception.

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trimestriale, on [http://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Trim_2_2012-10-39.pdf] Accessed 03.03.2019

25 German criminal code, accesed on [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_germany_en_1.pdf] Accessed 02.04.2019

26 Decision 2 BvR 564/95, 14.01.2004, par. 92, German Constitutional Court, in J. Boucht, *The limits of asset confiscation. On the legitimacy of extended appropriation of criminal proceeds*, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 187

27 The German Court held that: „the order of extended confiscation id considered only if the judge, on the basis of exhaustive consideration of all the evidence is fully convinced that the defendant has obtained the objects covered by the order from unlawful acts, without the latter having to be ascertained in detail”, J. Boucht, *op.cit.* note 26, p. 190

28 Esser, R., *A civil Asset Recovery Model. The German Perspective and European Human Rights*, in Rui, Sieber, *op. cit.* note 1, p. 74

29 For critiques related to the use of the term “special confiscation”, also see M. Georgescu, *op.cit.*, p. 192. The author states that the measure called “general” entrusted the State or the sovereign with all property belonging to the convict in the case of serious crimes punishable by capital punishment committed against the sovereignity or the State

Is “the state of danger” to which the general rule of art. 107 par. 2 of the Romanian Criminal Code refers a state of a good or a dangerousness of a person? The answer is difficult and so, depending on the arguments that lean towards one solution or another, the placement of the special confiscation in general, and of the extended one in particular, closer to the punishments or the security measures.

The option of European continental criminal policy, which has concentrated and systematized security measures, is a tributary to the Italian criminal law of the time, notably to the 1930 “Rocco” Criminal Code. The notion of “dangerousness” has gradually emerged as a new area of criminal law intervention[30], and a series of new terms will be associated, such as “dangerous delinquent”, “moral hazard, “social defence”, “safety measures”, “state of danger”, “harm”.

There have even been mentions of a “culture of danger”[31], by bringing the personality of the offender into the center of the criminal process and penitentiary science, putting the offence at a secondary level. Tradition punishment has been supplemented by a “second track” of legal consequences for criminal conduct, which are based exclusively on harm prevention principle, that is to say on the dangerousness of the defendant regardless of his personal culpability[32].

The criminal action would therefore be determined by a series of “extra penal” concepts that contribute to the shaping of a personality of the offender as a fundamental element of the criminal process. The dangerousness is, therefore, concludes Filippo Gramatica in 1933[33], “a state of the offender characterized by the more or less likely tendency to commit crimes”.

Therefore, if, on the one hand, we are talking about a social danger of crimes, there are certain states of danger that concern the person of the offender, falling into what is called “subjective dangerousness”. Others refer to goods in connection with the act committed by the offender (objective dangerousness)[34]. The fact that

[30] Doboş, C., *Între a preveni şi a pedepsi: un nou tip de acţiune penală în România interbelică*, în *Studia Politica:Romanian Political Science Review,* 13(3), 477-497, accesat la [http://nbn-resolving.de/urn:nbn:de:0168-ssoar-447444].

[31] Michel Foucault stated that “the motto of liberalism is to live dangerously (...) in the sense that individuals are constantly put in danger or, in fact, are conditioned to perceive their situation, life, present and future as generating danger” (M. Foucault, *Nașterea biopoliticii, Cursuri ținute la College de France*, Ed. Ideea Design & Print, Cluj, 2007, pp. 69-70; C. Doboș, *ibid.* p. 478)

[32] Vogel, J., *The Legal Construction That Property Can Do harm. Reflections on the Rationality and Legitimacy of Civil Forfeiture*, in Rui, Sieber, *op. cit.* note 1*,* p. 232

[33] Gramatica, F.,*Principii de drept penal subiectiv (tradus de J. Moruzzi),* Ed. Universul, București, 1934, p. 161

[34] Niculeanu, C., *Regimul juridic al confiscării speciale în lumina noului cod penal*, în *Dreptul*, nr. 6/2013, p. 146

a medical safety measure (*e.g.,* medical hospitalization for mental illness) has the purpose of removing the state of danger for the society represented by the person does not leave any doubt. The arguments that there might be a punishment of the person are totally unsupported, even if safety measure facilities are sometimes assimilated to places of detention. The curative element is here decisive.

The legal responsibility that involves the implementation of the safety measures in general can only be, it has been said, an objective responsibility. Unlike the subjective criminal liability, which is predominantly retributive, it has an exclusively preventive character.[35] Medical safety measures are definitely criminal sanctions because they are the consequence of breaching the precept of the criminal text, they are coercive measures because they obviously involve a restriction and even a deprivation of the person's freedom and are applied by the judicial authorities. Even if we were to accept, for the sake of argument, the contrary view regarding medical safety measures, the mechanism of criminal liability for other categories of security measures cannot be explained otherwise, the criminal liability being unequivocally an objective one[36].

In the case of extended confiscation, the property do not *per se* pose a state of danger. It is not directly related to the offence that caused the conviction of the accused, getting far from the classical system of responsibility that governs the safety measures. Then what kind of state of danger, more precisely *whose* state of danger are we talking about? As stated in the doctrine, if this state of danger were absent, the inclusion of the institution in the safety measures would be questioned[37].

## 5. SOME PUNISHMENT ELEMENTS REGARDING EXTENDED CONFISCATION IN ROMANIAN LAW

The first element distinguishing extended confiscation from other safety measures, which has led to it also being called improper "non-conviction criminal confiscation" is that the proceeds to which it refers do not come from an offence the person has been convicted for. Nevertheless, the "occasion" of extended confiscation, its pretext, is the criminal trial and the conviction for another offence. Indeed, a conviction does exist, but only one pronounced for other offence than the one the goods subject to extended confiscation were obtained from.

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35 Paşca, V., *Măsurile de siguranţă – sancţiuni penale*, Ed. Lumina Lex, Bucureşti, 1998, p.23

36 Stănilă, L.M., *Răspunderea penală obiectivă şi formele sale în dreptul penal român*, în *Analele Universității de Vest Timișoara, Seria Drept*, nr. 2/2011, p. 94, accesat la [https://drept.uvt.ro/administrare/files/1481042436-laura-maria-stanila--.pdf] Accessed 03.04.2019.

37 Ciopec, F., *Confiscarea extinsă, între de ce și cât de mult*, Ed. CH Beck, București, 2015, p. 109

In the context of the extension and diversification of the individualisation of the punishments (also by restorative justice), it can be stated that the current Romanian system will exclude extended confiscation when it comes to a minor offender against whom an educational measure has been applied. The decision to postpone the punishment is the same (the person is guilty, but it he is not called formally a "convict"). Therefore, it will only be the case of conviction (called sometimes a *stricto sensu* conviction) under detention regime or with conditional suspension (Article 91 of the Criminal Code).

So, the severity of the related conviction appears to be higher (on the one hand, by failing to fulfill the negative conditions provided by Article 81 and Article 83 of the Criminal Code-which do not lead to a "conviction", and on the other by the listing in Article 112 of crimes of increased gravity).

The Italian scholars noticed the mechanism of practical compensation for the incomplete support of a criminal charge, materialized, not without truth, in the expression *„poca prova, poca pena" (little evidence, little punishment)*[38]. This means in the criminal proceedings that, given the assertions in defence of the accused, the judge was not entirely convinced that the evidence did indeed prove the defendant's guilt, but did not have the courage to absolve him, and convicted him to a not so severe punishment. If the court has doubts about guilt, it should argue that the defendant is innocent and not apply a reduced sentence in a compensatory spirit. Similarly, regarding extended confiscation, the judge, sometimes noticing that the evidence does not fully support the "pure conviction" solution, which would also involve taking the extended confiscation, could choose one of the innovations of the Romanian Criminal Code not found among the strict conviction sentences.

It is obvious that the measure concerns goods against which no conviction sentence has been pronounced and will not be pronounced in the future[39]. The criminal court has not been called to judge the alleged activities the goods subject to extended confiscation come from. In regard to these facts, there will obviously not exist a complete analysis of the typicality (condition of a behaviour to consist an offence), as is necessary to be done with respect to the pretext-offence of the measure.

However, can a person be definitively deprived of some of their property (by means of a measure called in the old doctrine of an "eliminatory" type), things

[38] Masera, L., „*Poca prova, poca pena: una curiosa decisione della cassazione sulla rilevanza dell'atipicità del decorso causale al fine del riconoscimento delle circostanze attenuanti generiche*", disponibil la [https://www.penalecontemporaneo.it/d/6150-poca-prova-poca-pena-una-curiosa-decisione-della-cassazione-sulla-rilevanza-dell-atipicita-del-deco] Accesssed 21.02.2019

[39] Ciopec, *op. cit.* note 37, p. 138

which have not been found in a conviction sentence to be the *lato sensu* product of a crime, without talking of a punitive measure? Or only affirming the confiscation regards prevention is because it is considered more "noble" than repression[40]?

Some scholars stated[41] that taking into account, in particular, the provisions of the fundamental law, the regulation of "extended confiscation" as having the nature of a safety measure is an "impossible mission". Moreover, other authors[42] state that the measure does not present the features of a safety measure, especially concerning its preventive nature, as its strong repressive nature brings it closer rather to the specificity of complementary punishments.

Even the above-mentioned European Framework Decision, when providing the definition of "confiscation", admits that it may also be a punishment or other type of measure, stating in art. 1: "confiscation" *means a punishment or a measure* ordered by a court following a proceeding in connection with an offence or offences, resulting in the definitive dispossessing of the property.

Directive 2014/42/EU no longer refers to "punishment", providing in paragraph 13 that: "Freezing and confiscation under this Directive are *autonomous concepts* which should not prevent Member States from implementing this Directive by means of instruments which under national law would be considered as punishments or other types of measures". Apparently, the new Directive understood the danger of assimilation of the measure to a punishment, giving the Member States the freedom to choose in this respect, without however naming the type of punishment applied, making room for a new concept, quite frequently mentioned in the recent doctrine, of *sui generis* punishment.

In considering this terminology, some scholars said that it is a *punishment in the European sense*[43]. German legislation, as we observed above, treats the extended confiscation as a particular criminal law measure, not a safety measure, nor a punishment. We can remark that this can be the right position in understanding the European regulations and concepts.

The view of some concepts of undefined nature in the case law of the Strasbourg Court is still to be found in the case of the more famous concept of "*criminal ac-*

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40 Panzavolta; Flor, *op. cit.* note 23, p. 111

41 Hotca, M.A., Din nou despre confiscarea extinsa. Necesitatea reconsiderarii reglementarii. Solutii propuse, accessed at [https://www.juridice.ro/200465/din-nou-despre-confiscarea-extinsa-necesitatea-reconsiderarii-reglementarii-solutii-propuse.html] Accessed 23.03.2019

42 Gorunescu, M., în *Colectiv, Noul Cod penal comentat. Partea generală*, Ed. a III-a revăzută și adăugită, Ed. Universul Juridic, București, 2016, p. 662

43 Udroiu, M., *Drept penal. Partea generală*, Ed. IV, Ed. CH Beck, București, 2017, p. 488

*cusation in the European sense*". This reminds us of the criteria laid down in the jurisprudence of *Engel versus The Netherlands*.[44] However, even if the institution is present in Romanian law as a result of the transposing of Community instruments, we believe that the real challenge is to find the place of it among criminal law instruments in relation to domestic law.

But even in the context of the intense *internationalization* and *europeanization* of criminal law in the matter of identifying, freezing and confiscating the proceeds of crime, we cannot omit the fact that the national legal systems differ in many ways. Sometimes uniformity is in contradiction with a series of constitutional principles which cannot be derogated from.

Extended confiscation obviously concerns more the person than the property. It "punishes" the offender for holding things of an uncertain source, allegedly criminal, but still without having convicted him for a predicate-crime. It has been asserted[45] with good reason that we should accept that leaving alleged proceeds of criminal activity in the civil circuit is not necessarily a problem for society and does not *per se* create a state of danger. But is it moral?

Are we therefore talking about a danger of the person who possesses them, or simply not even that, as it is about punishing the person for an unjustified wealth, corroborated with a conviction for a related offence? The idea of prevention fades and the notion of "dangerousness", used by the old doctrine, seems to be the key: *the person has the tendency to commit new crimes, presumed to originate from the possession of goods, which the state will confiscate.* Thus, we believe, we are dealing with prevention by punishment, and not pure prevention (*punitur ut ne peccetur*).

Some scholars also point out that "it is known that, in the case under discussion, the stone was thrown again by the European Court of Human Rights, starting with the judgment of *Sud Fondi vs Italy*[46], thus confirming the finding of "the nature of punishment according to art. 7 of the Convention". On this basis, the Court has clarified as a *sine qua non* condition for ordering urban confiscation[47] - as well as any other type of confiscation and the character of "intrinsically punitive

44 *The Engel criteria*, used also to qualify if a measure should be qualified as a criminal measure, are (1) the clasification of the measure in criminal law, (2) the nature of the offence, and (3) the degree of severity of the penalty risked. (see also Welch v. The United Kingdom, app. nr. 17440, para.32)

45 Ciopec, *op. cit.* note 37, p. 110

46 Application 75909/01, Decision of 20 January 2009

47 By means of *„Confisca urbanistica"*, a measure stipulated in the Italian criminal law: "the final sentence of the criminal judge establishing the existence of illegal land plotting provides for the confiscation of the land and of the abusively constructed works."

sanction" of it - finding an intellectual connection (consciousness and will) that allows the detection of an element of responsibility in the offender's behaviour".[48]

Even the ECtHR is oscillating[49]. In *Walsh vs UK*[50] the Court faced the question of whether confiscation civil proceedings were criminal in nature. The Court held that "there was no finding of guilt of specific offences. The recovery order was not punitive in nature, the amount of money involved is not itself determinative of the criminal nature of the proceedings". In *Butler vs. UK*[51], the Court regarded a forfeiture order as a preventive measure , which can not be compared to a criminal sanction, since it was designed to take out money that was presumed to be tied with trade with drugs. In *Geerings vs. The Nederlands*[52], ECtHR took a different approach, holding that "if it is not found beyond a reasonable doubt that the person affected had committed the crime and if cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt".

In a recent decision, in *Telbis and Viziteu vs. Romania*[53], Court held that "the confiscation had been part of a fight against corruption, which was a legitimate aim for the Government to pursue. There were also common European legal standards which encouraged the seizure of property linked to such serious crimes, even without a prior conviction". So, ECtHR in recent jurisprudence accepts that the Romanian type of extended confiscation is part of criminal policy to fight against corruption (the case refered to the extended confiscation of goods detained by the wife and daughter of a doctor convicted for taking a large number of bribes).

## 6. PROPOSED MODIFICATION OF ROMANIAN CRIMINAL CODE WITH REGARD TO EXTENDED CONFISCATION. A HIGHER STANDARD OF PROOF?

According to Law sent in September 2018 for promulgation[54], with respect to which, in the Decision no. 650 dated 25 October 2018[55], the Romanian Consti-

[48] Mannes, V., *„La confisca senza condanna al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza"*, accesat la[ https://www.penalecontemporaneo.it/upload/1428820687MANES_2015.pdf] Accessed 02.03.2019

[49] Esser, *op. cit.* note 28, pp. 93-94

[50] Application no. 43384/05, Decision of 21 November 2006

[51] Application no. 41661/98, Decision of 27 June 2002

[52] Application no. 30810/03, Decision of 1 March 2007

[53] Application no. 47911/15, Decision of 26 June 2018

[54] accessed at [http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=17241]

[55] Published in the Official Journal no. 97, 7 February 2019

tutional Court admitted a series of criticisms, the main objective of the amendments to the safety measure under analysis was to harmonize the legislation with Directive 2014/42/EU. However, it appears from the Court's explanation that the legislator only formally stated this objective, with some modifying provisions being manifestly contrary to the European text.

The law (which at this moment is in new parliamentary procedures, after the Court decision) does not change the nature of the extended confiscation, maintaining it between the safety (or preventive) measures.

As far as we can see, on the one hand, intention of the legislator was to change the current list of crimes that permit the extended confiscation to be ordered, and on the other hand, the *standard of proof* needed to order the measure is amended - from simple conviction (which is more than what Directive 2014/42/EU required) to conviction *beyond any doubt* (excluding even the *reasonable doubt*)[56]. In a very interesting movement, for moment stopped by the Court, the legislator tries to introduce a criminal procedure standard of proof, where the standard is in fact one of balance of probabilities, even it Romanian legislation calls it "conviction".

The law provided that:

"In Article 112¹, paragraphs (1) and (2) shall be amended and shall have the following content:

"Article 112¹. (1) Goods, other than those provided for in art. 112, shall also be subject to confiscation, when a person is convicted of a crime susceptible of generating a material benefit for them, and for which the punishment provided by the law is 4 years or more of imprisonment, *and the court forms its conviction, based on the circumstances of the case, including the factual elements and the evidence presented, that the respective goods come from criminal activities. The conviction of the court can also be based on the disproportion between the person's legal income and wealth.*

(2) Extended confiscation is ordered if the following conditions are met cumulatively: (a) the value of the property acquired by the convicted person over a period of 5 years before and, where appropriate, after the offence has been committed, up to the date of the issue of the court notification, manifestly exceeds the wealth ob-

[56] Lord Denning defined the reasonable doubt so: "There is no need to achieve certainty, but a high level of probability must be attained. The standard beyond any reasonable doubt does not signify the proof beyond any shadow of doubt. The law does not protect society if it admits that imaginary possibilities can divert the course of justice. If the allegation is proven so that no distant probability is found in its favor, which would correspond to the argument - of course it is possible, but it is not at all probable - then the allegation is proven beyond reasonably doubt"

tained by the person legally; b) *the evidence shows that the goods come from criminal activities of the nature provided in par. (1)".*

In Article 112[1], after paragraph (2), a new paragraph will be inserted, paragraph (2[1]), which reads as follows: "(2[1]) *The court's decision must be based on clear evidence, beyond any doubt, that the convicted person is involved in criminal activities producing goods and money*".

In Article 112[1], paragraph (3) shall be amended and shall have the following content: "(3) For the application of the provisions of para. (2) account shall also be taken of the value of the assets transferred by the convicted person or a third party to a member of the family, *if the person knew that the purpose of the transfer was to avoid confiscation* or to a legal entity over which the convicted person holds control. Confiscation will be ordered within the bounds of the transferred assets when the illicit transfer can be proven by clear evidence beyond any doubt."

By means of the aforementioned decision, the Constitutional Court declared unconstitutional the phrase "from the evidence produced", the phrase "clear evidence, beyond any doubt" and the phrase "if the person knew that the purpose …".

Even in a simple reading, the standard of proof necessary for ordering the extended confiscation laid down by Directive 2014/42/EU is no longer even of a conviction, but more reduced, while the attempt by the Romanian authorities to impose a higher standard seems to be unrealistic. Recital 21 of the Directive provides that:

*„Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct."*

The Constitutional Court has rightly observed that the law regarding the changes of extended confiscation contains a series of confusions and inaccuracies which, if adopted, would divert the purpose of the measure from its rationale.

The Court finds that "the legislator has acted with the notion of evidence for the court to base its judgment applying the extended confiscation security measure on "clear evidence, beyond any doubt". It follows that the court must have separate evidence to be able to order said measure; thus, by producing such evidence, it is enough to prove the criminal act itself, a hypothesis in which the special confiscation, rather than the extended one, would be applied.

Thus, the use of the phrase "beyond any doubt" in art. $112^1$ par. $(2^1)$ and (3) of the Criminal Code makes it unnecessary to regulate the institution of extended confiscation. This is because it establishes a standard of proof that requires the full settlement of the criminal legal relationship of conflict, with the consequence of the applicability of the special confiscation institution and the establishment of a more severe condition than those provided for in Directive 2014/42/EU on evidence regime."

In confirming the „civil" standard of proof, in recent precited *Telbis and Viziteu vs. Romania*, ECtHR stated that „it was legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence suggesting that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of proceedings related to the proceeds of crime derived from serious offences, the Court has not required proof „beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, have been found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1. The domestic authorities were given leeway under the Convention to apply confiscation measures not only to persons directly accused of offences, but also to their family members and other close relatives who had been presumed to possess and manage the "ill-gotten" property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status".

We can observe that the legislator has not fully understood the modern standards of proof and the relationship between the concept of proof and that of "factual element". The last is being sufficient, according to European standards, to establish the illicit origin of goods subject to extended confiscation[57]. Romanian extended confis-

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57 Criste L., *Appraisal of evidence and the standard of proof in the common procedure and in the proceeding of plea argument, from a comparative law perspective*, in Criminal Law Writings nr. 4/2018, Ed. Universul

cation, being a criminal-confiscation, but also only a “related to an offence” measure, does not need a standard of proof similar to the one needed for a criminal conviction.

So, the law project seems to have aimed to operate with a double standard of proof. Firstly it admitted the sufficiency of existence of factual elements as well in forming the judge’s conviction (and the evidence is, broadly speaking, a factual element, but here notions have different meanings). However, next it speaks only of evidence in proving the source of the goods subject to the measure.

Moreover, using the phrase “clear evidence”, has in our opinion the role of raising the standard of proof, given the fact that in procedural sense, the antinomy clear/unclear evidence does not exist, although it is sometimes used in the jurisprudence. The evidence exists or not, it is lawful or illegally obtained; only the court’s conviction may be certain or less certain. The role of regulation seems to be to avoid abusive confiscations, while introducing hybrid concepts foreign to the Romanian system.

The new system proposed by the Romanian legislator and declared contrary to the Constitution aimed to reach a compromise between the continental standard of the judge’s conviction and the common-law one, also present in Romanian procedural system after 1 February 2014 (when the new code was enforced).

*Intimate conviction*, the current and traditional standard in continental systems, it is said, does not mean arbitrariness but is formed in relation to the evidence debated and produced under the conditions of the contradiction principle, and it is also necessary to present the reasons that led to their evaluation in a certain way or to their removal. It has been said in relation to the notion that the term *intimate* indicates something personal or individual, and *conviction*, a firm, certain opinion, which is required in an obvious manner[58].

The text also refers to the notion of “beyond any doubt”, which seems, in part, to refer us to the “beyond any reasonable doubt” standard. Since the classical standard of this kind admits the existence of a doubt in establishing the guilt, but it must lie within reasonable limits, the standard of the new provision, as it excludes the reasonableness of a doubt, is similar to that of pure certainty[59]. The legislator therefore proposed, in the matter of extended confiscation, a higher standard of proof than that required for a conviction, which is absolutely atypical.

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Juridic, București, pp. 80-85

58 Mateuț, Gh., *Libertatea aprecierii probelor*, în *Revista română de drept penal,* nr. 3, 2004, p. 44

59 Also see Hotca, M.A., *Neconstitutionalitatea si inutilitatea dispozitiilor care reglementează confiscarea extinsă*, accessed at [https://www.juridice.ro/199507/neconstitutionalitatea-si-inutilitatea-dispozitiilor-care-reglementeaza-confiscarea-extinsa.html] Accessed 03.03.2019

We can conclude, regarding the recent events in Romanian system that this attitude of the legislator was rightly censored by the Romanian Constitutional Court. The Court repeats that there is not always a need to establish a direct link between the assets and the alleged crime, since it is also possible to confiscate property that is disproportionate with the individual's income, and whose provenance the individual can not justify. The solution in Romanian system may be, in our opinion, moving the extended confiscation from a preventive to a *sui-generis* criminal measure.

## 7. FINAL CONCLUSIONS

It is certain that the extended confiscation is a compromise, which states have to accept, being faced with the diversification of the ways of obtaining high benefits from organized crime. Even it is qualified as a "civil forfeiture", like in American system, a "confiscation order", like in German law, or a "preventive/security measure", like in Italian or Romanian criminal system, if some distinctions are not taken as point of departure, negative effects will follow.

The Constitutional Court of Romania has so far protected this sanction from criticism, some not without support, related to the issue of sanctioning a person for possessing goods of questionable origin without a direct conviction, but only in the presence of a related offence.

Whether we see it as a variety of special confiscation, as a real punishment, lost among the "classic" preventive measures, or as a new, *sui-generis* European measure, extended confiscation is an institution that is developing under our eyes.

The repressive characteristics will be following it for a long time, and the context of the fight against profit-driven organized crime attempts to counterbalance this. The way in which European criminal law systems will receive extended confiscation depends on how  the specificity of each state faces the community regulations, and it is a real challenge in the near future.

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2. *Sud Fondi vs Italy,* Application 75909/01, Decision of 20 January 2009
3. *Walsh vs UK* Application no. 43384/05, Decision of 21 November 2006
4. *Butler vs UK* Application no. 41661/98, Decision of 27 June 2002
5. *Geerings vs. The Nederlands* Application no. 30810/03, Decision of 1 March 2007
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# TERRORIST FINANCING AS THE ASSOCIATED PREDICATE OFFENCE OF MONEY LAUNDERING IN THE CONTEXT OF THE NEW EU CRIMINAL LAW FRAMEWORK FOR THE PROTECTION OF THE FINANCIAL SYSTEM

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***ABSTRACT***

*The nexus between criminal and terrorist groups constitute an increasing security threat to the EU, especially in the area of the abuse of the financial system for the purposes of terrorist financing as the associated predicate offence of money laundering (hereinafter: terrorist financing). In that regard, Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing constitutes the main EU legal instrument not only in the context of the detection and investigation but also the prevention it from occurring. However, emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations, including those related to the misuse of prepaid cards and virtual currencies, have brought to light. On the other side, it is noted that there is lack of appropriate cooperation between financial intelligence units and with law enforcement authorities, especially in the area of the access to relevant information of financial organizations on transactions involving high-risk third countries. Therefore, it became undisputed that the Directive (EU) 2015/849 should be amended. In that context, the EU has adopted on 30 May 2018 amended Directive (EU) 2018/843 so as to include the changes to Directive (EU) 2015/849. This is precisely the main reason why the first part of the paper covers the new EU rules in identifying the financial operations of terrorist networks as well as in detecting their financial backers. Furthermore, since the objective of Directive (EU) 2018/843, namely the protection of the financial system by means of prevention, detection and investigation of terrorist financing, cannot be sufficiently achieved only by the Member States with individual measures adopted by them to protect their financial systems, it seems compulsory to take into consideration significant improvements achieved in this area at international level in order to examine whether the new amended EU framework is in compliance with existing international standards. For that reason, the second part of the article deals with the international standards on combating terrorist financing, especially those made by the Financial Action Task Force. Finally, since the Republic of Serbia has, in the context of accession and negotiations process to EU, recently adopted the new framework concerning money laundering and terrorist financing, the third part of the paper is dedicated to the analysis of the national framework in this area in order to examine its compliance with EU framework. In concluding remarks, it is noted that although in the recent period there have been significant improvements in the*

*framework on terrorist financing and money laundering both at the international and EU level but also at the national level, there is still lack of effective implementation of adopted standards. Bearing in mind the above, some recommendations for accelerating the implementation of adopted measures on preventing terrorist financing are listed.*

***Keywords:*** *terrorist financing, money laundering, criminal law, EU, Directive (EU) 2015/849, Directive (EU) 2018/843*

## 1. INTRODUCTION

Recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations.[1] Methods and techniques for acquiring funds and then using them for financing the terrorist activities have become very subtle, often unnoticeable and difficult to recognize which made it difficult to track money flows.[2] As their fund-raising activities were substantially curtailed, terrorist groups were forced to evolve and find new ways of financing their terrorist activities by creating hybrid criminal/terrorist entities with an internal system of funding, which enabled them to engage in terrorist activities in order to increase their profits. Therefore, nowadays the nexus between criminal and terrorist groups are much more complex and sophisticated and can be viewed from different aspects.[3] In this sense, in this paper firstly, it will be analyzed and discussed one aspect of that nexus concerning criminal offense terrorist financing as the predicate offense of money laundering. Furthermore, the focus will be on the new EU framework on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing as well as the international standards of the importance in this area, especially those made by the Financial Action Task Force. Finally, the relevant framework of the Republic of Serbia will be considered. To start with the link between criminal offenses of money laundering and terrorist financing and the stages through they occur.

As a specific form of organized crime, money laundering threatens all significant values of society since it encourages terrorists to engage in and expand their criminal activities. The essential feature of the money laundering process is that it is extremely changeable and adaptable to the circumstances and conditions in which it takes

[1] Pedić, Ž., *Neprofitni Sektor I Rizik Od Financiranja Terorizma*, Ekonomska misao i praksa, *Vol.* 19, No. 1, p. 139

[2] Manojlović, S., *Predlog zakona o sprečavanju finansiranja terorizma,* Bilten sudske prakse Vrhovnog suda Srbije, No. 2, 2006, p. 83

[3] Prokić, A., *The Link Between Organized Crime And Terrorism*, Facta Universitatis, *Vol.* 15, No, 1, 2017, pp. 85-86

place.[4] Money laundering is a process of concealing the illicit origin of money or assets acquired through crime.[5] The money laundering has three essential stages. During the first stage, so-called *the investment* phase, the perpetrator breakdowns the direct link between money and the illegal activity through it has acquired, introducing the illegally acquired money into the financial system most often in the form of some legal activity in which payment is made in cash. After the money had entered the legal financial system in the second *concealment* stage it is transferred from the account to which it is placed on other accounts in order to hide the link between money and criminal activity from which it originates. Finally, in the context of the last *integration* stage, laundered money appears as money from some legal activity.[6]

The link between money laundering and terrorist financing is reflected in the fact that the second one crime could be the associated predicate offence of the first one. Precisely, financing terrorism is a preparatory action to secure or collect funds or assets, intending to be used or knowing that they can be used, in whole or in part, for the commission of a terrorist act by a terrorist or by terrorist organizations.[7] Like money laundering, terrorist financing also has several stages.[8] The first phase includes the acts of the *collection of funds* derived either from the clandestine legitimate business of the entity that is connected or even guided by terrorist organizations or individuals or from criminal activities. A significant source of these funds is donations by individuals who support the goals of terrorist organizations, as well as charities funds that raise funds and channel them to terrorist organizations. In the second phase, the collected funds are *stored* in various ways, including banks accounts opened by intermediaries, individuals or companies. The third phase is the *transfer of these funds* to terrorist organizations or individuals for operational use, through the use of fund transfer mechanisms, such as international electronic transfers between banks or money remittances, the use of charity organizations, alternative systems or money transfer networks, through couriers or smuggling over state borders. However, there are three main methods by which terrorists move money or transfer value.

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4 Milošević, B., *Money Laundering As A Form Of Economic Crime In The Role Of Financing Terrorism*, Facta Universitatis, *Vol.* 14, No. 4, 2016, p.550

5 Važić, N. *Pranje Novca- Materijalni I Procesni Aspektu Međunarodnom I Domaćem Zakonodavstvu,* Bilten sudske prakse Vrhovnog suda Srbije, No. 2, 2008, p.121-122. See also, Cvitanović. L., *et.al.*, *Kazneno pravo- posebni dio*, Pravni fakultet Sveučilišta u Zagrebu, 2018, pp. 381-389

6 Sinanović, B., *Pranje novca,* Bilten sudske prakse Vrhovnog suda Srbije, No. 2, 2011, p.63-64

7 Bolta D., *Sprječavanje financiranja terorizma*, Policija i sigurnost, *Vol.*. 19, No. 4, 2010, p.420. Derenčinović, D., *The Review Of The Harmonisation Of The Croatian Criminal Law With International Legal Documents On Combating Terrorism*, Hrvatski ljetopis za kazneno pravo i praksu, *Vol.* 10, No. 2, 2003, p. 959; Derenčinović, D., *et. al.*, *Posebni dio kaznenog prava*, Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 32. See also, Cvitanović, *op.cit.*. note 5, pp. 41-42

8 Stanković N., *Terorizam i finansiranje terorizma*, Evropski Univerzitet Brčko, Brčko, 2014, pp.63-64

The first is through the use of the financial system, the second involves the physical movement of money (for example, through the use of cash couriers) and the third is through international trade.[9] The last stage is their *use* for the activities of terrorist organizations, such as the purchase of explosives, weapons of telecommunications equipment, the support of regular cell activities, financing camps for training or paying political support and shelter in suitable countries.[10]

## 2. THE NEW EU CONCEPT FOR THE PROTECTION OF FINANCIAL SYSTEM FROM MONEY LAUNDERING AND TERRORISM FINANCING

Although, Directive (EU) 2015/849 of the European Parliament and of the Council[11] represents the main EU legal instrument in the prevention of the use of the Union financial system for the purposes of money laundering and terrorist financing there was some legal gaps in the area of the prevention of the use of the financial system for the purposes of terrorist financing. Therefore it became essential for EU to extend the scope of Directive (EU) 2015/849 so as to adopt amended so-called the 5th Anti-Money Laundering Directive (EU) - 2018/843 which introduces several new or upgraded rules such as: 1) lifting the rules concerning the application of certain customer due diligence measures with respect to electronic money products; 2) extending anti-money laundering and counter-terrorism financing rules to virtual currencies and traders in works of art; 3) broadening the criteria for assessing high-risk third countries and improving checks on transactions involving such countries; 4) setting up centralized bank account registers or retrieval systems; 5) enhancing the powers of EU Financial Intelligence Units as well as between financial supervisory authorities and facilitating their cooperation.[12] The 5th Anti-Money laundering Directive has been adopted and entered into force on 9 July 2018.[13] Member States

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9 Financial Action Task Force, *Terrorist Financing*, Paris, 2008, p.21. Cmiljanić, B., *Zabrana finansiranja terorizma u svetlu međunarodnog prava i propisa Republike Srbije*, Temida No. 2, 2011, p.42

10 National Strategy on the combating of Money Laundering and the Financing of Terrorism, Official Gazette of the Republic of Serbia, No 89/08

11 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Official Journal of the European Union, L 141/73 of 5 June 2015, (hereinafter: Directive (EU) 2015/849)

12 Fahmy, M., *The Fifth Money Laundering Directiv*e, Global Risk Profile, Geneva, 2016, p.8

13 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Official Journal of the European Union, L 156/43 of 19 June 2018, (hereinafter: Directive (EU) 2018/843)

will have to implement these new rules into their national legislation by 10 January 2020.[14]

### 2.1. Lifting the rules concerning the application of customer due diligence measures with respect to electronic money products

First of all, the *Article 12* concerning the application of certain customer due diligence measures[15] with respect to electronic money products has been amended by lifting maximum monthly payment transactions limit as well as the maximum amount stored electronically allowed.[16] In other words, instead of the limit of EUR 250 prescribed by Directive (EU) 2015/849, amended Directive (EU) 2018/843 sets that limit up to EUR 150 (*Article 12 paragraph 1*). Precisely, *Article 12 paragraph 1* of Directive (EU) 2018/843 is amended in the following way. By way of derogation from certain customer due diligence measures and based on an appropriate risk assessment which demonstrates a low risk, a Member State may allow obliged entities not to apply certain customer due diligence measures with respect to *electronic money*, where all of the following risk-mitigating conditions are met: a) the payment instrument is not reloadable, or has a maximum monthly payment transactions limit of EUR 150 which can be used only in that Member State; b) the maximum amount stored electronically does not exceed EUR 150; c) the payment instrument is used exclusively to purchase goods or services; d) the payment instrument cannot be funded with anonymous electronic money; e) the issuer carries out sufficient monitoring of the transactions or business relationship to enable the detection of unusual or suspicious transactions. However, this derogation is not applicable in the case of redemption in cash or cash withdrawal of the monetary value of the electronic money where the amount redeemed exceeds EUR 50 (*Article 12 paragraph 2*) and not EUR 100 as it was prescribed by Directive (EU) 2015/849.[17] In the context of payments carried out with anonymous prepaid cards Member States may decide either not to accept on their territory payments carried out by using them or that credit institutions and financial institutions acting as acquirers only accept payments carried out with anonymous

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[14] Jourová V., *Strengthened EU rules to prevent money laundering and terrorism financing*, European Commission, 2018, p.2

[15] Generally speaking, these measures shall comprise of: a) identifying the customer and verifying the customer's identity; b) identifying the beneficial owner and taking reasonable measures to verify that person's identity; c) assessing and, as appropriate, obtaining information on the purpose and intended nature of the business relationship; d) conducting ongoing monitoring of the business relationship. Article 13 of Directive (EU) 2015/849

[16] Fletzberger, B., *5th Anti-Money Laundering Directive – a summary of the main points*, PayTechLaw, 2018, p.3

[17] Colin, N., *Adoption of fifth Anti-Money Laundering Directive*, White & Case, 2018, p. 2

prepaid cards issued in third countries where such cards meet requirements equivalent to those above-mentioned (*Article 12 paragraph 3*).[18] It could be concluded that in the context of the electronic money products the Member States should be allowed to exempt from certain customer due diligence measures, such as the identification and verification of the customer and of the beneficial owner and the assessing and, as appropriate, obtaining information but not from the monitoring of transactions or of business relationships.

### 2.2. Extending anti-money laundering and counter-terrorism financing rules to the providers of virtual as well as fiat currencies and traders in works of art

Secondly, in *Article 2 paragraph 1* of the amended Directive (EU) 2018/843 anti-money laundering and counter-terrorism financing framework has been extended so as to include providers of virtual as well as fiat currencies, custodian wallet providers and traders in works of art as the new obliged entities (added points g, h, i and j of the Article 2 paragraph 1 of amended Directive (EU) 2018/843 in relation to Directive (EU) 2015/849).[19] Precisely, amended Directive (EU) 2018/843 shall also apply to the following obliged entities: a) providers engaged in exchange services between virtual currencies and fiat currencies; b) custodian wallet providers; c) persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more;[20] d) persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more.[21] For the purposes of this Directive, *virtual currencies* means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically. On the other side, *fiat currencies* mean coins and banknotes that are designated as legal tender and electronic money, of a country, accepted as a medium of exchange in the issuing

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18 Internal Audit, Risk, Business & Technology Consulting, *Anticipating the Fifth EU AML Directive*, Internal Audit, Risk, Business & Technology Consulting, London, 2017, p. 3

19 Haffke, L.; Fromberger, M.; Zimmermann P., *Virtual Currencies and Anti-Money Laundering – The Shortcomings of the 5th AML Directive (EU) and how to Address them*, pp. 9-12. Available at SSRN: [https://ssrn.com/abstract=3328064] or [http://dx.doi.org/10.2139/ssrn.3328064] Accessed 15.04.2019

20 Deloitte, *Five insights into the art market and money laundering*, Deloitte Development LLC, London, 2018, p. 5

21 Tomić S., *New EU Directive On The Prevention Of The Use Of The Financial System For The Purposes Of Money Laundering And Terrorist Financing*, Bankarstvo, *Vol.* 47, No.2, 2018, p.110

country. Finally, *custodian wallet provider* means an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies (*Article 3 points 18 and 19* of the amended Directive (EU) 2018/843).[22]

### 2.3. Broadening the criteria for assessing high-risk third countries and improving checks on transactions involving such countries

Thirdly, the inserted rule in *Article 18a* of the amended Directive (EU) 2018/843 is focusing on broadening the criteria for assessing high-risk third countries and improving checks on transactions involving such countries.[23] According to the amended Directive (EU) 2018/843, with respect to business relationships or transactions involving high-risk third countries, Member States shall require obliged entities to apply the following *enhanced* customer due diligence measures: a) obtaining additional information on the customer and on the beneficial owner(s); b) obtaining additional information on the intended nature of the business relationship; c) obtaining information on the source of funds and source of wealth of the customer and of the beneficial owner(s); d) obtaining information on the reasons for the intended or performed transactions; e) obtaining the approval of senior management for establishing or continuing the business relationship; f) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination (*Article 18a paragraph 1*). In addition to these measures the Member States shall require obliged entities to apply, where applicable, one or more additional mitigating measures to persons and legal entities carrying out transactions involving high-risk third countries. Those measures shall consist of one or more of the following: a) the application of additional elements of enhanced due diligence; b) the introduction of enhanced relevant reporting mechanisms or systematic reporting of financial transactions; c) the limitation of business relationships or transactions with natural persons or legal entities from the third countries identified as high-risk countries. (*Article 18a paragraph 2*).Finally, in addition to the abovementioned measures, the Member States shall apply, where applicable, one or several of the following measures with regard to high-risk third countries in compliance with the Union's international obligations such as: a) refusing the establishment of subsidiaries or branches or representative offices of obliged enti-

[22] Keatinge, T.; Carlisle, D.; Keen, F., *Virtual currencies and terrorist financing: assessing the risks and evaluating responses*, European Parliament, Brussels, 2018, pp. 50-53

[23] Council of Bars and Law Societies of Europe, *CCBE comments on the proposal of 5 July 2016 to amend Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing*, Council of Bars and Law Societies of Europe, Bruxelles, 2016, p. 4

ties from the country concerned, or otherwise taking into account the fact that the relevant obliged entity is from a country that does not have adequate regimes; b) prohibiting obliged entities from establishing branches or representative offices in the country concerned, or otherwise taking into account the fact that the relevant branch or representative office would be in a country that does not have adequate regimes; c) requiring increased supervisory examination or increased external audit requirements for branches and subsidiaries of obliged entities located in the country concerned; d) requiring increased external audit requirements for financial groups with respect to any of their branches and subsidiaries located in the country concerned; e) requiring credit and financial institutions to review and amend, or if necessary terminate, correspondent relationships with respondent institutions in the country concerned (*Article 18a paragraph 3*). However, it should be noticed that when enacting or applying these measures Member States shall take into account, as appropriate relevant evaluations, assessments or reports drawn up by international organizations and standard setters with competence in the field of preventing money laundering and combating terrorist financing, in relation to the risks posed by individual third countries. Finally, it is prescribed that the Member States shall notify the Commission before enacting or applying these measures (*Article 18a paragraph 4 and 5*).

### 2.4. Setting up centralized bank account registers or retrieval systems

Fourthly, the amended Directive (EU) 2018/843 introduces the new one rule in *Article 32a* regarding setting up centralized bank account registers or retrieval systems.[24] In this sense, the Member States shall put in place centralized automated mechanisms, such as central registries or central electronic data retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts and bank accounts identified by IBAN and safe-deposit boxes held by a credit institution within their territory ensuring that the information held in the centralized mechanisms is directly accessible in an immediate and unfiltered manner to national Financial Intelligence Units and to national competent authorities as well in a timely manner (*Article 32a paragraph 1 and 2*).[25] The following information shall be accessible and searchable through the centralized mechanisms[26]: a) for the customer-account holder and any person purporting to act on behalf of the customer: the name, complemented by either the other identification data required under the national provisions or a unique

[24] Finn, H., *The fifth anti-money laundering and terrorist financing directive (AML 5)-Key aspects and changes* Arendt & Medernach, , Luxembourg, 2018, p. 5

[25] Fletzberger, *op.cit.*, note 16, p. 4

[26] Colin, *op.cit.,* note 17, p.3

identification number; b) for the beneficial owner of the customer-account holder: the name, complemented by either the other identification data required under the national provisions or a unique identification number; c) for the bank or payment account: the IBAN number and the date of account opening and closing; d) for the safe-deposit box: name of the lessee complemented by either the other identification data required under the national provisions or a unique identification number and the duration of the lease period (*Article 32a paragraph 3*). The list is not limited since the Member States may consider requiring other information deemed essential for Financial Intelligence Units and national competent authorities (*Article 32a paragraph 4*). Anyway, the goal is set and implies that by 26 June 2020, the Commission shall submit a report to the European Parliament and to the Council assessing the conditions and the technical specifications and procedures for ensuring secure and efficient interconnection of the centralized automated mechanisms (*Article 32a paragraph 5*).

### 2.5. Enhancing the powers of EU financial intelligence units as well as between financial supervisory authorities and facilitating their cooperation

Finally, the amended Directive (EU) 2018/843 in the inserted *Articles 50a*, as well as, *57a* prescribe the rules concerning the facilitation of cooperation between competent authorities of the Member States and competent authorities supervising credit and financial institutions and other authorities bound by professional secrecy as well.[27] In the context of the cooperation between competent authorities of the Member States, it is not allowed to be prohibited or placed unreasonable or unduly restrictive conditions on the exchange of information or assistance between competent authorities. In particular the Member States shall ensure that competent authorities do not refuse a request for assistance on the grounds that: a) the request is also considered to involve tax matters; b) national law requires obliged entities to maintain secrecy or confidentiality, except in those cases where the relevant information that is sought is protected by legal privilege or where legal professional secrecy applies; c) there is an inquiry, investigation or proceeding underway in the requested Member State, unless the assistance would impede that inquiry, investigation or proceeding; d) the nature or status of the requesting counterpart competent authority is different from that of requested competent authority (*Article 50a paragraph 1*).

[27] Mitsilegas,V.;Vavoula,N., *The Evolving Eu Anti-Money Laundering Regime Challenges For Fundamental Rights And The Rule Of Law*, Maastricht Journal of European and Comparative Law, *Vol.* 23, No. 2, 2016, pp. 288-289

On the other side, when it comes to the cooperation between competent authorities supervising credit and financial institutions and other authorities bound by professional secrecy Member States shall require that all persons working for or who have worked for competent authorities supervising credit and financial institutions and auditors or experts acting on behalf of such competent authorities shall be bound by the obligation of professional secrecy.[28] Without prejudice to cases covered by criminal law, confidential information which these persons receive in the course of their duties may be disclosed only in summary or aggregate form, in such a way that individual credit and financial institutions cannot be identified. Abovementioned shall not prevent the exchange of information between competent authorities supervising credit and financial institutions within a Member State or in different Member States in accordance with Directive (EU) 2018/843 or other legislative acts relating to the supervision of credit and financial institutions, including the European Central Bank (*Article 57a paragraph 1 and 2*).[29] However, competent authorities supervising credit and financial institutions receiving confidential information shall only use this information: a) in the discharge of their duties under Directive (EU) 2018/843 or under other relevant legislative acts, of prudential regulation and of supervising credit and financial institutions, including sanctioning; b) in an appeal against a decision of the competent authority supervising credit and financial institutions, including court proceedings; c) in court proceedings initiated pursuant to special provisions provided for in Union law adopted in the field of Directive (EU) 2018/843 or in the field of prudential regulation and supervision of credit and financial institutions (*Article 57a paragraph 3*). It should be concluded that the goal of the amended Directive is to allow that competent authority supervising credit and financial institutions cooperate with each other to the greatest extent possible, regardless of their respective nature or status. Such cooperation also includes the ability to conduct, within the powers of the requested competent authority, inquiries on behalf of a requesting competent authority, and the subsequent exchange of the information obtained through such inquiries (*Article 57a paragraph 4*).

## 3. INTERNATIONAL STANDARDS FOR THE PROTECTION OF FINANCIAL SYSTEM FROM MONEY LAUNDERING AND TERRORISM FINANCING

Starting from the above-mentioned five new or upgraded rules of the 5th Anti-Money laundering EU Directive 2018/849 significant improvements achieved in

[28] Finn, *op.cit.*, note 24, p.5

[29] Jourová*, op.cit.,* note 14, p. 2

this area at international level, will be taken into consideration, especially those made by Financial Action Task Force[30] (hereinafter: FATF) since the objective of Directive, namely the protection of the financial system by means of prevention, detection and investigation of terrorist financing cases, cannot be sufficiently achieved only by the Member States with individual measures adopted by them and should be fully compliant with the FATF standards.[31]

### 3.1. Customer due diligence measures with respect to electronic money

First of all, when it comes to the rules concerning the application of certain customer due diligence measures with respect to electronic money it should begin from the fact that FATF standards indicate that financial institutions should be required to undertake customer due diligence measures when: 1) establishing business relations; 2) carrying out occasional transactions: a) above the applicable designated threshold (USD/EUR 15,000); or b) that are wire transfers; 3) there is a suspicion of money laundering or terrorist financing; or 4) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data. These measures to be taken are as follows: a) identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information; b) identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements, this should include financial institutions understanding the ownership and control structure of the customer; c) understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship. d) conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.[32] These requirements should apply to all new customers including those who use electronic money products. However, to avoid confusion, FATF has set the distinction between electronic money and real or fiat currencies, on the one hand, and virtual or digital currencies, on the other

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[30] Schott, P., *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, The World Bank and The International Monetary Fund, Washington DC, 2006, p. 128; See also Borlini L.; Montanaro, F., *The Evolution Of The Eu Law Against Criminal Finance: The "Hardening" Of FATF Standards Within The EU* George Town Journal Of International Law, *Vol.* 48, 2017, p. 1011

[31] Kordík, M.; Kurilovská, L., *Protection of the national financial system from the money laundering and terrorism financing*, Entrepreneurship and Sustainability Issues, *Vol.* 5, No.2, 2017 p. 243

[32] The Financial Action Task Force, *International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation- The FATF Recommendations*, Paris, 2016, p. 14

side.[33] In that sense, e-money means a digital transfer mechanism for fiat currency since it electronically transfers value that has legal tender status, while fiat currency is the coin and paper money of a country that is designated as its legal tender and is customarily used and accepted as a medium of exchange in the issuing country. On the other side, the digital currency can mean a digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term virtual currency. Finally, virtual currency is distinguished from fiat currency or real currency since it is not issued nor guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency as digital representation of value that can be digitally traded as a medium of exchange, a unit of account and/or a store of value.[34]

### 3.2. Money laundering and counter-terrorism financing risks concerning virtual currencies

Secondly, in the context of the issue regarding virtual currencies, it should be noted that the development and widespread use of the Internet, personal computers, mobile devices, and related platforms and services, has had a vast impact on financial transactions.[35] The ability of new financial innovations, such as pre-paid cards and online and mobile payment platforms, to enable rapid cross-border payments presents elevated terrorist financing risks. For that reason, financial institutions should identify the money laundering as well as terrorist financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies for both new and pre-existing products.[36] In that regard, in 2014, the FATF took up the specific topic of virtual currencies linking cryptocurrencies with the anonymity risks because customer identification features such as name and address are not attached to a user's Bitcoin address, and because the system has no central service provider that has oversight of transactions and can be held accountable. According to the FATF's assessment, suspicious activity may therefore not only be more difficult to detect, but the source of payments may be blurred in contrast to traditional credit or debit cards, or payment systems such as PayPal and Western Union. Since the existence of the anonymity risks in relation to cryptocurrencies, there are increasing concerns about the use of virtual currencies by terrorist orga-

[33] Cindori, S.; Petrović, T., *Indikatori Rizičnosti Bankarskog Sektora U Okvirima Prevencije Pranja Novca*, Zbornik PFZ, *Vol.* 66, No. 6, 2016, pp. 770-772

[34] Financial Action Task Force, *Virtual Currencies – Key Definitions And Potential Aml/Cft Risks- The FATF Report*, Paris, 2014, p. 4

[35] Keatinge, *el.al.*, *op.cit.,* note 22, p. 21

[36] Financial Action Task Force, *op.cit.*, note 32, p.17

nizations, especially with evidence of websites connected to terrorist organizations seeking Bitcoin donations or providing instructions of how to purchase weapons using Bitcoin. The report made by the FATF on terrorist financing for recruitment purposes from 2018 highlights an instance in which an ISIS propaganda through a website, whose owner is unidentified, was used to solicit donations in Bitcoin, some of which was used to pay for the site's web-hosting services.[37]

Furthermore, cases such as Liberty Reserve and Silk Road has shown that criminal organizations are already using digital currencies, not only to finance their terrorist activities but also to launder their proceeds of crime. Digital currencies have the potential to make it easier for criminals to hide the source of their proceeds and move their funds across borders without detection. However, these cases have also shown that, although difficult, the investigation of the ownership of digital currencies is not impossible since digital currency networks usually record transactions in a distributed public ledger, which can be subjected to analytical monitoring tools capable of highlighting suspect transactions.[38] In the context of the investigation, the use of virtual currencies such as Bitcoin for money-laundering purposes is going to highlight the distinction between objective elements of the crime (an act in itself, as well as objects and tools of crime) and subjective (intent, purpose, complicity, etc.). The use of virtual currency as objective elements of the criminal offence of money-laundering can be brought down to the following aspects. In terms of placement, when criminally obtained funds are introduced in the financial circulation, the procurement of the virtual currency through an exchanger may be used as a relevant element of the crime. In terms of layering (the process in which criminally derived funds are legalized and their ownership and source is disguised), the essential features of virtual currency can be brought forward as an element of money-laundering offence where the prosecution will be willing to prove the case that the virtual currency was selected precisely for these features, in order to conceal the criminal origin of funds. In terms of integration (the process by which the property legalized through layering is re-introduced into the economy), the use of virtual currency may be one of the elements, for instance, if the laundered proceeds are re-invested into the virtual currency market, this may be an additional element of offence that can be used. On the other hand, in terms of proof of intent, as a subjective element of the crime, which is an essential feature of money-laundering offences, the focus should be on the following aspects of bitcoin. Firstly, anonymity and general lack of face-to-face interaction may be a valid proof of intent to commit offence related to illegal use of virtual currencies

[37] Keatinge, *el.al.*, *op.cit.* note 22, pp.21-23

[38] International Centre For Asset Recovery*, Tracing Illegal Assets - A Practitioner's Guide*, International Centre For Asset Recovery, Basel 2015, p.115

and secondly, difficult traceability, including lack of paper/document trail could be specifically noted as an element of intent, as well.[39]

### 3.3. Countermeasures regarding high-risk third countries and transactions involving such countries

Thirdly, regarding the criteria for assessing high-risk third countries and improving checks on transactions involving such countries it should be noted that FATF standards point out that financial institutions should be required to apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from higher- risk countries if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing.[40] Countries should be able to apply appropriate countermeasures such as: a) requiring financial institutions to apply specific elements of enhanced due diligence; b) introducing enhanced relevant reporting mechanisms or systematic reporting of financial transactions; c) refusing the establishment of subsidiaries or branches or representative offices of financial institutions from the country concerned, or otherwise taking into account the fact that the relevant financial institution is from a country that does not have adequate systems; d) prohibiting financial institutions from establishing branches or representative offices in the country concerned, or otherwise taking into account the fact that the relevant branch or representative office would be in a country that does not have adequate systems; e) limiting business relationships or financial transactions with the identified country or persons in that country; f) prohibiting financial institutions from relying on third parties located in the country concerned to conduct elements of the customer due diligence process; g) requiring financial institutions to review and amend, or if necessary terminate, correspondent relationships with financial institutions in the country concerned; h) requiring increased supervisory examination and/or external audit requirements for branches and subsidiaries of financial institutions based in the country concerned; i) requiring increased external audit requirements for financial groups with respect to any of their branches and subsidiaries located in the country concerned. Finally, it should be noted that such countermeasures should be effective and proportionate to the risks.[41]

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[39] United Nations Office on Drugs and Crime, *Basic Manual on the Detection And Investigation of the Laundering of Crime Proceeds Using Virtual Currencies*, United Nations Office on Drugs and Crime, Vienna, 2014, pp.85-86

[40] Financial Action Task Force, *op.cit.,* note 32, p. 19

[41] FATF Recommendation 19, [https://cfatf-gafic.org/index.php/documents/fatf-40r/385-fatf-recommendation-19-higher-risk-countries] Accessed 11.03.2019

### 3.4. Potential sources of obtaining the requested information on the beneficial ownership

Fourthly, in the terms of setting up centralized automated mechanisms, FATF standards prescribe that countries may choose the mechanisms they rely on to achieve the objective of having access in a timely manner, adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons.[42] Potential sources of obtaining the requested information on the beneficial ownership are: a) central registries; b) other competent authorities that hold information such as tax authorities which collect information on beneficial ownership and c) other agents and service providers such as investment advisors or managers, lawyers, or trust and company service providers.[43] In that respect, competent authorities should have access to certain basic information about the obliged entities, which, at a minimum, would include information about the legal ownership and control structure of the company, including the status and powers of the company, its shareholders and its directors.[44]

### 3.5. Cooperation between competent authorities supervising credit and financial institutions and other authorities

Finally, in the context of the process of facilitation of cooperation between competent authorities supervising credit and financial institutions and other authorities bound by professional secrecy FATF standards made the difference between principles applicable to all forms of international cooperation and those applicable to specific forms of international cooperation such as: 1) exchange of information between Financial Intelligence Units; 2) exchange of information between financial supervisors; 3) exchange of information between law enforcement authorities; 4) exchange of information between non-counterparts. However, for both categories regarding the international principles of cooperation, the following rules are of the most relevance. Firstly, when making requests for cooperation, competent authorities should make their best efforts to provide complete factual and, as appropriate, legal information, including indicating any need for urgency, to enable timely and efficient execution of the request, as well as the foreseen use of the information requested. Furthermore, countries should not prohibit or place unreasonable or unduly restrictive conditions on the provision of exchange of informa-

[42] FATF Recommendation 24, [https://cfatf-gafic.org/index.php/documents/fatf-40r/390-fatf-recommendation-24-transparency-and-beneficial-ownership-of-legal-persons] Accessed 11.03.2019

[43] FATF Recommendation 25, [https://cfatf-gafic.org/index.php/documents/fatf-40r/391-fatf-recommendation-25-transparency-and-beneficial-ownership-of-legal-arrangements] Accessed 11.03.2019.

[44] FATF Recommendation 24, [https://cfatf-gafic.org/index.php/documents/fatf-40r/390-fatf-recommendation-24-transparency-and-beneficial-ownership-of-legal-persons] Accessed 11.03.2019

tion or assistance. In particular competent authorities should not refuse a request for assistance on the grounds that: a) the request is also considered to involve fiscal matters; and/or b) laws require financial institutions (except where the relevant information that is sought is held in circumstances where legal privilege or legal professional secrecy applies) to maintain secrecy or confidentiality; and/or c) there is an inquiry, investigation or proceeding underway in the requested country, unless the assistance would impede that inquiry, investigation or proceeding; and/or d) the nature or status (civil, administrative, law enforcement, etc.) of the requesting counterpart authority is different from that of its foreign counterpart. Finally, law enforcement authorities, as well as financial supervisors, should be focused to exchange domestically available information with foreign counterparts or non-counterparts for intelligence or investigative purposes relating to money laundering, associated predicate offences or terrorist financing, including the identification and tracing of the proceeds and instrumentalities of crime.[45]

## 4. THE NEW NATIONAL FRAMEWORK IN AREA OF THE PROTECTION OF FINANCIAL SYSTEM FROM MONEY LAUNDERING AND TERRORISM FINANCING

Bearing in mind that the Republic of Serbia has, in 2017, adopted the new framework concerning money laundering and terrorist financing,[46] this part of the paper is dedicated to the analysis of the national framework in this area.[47] In order to examine its compliance with EU framework further remarks will focus on the five abovementioned new EU adopted or updated rules from the Directive (EU) 2018/843.[48]

### 4.1. Customer due diligence actions and measures as well as the exemptions from customer due diligence in relation to electronic money

To start with the rules concerning the application of certain customer due diligence measures with respect to electronic money products it should be pointed

[45] FATF Recommendation 40, [https://cfatf-gafic.org/index.php/documents/fatf-40r/406-fatf-recommendation-40-other-forms-of-international-cooperation]. Accessed 11.03.2019

[46] Law on the prevention of money laundering and the financing of terrorism, Official Gazette of the Republic of Serbia, No. 113/17 of 17 December 2017

[47] See also Milošević, M., *Novi Zakon o sprečavanju pranja novca i finansiranja terorizma*, Časopis "Izbor sudske prakse", No. 3, 2018, pp. 9-13

[48] Kostić, J., *Harmonizacija nacionalnog zakonodavstva Republike Srbije sa Konvencijom o zaštiti finansijskih interesa Evropske unije*, Evropsko zakonodavstvo, *Vol.* 13, No. 47/48, 2014, p. 187-202; See also Kostić, J., *Krivičnopravna zaštita finansijskih interesa Evropske unije*, Institut za uporedno pravo, Beograd, 2018, pp. 22-24

out that in line with the relevant solution of Directive EU 2018/843, the Serbian law on the prevention of money laundering and the financing of terrorism in *Article 7* prescribes that unless otherwise provided for under this Law, the obliged entity shall: 1) identify the customer; 2) verify the identity of the customer based on documents, data, or information obtained from reliable and credible sources; 3) identify the beneficial owner and verify their identity in the cases specified in this Law; 4) obtain and assess the credibility of information on the purpose and intended nature of a business relationship or transaction, and other data in accordance with this Law; 5) obtain and assess the credibility of information on the origin of property which is or which will be the subject matter of the business relationship or transaction, in line with the risk assessment; 6) regularly monitor business transactions of the customer and check the consistency of the customer's activities with the nature of the business relationship and the usual scope and type of the customer's business. However, in accordance with *Article 16* certain difference exists in the terms concerning the exemption from customer due diligence in relation to electronic money. Namely, electronic money issuers are not obliged to apply customer due diligence actions and measures if it has been established, according to the risk analysis, that there is low risk of money laundering or terrorist financing and if the following conditions are met: 1) the amount of electronic money stored on a payment instrument cannot be recharged, or there is a monthly payment limit amounting to the RSD equivalent of EUR 250 that can only be used in the Republic of Serbia; 2) the total amount of stored electronic money does not exceed the RSD equivalent of EUR 250; 3) the money stored on a payment instrument is only used for purchase of goods and services; 4) the payment instrument may not be funded by anonymous e-money; 5) an electronic money issuer monitors transactions or business relationship to a satisfactory extent which enables it to detect unusual or suspicious transactions. Notwithstanding this rules shall not be applied if there are reasons for suspicion of money laundering or terrorist financing, as well as in case of redemption of electronic money for cash or in cases of withdrawal of cash in the value of electronic money, when the amount redeemed does not exceed the RSD equivalent of EUR 100. In this sense, it should be noted that instead of the limit of EUR 250 prescribed by Directive (EU) 2015/849 and the Serbian Law, amended Directive (EU) 2018/843 sets that limit up to EUR 150. Therefore, it should be concluded that Serbian law contains the solution regarding the exemption from customer due diligence in relation to electronic money which does not include the lifting rule concerning the application of certain customer due diligence measures with respect to electronic money products as it prescribed by the amended Directive (EU) 2018/843. The following is related also to the rule which prescribes that this derogation is not applicable in the case of redemption in cash or cash withdrawal of the monetary value of the

electronic money where the amount redeemed exceeds EUR 100 according to Directive (EU) 2015/849 and the Serbian Law, while amended Directive (EU) 2018/843 sets that limit up to EUR 50.

### 4.2. Providers of virtual currencies as the new obliged entities

Secondly, in the matter of extended EU anti-money laundering and counter-terrorism financing framework so as to include providers of virtual currencies and traders in works of art as the new obliged entities, it should be mentioned that Serbian Law *in Article 4 point 17* recognizes as obliged entities only providers of virtual currencies defining as persons providing the services of purchasing, selling or transferring virtual currencies or exchanging of such currencies for money or other property through internet platform, devices in physical form or otherwise, or which intermediate in the provision of these services.[49] However, it should be mentioned that Serbian law does not contain any further provision which defines virtual currencies. In that regard, the Serbian law should be amended, according to the meaning of virtual currencies referred to in Directive (EU) 2018/843, since it is incomprehensible that it recognized as obliged entities persons providing the services of purchasing, selling or transferring virtual currencies, but that did not include the definition of virtual currencies in the list of terms used in the Law. Moreover, comparing to the amended provisions of the Directive (EU) 2018/843 concerning virtual currencies, Serbian Law does not recognize the term of custodian wallet provider as an obliged entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies. To conclude, it should be noted that Serbian law is incompletely harmonized with EU *acquis* in this area and in the context of *de lege ferenda* amendments it would be necessary to introduce these solutions.

### 4.3. Enhanced customer due diligence actions concerning the countries which do not implement international standards in the area of the prevention of money laundering and terrorism financing

Furthermore, in the context of the criteria for assessing high-risk third countries and improving checks on transactions involving such countries it should be pointed out that Serbian law in *Article 41* prescribes that when establishing a business relationship or carrying out a transaction amounting to EUR 15,000 or more, in case when a business relationship has not been established, with a customer from a country which has strategic deficiencies in the system for the prevention

[49] See also Lukić T., *Borba Protiv Pranja Novca I Finansiranja Terorizma U Republici Srbiji*, Zbornik radova Pravnog fakulteta u Novom Sadu, No. 2, 2010, p. 202

of money laundering and terrorism financing, the obliged entity shall apply enhanced customer due diligence actions.[50] Precisely, the obliged entity shall: 1) apply the enhanced customer due diligence in the manner and scope proportionate to high risk associated with having a business relationship with such customer; 2) obtain data on the origin of the property which is the subject matter of the business relationship or transaction; 3) obtain additional information on the purpose and intended nature of the business relationship or transaction; 4) conduct additional inspection of submitted identity documents; 5) undertake other additional measures to eliminate the risks. Finally, if having a business relationship with a country which has strategic deficiencies in its system for the prevention of money laundering and terrorism financing is especially risky, and competent authorities muy: 1) prohibit the financial institutions for whose registration they are relevant from establishing branches and business units in such countries; 2) prohibit the establishment of branches and business units of financial institutions from such countries; 3) limit financial transactions and business relationships with customers from such countries; 4) request financing institutions to assess, amend and, if necessary, break correspondent or similar relationships with financial institutions from such countries; 5) other adequate measures. Considering the Serbian law in relation to the application of enhanced customer due diligence actions it should be noted that it is harmonized with Directive (EU) 2018/843 in this part.

### 4.4. Establishing and verifying the identity of a customer or a legal person

Moreover, when it comes to the rules regarding the setting up central registries or central electronic data retrieval systems as it prescribed in the Directive (EU) 2018/843, the Serbian law does not contain a provision in that sense, although in *articles 17-26* introduces some situations for identification of any natural or legal persons. Precisely, the Serbian law prescribes the rule regarding: a) Establishing and verifying the identity of a natural person, legal representative and empowered representative (Article 17); b) Identifying and verifying the identity of a natural person using a qualified electronic certificate (Article 18); c) Establishing and verifying the identity of an entrepreneur (Article 19); d) Identifying and verifying the identity of a legal person (Article 20); e) Establishing and verifying the identity of the representative of a legal person and a person under foreign law (Article 21); f) Establishing and verifying the identity of a person under civil law (Article 23) g) Establishing and verifying the identity of a procura holder and empowered representative of a legal person, person under foreign law and entrepreneur (Article

[50] Decision On Guidelines For The Application Of The Provision Of The Law On Prevention Of Money Laundering And Financing Terrorism For Obliged Entities National Bank Of Serbia Perform Supervision [http://www.apml.gov.rs/REPOSITORY/2015_2_smernice-nbs.pdf, p.17] Accessed 11.03.2019

22) and h) Identification of the beneficial owner of a customer articles 25 and 26). In that regard, the obliged entity shall obtain the referred data by inspecting the original personal identity document with the mandatory presence of the identified person or by inspecting original or a certified photocopy of the documentation from a register maintained by the competent body of the country where the legal person or the customer has a registered office. However, in order to be fully harmonized with Directive (EU) 2018/843 the Serbian law should be amended in that manner which inserts provisions on setting up central registries or central electronic data retrieval system.

### 4.5. Cooperation between competent authorities supervising credit and financial institutions and other authorities

Finally, concerning the provisions on cooperation between competent authorities supervising credit and financial institutions and other authorities bound by professional secrecy, Serbian law in *Article 90* implies that the obliged entity, and/or its staff, including the members of executive, supervisory and other governing authority, as well as other persons having access to the data of content of records, must not disclose to the customer or the third party the following: 1) that the competent authority has been received information and documentation on a client or a transaction suspected of being related to money laundering or terrorist financing; 2) that the competent authority has issued an order to suspend temporarily the transaction; 3) that the competent authority has issued an order to monitor the financial operations of the customer; 4) that a procedure against a customer or a third party has been initiated or may be initiated in relation to money laundering or terrorist financing. However, this prohibition does not apply to the following situations: 1) when the data, information and documentation obtained and maintained by the obliged entity is necessary to establish facts in a criminal procedure and if such data are requested by the competent court in line with the law; 2) if the data is requested by the authority in the supervision of the implementation of the provisions of this Law; 3) if the auditing company, licensed auditor, legal or natural person offering accounting services or the services of tax advising attempt to dissuade a customer from illegal activities; 4) when the obliged entity is a part of an international group and shall apply programmes or procedures relevant for the whole group with the aim of preventing money laundering and terrorism financing and 5) when information exchange occurs between two or more obliged entities in cases related to the same customer and the same transaction, on condition that these obliged entities are from the Republic of Serbia or a third country that prescribes obligations related to the prevention of money laundering and terrorism, which are equivalent to the requirements as

prescribed by the Law, on condition that they engage in the same line of business as well as being subject to professional secrecy and personal data protection laws. Observing this solution in the context of Directive (EU) 2018/843 and comparing to the Serbian Law it is worth mentioning that Serbian Law contains a wider list of exemptions when it is allowed the use of received confidential information.

## 5. CONCLUDING REMARKS

Proceeds derived from or obtained, directly or indirectly, through the commission of an offence of organized criminal groups are significantly used by terrorist groups to finance their terrorist activities. In the area of prevention of money laundering and the financing of terrorism Directive (EU) 2018/843 in compliance with existing international standards, introducing several remarkable new or updated provisions and thus represents step forward strengthening EU framework on the protection of EU financial system. The only thing that remains is the need for its proper implementation. In that regard, there are a few significant recommendations for the acceleration of the implementation of adopted measures on combating money laundering and the financing of terrorism. In the area of early detection of sources of terrorist financing, the investigative focus should be on the recognition and analysis of indicators for identifying suspected money laundering and the financing of terrorism transactions especially in certain groups of obliged entities who, due to new modalities for terrorist financing, were not covered by the normative framework relating to the protection of EU financial system. This applies particularly to entities providing the services of purchasing, selling or transferring virtual currencies or exchanging of such currencies for money or other property through an internet platform, devices in physical form or otherwise, or which intermediate in the provision of these services. The next recommendation for the adequate implementation of adopted measures on preventing terrorist financing implies timely reporting of suspected transactions that indicate money laundering or terrorist financing, based on information received by the competent authorities in the process of supervising. Furthermore, in order to achieve better identification of information concerning beneficial ownership, the goal linked to setting up of centralized bank register should be realized. Finally, the comprehensive response to the prevention of money laundering and the financing of terrorism risks includes as broad as possible cooperation between criminal law systems including mutual support among national financial units such as the competent authorities supervising credit and financial institutions and other authorities as well.

When it comes to the Serbian Law on the prevention of money laundering and the financing of terrorism it can be noticed that national legislation is almost com-

pletely in compliance with the new EU framework on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. However, there are certain parts of that Law which are not completely in line with the new EU framework. Firstly, in the area of customer due diligence measures with respect to electronic money products, there is different level for the amount of stored electronic money as well as the maximum monthly payment transactions limit which do not exceed the RSD equivalent of EUR 250 according to Serbian law and EUR 150 as stated by EU law. Furthermore, the difference also exists concerning the fact that this rule is not applicable in the case of redemption in cash or cash withdrawal of the monetary value of the electronic money where the amount redeemed exceeds EUR 50 in a line with EU law or EUR 100 as claimed by the Serbian law. In addition, when it comes to the issue of obliged entities it should be mentioned that Serbian Law recognizes as obliged entities only providers of virtual currencies, while EU law includes as the new obliged entities providers of fiat currencies and traders in works of art, too. Finally, since EU law has set the goal in the sense of setting up centralized central registries or central electronic data retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons by 26 June 2020 it is undisputed that Serbian law must be amended including this provision as well.

To conclude, bearing in mind, emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations it is extremely important to constantly collect data on new trends for the commission of a criminal offense of terrorist financing. In that regard, it is necessary to work through the training program to develop the skills and capabilities of persons involved in the suppression of terrorist financing to enable them to be prepared for all methods and techniques used by terrorist groups. Precisely the risk of the new threats in the area of the abuse of the financial system for the purposes of terrorist financing requires application of the multinational approach in order to combat this phenomenon, since it is unrealistic to expect that one or several countries, without others, will achieve any results at the level of prevention. Therefore, owing to the fact that the abuse of the financial system through the terrorist financing as a phenomenon cannot be eradicated, it should be aware that by working together the whole international community can achieve much more in the context of controlling this phenomenon.

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# ESTABLISHING THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND SUPPRESSION OF CRIMINAL OFFENSES AGAINST THE EU FINANCIAL INTERESTS[*]

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***ABSTRACT***

*During 2017, at the level of the European Union, two regulations of importance for the suppression of criminal offenses against the EU financial interests have been passed: Directive on the fight against fraud to the Union's financial interests by means of criminal law and Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO). The protection of these interests by the criminal substantive legislation did not encounter such resistance in the Member States as an idea of the establishment of the EPPO.*

*Pursuant to the provisions of Regulation implementing enhanced cooperation on the establishment of the EPPO are carried out by national delegated prosecutors, and the criminal proceedings are conducted by the courts of the Member States. The experience of the public prosecutors and judges in proceedings concerning those criminal offenses may also enhance knowledge and skills of relevance to the conduct of proceedings against perpetrators of offenses against financial interests of the Member States'.*

*In the paper authors are trying to point out the importance of timely and adequate sanctioning the perpetrators of the above-mentioned crimes. Consequently authors point to the advantages*

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*of establishing the European Public Prosecutor's Office in order to combat crimes that damage not only the financial interests of the European Union, but also the national financial interests. However, the concept of the European Public Prosecutor is not fully accepted, because the Regulation contains illogicalities that still make it unacceptable for member states. Therefore, in order for wider acceptance the establishment of the EPPO, it is necessary to amend these provisions of the Regulation.*

***Keywords:*** *the European Public Prosecutor's Office, EU financial interests, economic crimes, perpetrators, investigations and prosecutions.*

## 1. INTRODUCTION

Criminal offenses affecting the financial interests of the European Union (EU) fall into the category of economic offenses. Method of execution of such offenses is specific. Therefore, it is necessary to have special knowledge and skills for discovering them, and later for undertaking an investigation and conducting criminal proceedings. Discovering such offenses mainly involves specialized institutions, such as, for example, the European Anti-Fraud Office (OLAF).[1] However, apart from the OLAF, findings of some national institutions can be very helpful in discovering such criminal offenses. In order to improve the fight against economic crimes, the Anti-fraud coordination service network (AFCOS network) has been established in the member states and also in the EU candidate countries. AFCOS network is a network of state authorities created to combat activities affecting the EU's financial interests. [2]

Control of the lawfulness of spending EU funds is in the competence of both, the internal audits in the public institutions of the member states and candidate countries, as well as in the competencies of their supreme audit institutions. The revenue of the European Union budget is mainly collected in the territory of the member states. The legality and regularity of their payment to the budget of the European Union is under the jurisdiction of the national (member states) tax and customs institutions. Due to the specific job a high level of specialization of employees in these institutions is necessary for the purpose of efficient and timely detection of irregularities affecting the EU budget. It should be borne in mind

[1] See: Kostić, J.; Jelisavac Trošić, S., *Digital Forensic Procedures of European Anti-Fraud Office and Protection of Personal Data*, in: Duić D.; Petrašević, T. (eds.), EU and Comparative Law issues and challenges, Jean Monnet International Scientific Conference „Procedural aspects of EU law", 06 and 07 April 2017, Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, pp. 32-47

[2] Art. 7. of the Regulation (EU, Euroatom) 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EU) No 1073/1999 of the European Parliament and of the Council and Council Retulation (Euroatom) No 1074/1999, [2013] OJ L248/1. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0883] Accessed 14.03.2019

that the specialization of the competent public prosecutor's offices and judicial authorities is also necessary. One aspect of such specialization is the establishment of the European Public Prosecutor's Office (EPPO). However, this process is not easy or simple. First of all, it seems that in the member states for a long time there was a position that, by the establishment of the European Public Prosecutor's Office, states in fact renounce their sovereignty in the field of criminal law, and for the state it is the hardest and the rarest to disavow. Today, it seems that it is no longer part of the state sovereignty, to the extent that it was before.[3] One of the indicators of this member states attitude is the adoption of Council Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.[4] However, this does not mean that the concept of establishing EPPO is generally accepted, but only that there is a high level of agreement between the member states on the need for its establishment. Accordingly, in 2017, a total of sixteen countries informed the European Parliament, the Council and the Commission of the intention to participate in the EPPO establishment. Some countries are not involved in the process, while four countries have only expressed their desire to participate in the establishment of the Office.[5] Nevertheless, regardless of skepticism, it seems that the establishment of such an office can improve the suppression of crimes for EU member states, which not only damage the financial interests of the EU, but also the national financial interests of the EU member states.

Due to the way of the European Union financing, by the establishment of criminal law protection of EU financial interests, the protection of the member states national financial interests is actually enhanced. With every new expansion, the question arises not only of how current member country will manage to face new challenges and risks, but how new member will face them. The European Union is financed mainly from its own resources, supplemented by other sources of reve-

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3 Ćirić, J., *Srbija i Evropski standardi u krivičnom pravu*, in: , Ćirić, J.; Bejatović S. (eds.), Evropske integracije i međunarodna krivičnopravna saradnja, Institut za uporedno pravo, Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2011-2012, pp. 23 and 24

4 Council Regulation 2017/1939 implementing enchanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1, [https://eur-lex.europa.eu/eli/reg/2017/1939/oj] Accessed 14.03.2019

5 Countries that have expressed their intention to participate in the establishment of the European Public Prosecutor's Office are: Belgium, Bulgaria, Cyprus, Czech Republic, Finland, France, Greece, Croatia, Lithuania, Luxembourg, Germany, Portugal, Romania, Slovakia, Slovenia and Spain. The following countries have expressed the desire to participate in the establishment of the Office: Latvia, Estonia, Austria and Italy. In addition to these countries, other countries may also be included in this cooperation under Article 328. of the Treaty on the Functioning of the European Union

nue.[6] Own resources include: 1) traditional own resources that are collected mainly from customs duties on imports from countries outside the European Union, as well as import duties for sugar (sugar levies), 2) own resources from value added tax (VAT), and 3) a percentage of each country's gross national income (GNI).[7] Most of the European Union funds are spent on the member states territories. These funds finance: expenditures in the field of agriculture; rural development expenditures and related measures; structural operations expenditure for structural and cohesion fund; internal policy expenditure; foreign policy expenditure; administrative expenditure; reserves (monetary reserves, emergency reserves, reserve guarantees for the coverage of loans granted to non-member countries and assistance for accession to the European Union (pre-accession assistance).[8] Due to the way in which the European Union finances, it can be said that the financial interests of the member states are also protected by criminal law protection of EU financial interests. Due to the amount of funds in question, as well as the use of complex structures, there are possibilities for fraud and other illegal activities. Therefore, we believe that the improvement of mechanisms for EU protection is of paramount importance for all member states.

## 2. NOVELTIES REGARDING LEGAL PROTECTION OF EU'S FINANCIAL INTERESTS

During 2017, at the level of the European Union, two regulations were adopted that are important for improving the protection of EU's financial interests in the area of criminal law. These are: Directive on the fight against fraud to the EU's financial interests by means of criminal law and the Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.[9] However, although it does not constitute a criminal offense, it is also of

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6 See: Jelisavac Trošić, S., Stojanović-Višić, B., *EU Budget and Budget of Serbia: Impact on Serbia's Accession to the EU*, Journal of Business Economics and Management, March-April 2018, year LXVI, Serbian Association of Economists, pp. 266-282, DOI:10.5937/EJOPRE1804266

7 Art. 2. of the Council Decision on the system of own resources of the European Union 2014/335/EU, Euroatom, [2014] OJ L168/105. Art. 8. (1) of the above mentioned Decision stipulates that the Member States shall collect resources in its territory in accordance with the regulations which, if necessary, are adapted to the requirements of the European Union in order to fulfill the obligations. Consequently, such rules are communicated to the Commission for approval, and which shall be made available to the Commission in accordance with Art. 8. (2) of Union resources collected in the territory of the Member States

8 See: Stojanović, S., *Razvoj sistema finansiranja Evropske unije*, in: Ćirić, J. (ed.), 50 godina Evropske unije, Institut za uporedno pravo, Vlada Republike Srbije – Kancelarija za pridruživanje Evropskoj uniji, Beograd, 2007. p. 173

9 Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, [2017] OJ L 198/29, [http://data.europa.

a great importance to combat irregularities affecting the EU's financial interests, which is done through the amendment to the Financial Regulation of 2018 and establishing the so-called EDES system.[10] In this way, strengthens the EU regulations in the field of protection of the financial interests of the EU and member states from irregularities in public procurement proceeding.

The Directive on the fight against fraud to the EU's financial interests by means of criminal law contains minimum rules concerning the definition of criminal offenses and sanctions in order to combat fraud and other illegal activities that reflect negatively on the financial interests of the European Union. It replaced the Convention on the Protection of the European Communities' Financial Interests and its Supplementary Protocols of 1996 and 1997, which provided for the obligation for member states to provide not only criminal sanctions for persons committing crimes that affect the EU's financial interests, but also for persons who attempt to carry out such acts.[11] According to the provisions of the Directive, criminal offense to the detriment of the financial interests of the European Union is considered as:

1) act in relation to the expenditures of the European Union budget, which is not related to public procurement;
2) any act or omission relating to the use and presentation of false, inaccurate or incomplete statements or documents resulting in unlawful retention of funds

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eu/eli/dir/2017/1371/oj] Accessed 14.03.2019

10 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, [2018] OJ L 193/1, Early Detection and Exclusion System (EDES) — Panel referred to in Article 108 of the Financial Regulation. Provisions establishing an early detection and risk prevention system at the expense of the financial interests of the European Union have been made to prevent not only criminal offenses, but also other unlawful conduct that damages those interests. Under Article 105a and 106 (1) of the Financial Regulation, the Commission or other public contracting authority is obliged to exclude private entities from the European Union's program of receiving funds, whether it is a public procurement procedure or a grant award procedure, if those persons are in bankruptcy, insolvency proceedings or do not engage in business activities, if they do not pay taxes or social security contributions to employees, in the event of a serious breach of duty by such persons, such as a violation of intellectual property rights or the negotiation with other economic operators to distort free competition, if in the name of that legal person is commited crimes that can be considered financial fraud in terms of EU regulations protecting financial interests, corruption offense, participation in criminal organization, participation in money laundering, terrorism, child labor or trafficking, as well in case of serious violation of a contract concluded with the institutions of the European Union or other irregularities

11 The Convention on the protection of the European Communities financial interests, [1995] OJ C 316/48

or assets from the EU budget, from the budgets managed by the EU or administered on behalf of the EU;

3) non-disclosure of information that violates a particular obligation, which has the same effect;
4) use of EU budget funds or assets for purposes other than those for which those funds were originally granted.[12]

Criminal offenses to the detriment of the financial interests of the European Union in accordance with the provisions of the Directive are also:

1) activities undertaken in relation to public procurement expenditures, if they have been committed in order to obtain unlawful material benefit for the perpetrator of the criminal offense or another person, the consequence of which is to detriment the financial interests of the EU;
2) any act or omission relating to the use or presentation of false, inaccurate or incomplete statements or documents, consisting in the misappropriation or unlawful retention of funds or assets from the Union budget, which are managed on EUs behalf;
3) failure to disclose information that violates a particular obligation, which has the same effect as the misuse of such funds or assets, for purposes other than those for which the funds have been granted, thereby damaging the financial interests of the European Union.[13]

Since the aforementioned activities refer to the illegal spending of the EU budget funds, determining the existence and proving such crimes requires knowledge in specific areas. Criminal acts which damages not only the national budget but also the budget of the European Union have a blanket disposition, so in order to define the elements of the criminal acts it is necessary to know both, the regulations adopted at the level of the European Union, and the national regulations regulating the field of public spending and disposal of the public property, but also accounting and financial regulations. For this reason, additional education is needed not only for persons involved in detection, but also for the prosecuting authorities and judicial authorities in order to improve knowledge in the field of economics.

Such a position also supports the fact that under criminal offenses (under the provisions of the Directive) are also considered the criminal offenses that can be committed in relation to income, which is different than income arising from

[12] Art. 3, paragraph 2. (a) of the Directive on the fight against fraud to the Union's financial interests by means of criminal law

[13] Article 3. paragraph 2 (b) of the Directive

own resources on the basis of value added tax are also considered to be harmful to the European Union. For instance if a person takes an action or fails to perform any action in relation to the use or presentation of false, inaccurate or incomplete statements or documents, and the consequence of which is the unlawful reduction in the EU budget.[14]

It is important to point out that the criminal offenses against the financial interests of the European Union is also the criminal offense that is undertaken in relation to income arising from own resources on the basis of value added tax, as well as any act or omission committed in cross-border fraud schemes which refer to the use or presentation of false, inaccurate or incomplete declarations or documents relating to VAT, which result in a reduction in EU budget funds or non-disclosure of information in relation to value added tax, thereby violating a particular obligation with the same effect, as well as showing incorrect statements in relation to VAT in order to hide the non-payment or unlawful creation of the right to a VAT refund.[15] Proof of such acts presupposes not only the knowledge of the regulations governing tax matters, but also the regulations governing accounting and financial operations. However, besides such knowledge, there is a need for adequate cooperation between tax authorities and prosecuting authorities at the national level as well as at the international level. This is precisely what justifies the specialization of the competent prosecuting authorities in the EU member states in the financial area. The prosecution and judicial authorities sometimes need to require the member states authorities to submit supplementary evidence, on which not only the indictment will be based, but later, in the course of the procedure, a final verdict. Also on the basis of which the damage to the European Union budget could be determined for the purpose of pronouncing adequate measures of property character.

The major novelty regarding the improvement of the mechanisms of criminal law protection of the EU's financial interests is the Council Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. In addition to imposing criminal sanctions, significant for the suppression of crimes are measures that allow determining the existence of irregularities, which subsequently increases the chance that the perpetrators face adequate sanctions. Such an intent is precisely contained in the Regulation, since it not only defines the competencies of the European Public Prosecutor's Office,

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[14] Such act will exist even if information is not disclosed or a certain obligation is overcome, the consequences of which are the same as in the previous part, or if a person misuses the benefit obtained in a lawful manner and such behavior has a consequence for the EU budget or budgets managed in EU name. According to the Article 3. paragraph 2 (d) of the Directive

[15] *Ibid.*

but also its commitment to other bodies and institutions of the European Union, as well as to the member states and candidate countries. Some EU bodies have been active in the field of detecting and preventing cross-border crimes affecting the EU's financial interests for a number of years now. Establishing close cooperation of the Office with such bodies, in our opinion contributes to more effective proof of criminal offenses, and later to imposing criminal sanctions.

## 3. EPPO'S ORIGIN, LEGAL FRAMEWORK AND ESTABLISHMENT

The first attempt to establish the European Public Prosecutor's Office happened in the 1990s. A step towards this goal was the *Corpus iuris* project. However, it did not only concern the establishment of the Office, but also the establishment of European criminal law. It was, for the first time that the rules of importance for establishing the European Public Prosecutor's Office were defined.[16] Some authors considered that the project was rather unrealistic, given the differences that exist in the legal systems of the member states of the European Union.[17] However, it seems that such a problem has been overcome by establishing a new concept of criminal law protection of the financial interests of the European Union. Bearing in mind that these considers implementation of national legislation, both during prosecution and during trials in front of national courts.[18] Concept of EPPO in this way imply specificities of member countries legal systems and also national sovereignty in criminal matters. However, in the event that the delegated public prosecutor withdraws from the investigation, if a decision is made by the Permanent Chamber, which is a collegial body of the EPPO, investigation may be undertaken.[19] It is therefore possible that because of the fact that the Permanent Chamber is the body that monitors and directs investigations and prosecutions, a number of countries

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[16] The latest version of Corpus iuris from May 1999 is available on: [www.europa.eu/anti_fraud/documents/fwk-green-paper-corupus/corupus_juris_en.pdf] Accessed 14.03.2019

[17] Hamran L.; Szabova E., *European prosecutor's office-Cui bono?*, New Journal of European Criminal Law, *Vol.* 4, Issue 1-2, 2013, pp. 41-42. See: Šuput, J. *Uspostavljanje kancelarije Evropskog javnog tužioca,* Evropsko zakonodavstvo, No. 52-53, 2015, p. 43

[18] According to Article 13. paragraph 1, Council Regulation 2017/1939, delegated European Prosecutors, acting on behalf of the Office, shall act in their own Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and indictments. Criminal prosecution before the national courts is prescribed by Article 36. of the Regulation

[19] The Permanent Council chaired by the Chief European Prosecutor (Head of the Office) or one of his deputies or a European Prosecutor appointed as Chairman in accordance with the EPPO's internal rules of procedure. In addition, the permanent panel has two additional permanent members and decides in accordance with Article 10. paragraph 3 of the Decree on the withdrawal and rejection of the indictment, as well as the reopening of the investigation

restrained in the establishment of the EPPO.[20] In addition, it appears that the powers of the national courts in the matter of the indictment are considerably narrowed. It seems that the matters to be decided by the national court are decided by the Permanent Chamber as part of the EPPO.[21] This significantly deviates from the powers that traditionally belong to the judiciary in contemporary democracies. However, judicial review of EPPO decisions is nevertheless defined by the Regulation. Its provisions have established the division of jurisdiction of national courts and the Court of Justice of the European Union. National courts review the EPPO's procedural documents if they produce legal effect vis-à-vis third parties. They shall then act in accordance with the conditions and procedures established by national law. The same rule applies even if the EPPO fails to issue procedural acts that would have legal effect vis-à-vis third parties, although it was obliged to adopt these acts in accordance with the provisions of the Regulation. The validity of procedural acts of the EPPO, if such a question is raised before any court of the Member States, the interpretation and validity of the provisions of European Union law, the settlement of the conflict of jurisdiction between the EPPO and the competent national authorities in accordance with Article 267 of the Treaty on the Functioning of the European Union is decided by the Court of Justice of the European Union.[22] Nevertheless, there is a controversial provision according to which a certain type of prior control of the decisions of the delegated public prosecutors is carried out by the institution in charge, represented in the Permanent Chamber of the EPPO. Consequently, the concept seems to remain controversial for a large number of member states, so the provisions of the Regulation in that part require amendment. The real possibility of establishing the European Public Prosecutor's Office is denoted in the provision of Article 86. of the Treaty on the Functioning of the European Union.[23] According to this provision, the Council has the possibility to establish such Office after obtaining the approval of the Parliament. That provision also provided the legal basis for the adoption of Regulation 2017/1939, but the scope of application of that Regulation is limited.

[20] Article 10. item 2 of the Regulation. Countries that have expressed a desire to establish cooperation in the process of establishing the EPPO, but not the readiness to cooperate are: Latvia, Estonia, Austria and Italy. Out of 28 members, eight members did not express readiness or desire in terms of establishing closer cooperation in order to establish the EPPO. These are the following countries: Denmark, Sweden, Malta, Ireland and the United Kingdom, the Netherlands and Hungary

[21] Pursuant to Article 36. of the Regulation, it is stipulated that a draft decision on the indictment is decided by the Permanent Chamber within 21 days from the date of its delivery by the European Public Prosecutor. Therefore, some authors justly criticized the Proposal of the Regulation. About: Novokmet, A., *The European public prosecutor's office and the judicial review of criminal prosecution*, New Journal of European Criminal Law, *Vol.* 8, No. 3, 2017, pp. 374-402, DOI: 10.1177/2031952517729934

[22] Article 42. of the Regulation

[23] The Treaty on the Functioning of the European Union [2012], OJ C 326

It applies primarily to the Member States that have expressed their intention to participate in the process of close cooperation in order to establish the European Public Prosecutor's Office. In accordance with the provisions of the Regulation, EPPO jurisdiction is exclusively limited to criminal offenses affecting the financial interests of the European Union. Therefore, its jurisdiction would be to investigate, prosecute and file charges against perpetrators of crimes that damage the financial interests of the EU, as well as to the crimes that are related to them.

This Regulation provides for a system of shared competences between the European Public Prosecutor's Office and national authorities in the suppression of criminal offenses that are detrimental to the financial interests of the European Union. In order to achieve the necessary cooperation between the EPPO and national institutions, mutual exchange of information of importance for the suppression of offenses within the competence of the Office is essentially necessary. The EPPO also performs the function of the indictment before the member states national courts, and the Regulation also defines the relation of its provisions with the national legislation of the member states that have expressed their intention to participate in the establishment of the EPPO. Under these provisions, the national law of the member state before whose court the European Public Prosecutor is acting, is applicable in the event that a matter is not defined by the Regulation.[24] The national law of the member states whose delegated European prosecutor conducts the proceedings shall be applied in the event that it differs in relation to the decision contained in the Regulation. In case the solutions are contained in both regulations, the provision of the Regulation 2017/1939 shall apply.[25] In this way, the Regulation is made more suitable for the interests of the member states, which are hesitative to renounce sovereignty in the criminal law area. This was an EU compromise in order to attract the rest of the member states in the process of closer cooperation.

The Regulation among other sets out the principle of loyalty, according to which the competent national bodies actively assist and support the investigations and prosecution carried out by the EPPO.[26] The cooperation of responsible authorities and institutions is also of great importance in investigative procedures that are conducted in relation to crimes that endanger national financial interests.

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[24] Art. 1. and 4. of the Regulation implementing enchanced cooperation on the establishment of the European Public Prosecutor's Office. Kostić, J., *Krivičnopravna zaštita finansijskih interesa Evropske unije, Institut za uporedno pravo*, Beograd, 2018. p. 63

[25] Art. 5. (3) of the Regulation

[26] Art. 5. (6) of the Regulation

Pursuant to the provisions of the Regulation, delegated public prosecutors are before the national courts, acting on behalf of the EPPO. With regard to the conducting an investigation, prosecution, and indictment, they have the same powers as the national prosecutors.[27] This is precisely the solution which is acceptable for the EU member states.

## 4. EPPO'S DECENTRALIZATION

The structure of the EPPO has been decentralized. It has a central office which consists of: the Collegium, the permanent Council of the European Chief Prosecutor, the Deputy European Chief Prosecutor, European Prosecutors and the Administrative Director. The decentralized structure is composed of delegated European prosecutors, which are located in the member states.[28] They are persons acting on behalf of the European Public Prosecutor's Office in their respective member states with special powers and under the conditions prescribed by the Regulation. They are responsible for carrying out investigations and prosecutions in proceedings initiated or taken over using the right to take over the case. They have the authority to file an indictment, make arguments at the hearing, take part in the collection of evidence, and declare remedies, in accordance with national law. Under the provisions of the Regulation, in each member state it is necessary that there is at least a delegated European prosecutor. Their maximum number, as well as the functional and territorial jurisdiction of each member state, depend on the decision of the European Chief Prosecutor. However, such a decision is made only after consultation and reaching agreement with the competent institutions of the member states.[29]

Delegated prosecutors are actually prosecutors at the national level of member states. They are responsible for the conduct of investigations and the prosecution of perpetrators of offenses at the expense of the financial interests of the European Union, exclusively if the acts of the offense were committed with intent, if the offense is related to the territory of two or more member states, if the commission of the criminal offense caused damage to financial interests of the European Union in the amount of at least EUR 10 million and if the criminal offense is committed within a criminal group organized for the execution of criminal offenses to the detriment of the financial interests of the European Union. The EPPO is also responsible for dealing with cases relating to offenses related to acts containing the

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[27] Art. 13. paragraph 1 of the Regulation

[28] Art. 8. of the Regulation

[29] Art.13. paragraph 1 and 2 of the Regulation

aforementioned features.[30] Conducting investigations and dealing with cases are the main tasks of delegated prosecutors. The results of their work will be seen only in the coming years. Practice will show how they were integrated into the national legal systems, what kind of cooperation is achieved in the host country, and with each other and what is their overall contribution to identifying, processing, and final judgments of economic crime. With successful practices, errors and experience we will be able to draw definitive conclusions about the benefits or damages of such European Union legal solutions.

## 5. SHARED COMPETENCES

The Regulation provides for a system of shared competences between the European Public Prosecutor's Office and national authorities in the suppression of criminal offenses that are detrimental to the financial interests of the European Union. In order to achieve the necessary cooperation between EPPO and national institutions, mutual exchange of information of importance for the suppression of offenses within the competence of the Office is necessary. EPPO also performs the function of the indictment before the national courts of the member states, and the Regulation also defines the relation of its provisions with the national legislation of the member states that have expressed their intention to participate in the establishment of the European Public Prosecutor's Office. Under these provisions, the national law of a member state, before whose court the European Public Prosecutor is acting, is applicable in the event that a matter is not defined by the Regulation.[31] The national law of the member states, which delegated European prosecutor conducts the proceedings, shall be applied in the event that it differs in relation to the decision contained in the Regulation. In case the solutions are contained in both regulations, the provision of the Regulation shall apply. [32] In this way, the solution has become suitable for the interests of the member states, whom are the most difficult to renounce sovereignty in the criminal law area.

The Regulation sets out the principle of loyalty, according to which the competent national bodies actively assist and support the investigations and prosecution carried out by the European Public Prosecutor's Office.[33] The cooperation of competent authorities and institutions is also of great importance in investigative

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[30] Art. 22. paragraph 4 of the Regulation

[31] Art. 1. and Art. 4. of the Regulation; Kostić, o*p. cit.,* note 24, p. 63

[32] Art. 5. (3) of the Regulation. More about competences of the EPPO in: Mitsilegas, V.; Giuffrida, F., *Raising the bar? Thoughts on the establisment of the European Public,* Policy Insightes, No. 2017/39, CEPS, Brussels, 2017, p. 8

[33] Art. 5. (6) of the Regulation

procedures that are conducted in relation to crimes that endanger national financial interests.

Under the provisions of the Regulation, delegated public prosecutors are acting in front of the member states competent courts, on behalf of the European Public Prosecutor's Office. With regard to the disputed investigation, prosecution and indictment, they have the same powers as the national prosecutors.[34] We believe that this, we can call them compromise solutions, enhances the attractiveness of EPPOs for EU member states that have not initially agreed to form this body.

## 6. THE STRUCTURE OF IRREGULARITIES TO THE DETRIMENT OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION ACCORDING TO THE REPORTS OF THE EUROPEAN COMMISSION

Article 325. of the Treaty on the Functioning of the European Union provides that the European Commission, in cooperation with the member states, each year submits to the European Parliament and the Council a report on the measures taken at the level of the member states in the field of combating fraud and other irregularities affecting the EU's financial interests.[35] Based on these reports it is possible to conclude which irregularities affecting the European Union's financial interests are most often recorded by the responsible national institutions, as well as by the responsible bodies of the European Union. It has been noticed that the only similarity is the manner of committing criminal offenses, while the area in which irregularities are detected varies depending on the country on whose territory offenses occurred. Therefore, it can be said that the field of committing crimes is conditioned by various factors, such as geographic, historical, and cultural. Thus, the greatest probability that in countries using agricultural funds in order to encourage the development of agriculture, a great number of irregularities would arise in connection with the obtaining and using of these funds. A large number of irregularities in customs will most often be present in the territory of countries bordering with a non-EU country from whose territory certain goods are imported or transited. Given the specific nature of each country, it is necessary for national institutions to take adequate measures not only to detect these irregularities, but also to reduce the risk of their occurrence.

[34] Art. 13. paragraph 1 of the Regulation

[35] Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests-Fight against fraud, several annual outputs

## 7. SPECIFICITY OF IRREGULARITIES IN MEMBER STATES

The European Commission, in 2013 Report, states that a large number of irregularities affecting the European Union's financial interests are related to the evasion of payments to the EU budget, while the most frequent *modus operandi* was falsification of documents relevant for the determination of the amount representing the income of the European Union. In the same year, a significant number of irregularities were noted with regard to the use of funds of the European Union budget. These irregularities were observed in the context of agricultural incentive programs, and they were most present in Bulgaria, Denmark, Italy and Romania. [36] During 2014, irregularities affecting the EU's financial interests have also been recorded both, in connection with failure to pay revenue, as well as in connection with the illegal acquisition and consumption of funds. The European Commission's report also states that the manner in which these crimes were committed most often was the submitting false or inaccurate documentation.[37] According to the data from the 2015 Report, a large number of irregularities was recorded in the procurement procedures for solar panels. During that year, the Spanish authorities reported an increased number of irregularities in the field of cohesion policy, which resulted in greater damage to the European Union's financial interests. [38]

According to the data contained in the European Commission's Report for 2016, during that year, the largest number of irregularities was recorded in the procurement procedures for solar panels. There were 40 cases of suspected tax evasion related to imported goods. In this regard, for instance, a significant damage to the European Union budget was made in the 2013-2016 period when, for the purpose of tax evasion, the value of textiles and footwear imported into the European Union from the People's Republic of China through the territory of the United Kingdom was estimated to be lower than the real value. [39] In addition, a large number of irregularities was discovered in the illegal spending of funds allocated to the EU's common agricultural policy. The method of committing criminal offenses during 2016 consisted mainly of using false and forged documents in the procedures for allocating these funds. Such irregularities were also revealed in connection with the decentralized management of EU funds within the agricultural

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36 Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests-Fight against fraud 2013, Annual Report pp. 10, 12. and 15

37 Report from the Commission to the European Parliaments and the Council, Protection of the European Union's financial interests-Fight against fraud 2014, Annual Report, p. 5

38 Report from the Commission to the European Parliaments and the Council, Protection of the European Union's financial interests-Fight against fraud 2015, Annual Report, pp. 20. and 27

39 Report from the Commission to the European Parliaments and the Council, Protection of the European Union's financial interests-Fight against fraud 2016, Annual Report, p. 22

programs.[40] During 2015, a large number of abuses in the procurement procedures for solar panels were also recorded, and this number increased by 36% in relation to 2014.[41]

During 2017, the highest number of irregularities to the detriment of the financial interests of the European Union related to the illicit consumption of the agricultural funds. The modus operandi of the offense consisted of providing false and incorrect information regarding the conditions necessary for obtaining agricultural subsidies.[42]

Bearing in mind great diversity in the objects and modes of fraud their detection and the collection of evidence, we're highlighting again, requires a special knowledge and skills, because criminal offenses against the financial interests of the European Union are primarily economic crimes. Sometimes, it is not sufficient to rely exclusively on the findings of responsible national authorities, such as, for example, institutions that are involved in the AFCOS network. Sometimes it is also necessary to obtain additional evidence that will be of interest for the adoption of a final judgment, but also for the return to the budget of the European Union unlawfully acquired revenues. It is therefore necessary to train public prosecutors who will handle cases against the perpetrators of criminal offenses against the financial interests of the European Union. Therefore, in addition to the specialization of public prosecutors and their deputies, of great importance is also the cooperation of the EPPO with OLAF and Europol, but also with countries that do not participate in the close cooperation procedure with regard to its establishment, as well as countries that are not members of the European Union.

## 8. COOPERATION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND OLAF

According to the provisions of Regulation 2017/1939, if the EPPO is conducting an investigation in accordance with its provisions, OLAF shall not initiate a comparative administrative investigation into these facts. However, where this is necessary, the Office may require OLAF to support or possibly supplement the activities undertaken by the Office within the limits of its powers. These activities consist mostly of providing relevant information, analysis of reports (including

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[40] Report from the Commission to the European Parliaments and the Council, Protection of the European Union's financial interests-Fight against fraud 2016, *Op. cit.* note 39, pp. 23 and 24

[41] Report from the Commission to the European Parliaments and the Council, Protection of the European Union's financial interests-Fight against fraud 2015, *Op. cit.*, note 38, p. 20

[42] Report from the Commission to the European Parliament and the Council, Protection on the European Union's financial interests – Fight aganst fraud, 2017, Annual Report, p. 21

forensic analysis), i.e. the application of knowledge and skills not available to the European Public Prosecutor's Office. In addition, OLAF may also provide operational support to facilitate coordination of specific measures of national institutions, and also the European Union bodies, as well as to conduct investigations and inspections, if necessary. Based on this, it can be concluded that OLAF, in relation to the Office, acts as a service for financial forensics and also as a liaison officer in relation to the national institutions and the European Union bodies, depending on the circumstances of the particular case. In addition, it also acts as a budgetary inspection of the European Union, if the Office order it to carry out certain investigations or inspections regarding suspicions of irregularities in spending of EU funds.[43]

In order to allow OLAF to carry out planned investigations, and in order not to duplicate the work, the European Public Prosecutor's Office has an obligation to inform OLAF in due time of the ongoing investigations. Therefore, one should provide each other with timely and adequate access to all necessary information.[44]

## 9. COOPERATION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE WITH EUROPOL AND THE EUROPEAN COMMISSION

In order to enable detection and proof of the existence of criminal offenses to the detriment of the financial interests of the European Union, the European Public Prosecutor's Office may conclude an agreement on cooperation with Europol. If necessary, EPPO may request Europol for all relevant information significant for the proceedings, as well as to request analytical support for the conduct of a specific investigation.[45]

The European Public Prosecutor's Office, in order to protect the financial interests of the European Union, can conclude a cooperation agreement with the European Commission. On this basis, the Office may not only provide the Commission, but also other institutions, bodies and agencies, with information of importance for taking appropriate measures in order to protect the financial interests of the European Union. To that end, the Office, in addition to the proposal for taking preventive measures, may also propose participation in the proceedings against of-

[43] Art. 101, paragraphs 4 and 5 of the Regulation on implementing enchanced cooperation on the establishment of the European Public Prosecutor's Office. About relation with other EU bodies see in: Giuffrida F., *The European Public Prosecutor's Office: King without Kingdom?*, Research Report, No. 2017/03, CEPS, Brussels, 2017, 34

[44] Art. 101. paragraphs 4 and 5 of the Regulation

[45] Art.102. of the Regulation

fenders for the detriment of the financial interests of the European Union. In addition, it may also inform the responsible institutions of the right to raise a claim for the return of a certain amount owed to the budget of the European Union. [46] In this way, cooperation is regulated and a conflict of competence between the EPPO and EUROPOL is avoided.

## 10. COOPERATION OF THE EPPO AND COUNTRIES THAT DO NOT PARTICIPATE IN THE PROCESS OF CLOSE COOPERATION IN CONNECTION WITH ITS ESTABLISHMENT AND COUNTRIES THAT ARE NOT MEMBERS OF THE EUROPEAN UNION

Regulation 2017/1939 regulates the cooperation of the European Public Prosecutor's Office with the competent institutions of non-EU countries, as well as with other international organizations. On the basis of a special agreement, EPPO can exchange strategic information with them and request a liaison officer to work in the Office.[47] Such cooperation can be established with countries that have not expressed their intention to cooperate closely in the process of establishing European Public Prosecutor's Office. Cooperation with these countries is also carried out in the same way, based on a previously concluded agreement.[48] Precisely the possibility of cooperation and the posting of liaison officers to work in the Office could contribute to more efficient proving the existence of criminal offenses against the financial interests of the European Union. In this way, the door for full connection by the remaining candidate countries have been left open.

The need to establish a specific mechanism of cooperation, to verify the financial crimes, has been recognized in the legislation of Serbia, as one of the EU candidate countries. Institute of liaison officers has been established with respect to the crimes falling within the jurisdiction of the Prosecutor's Office for Organized Crime and the special departments of the Higher Public Prosecutor's Offices for the fight against corruption. In addition, in the Republic of Serbia, in accordance with the Law, it is possible to establish the financial forensic service in the aforementioned prosecutor's offices.[49] Similarly, Council Regulation 2017/1939 provides for the possibility of using OLAF forensic analyzes for the purposes of inves-

[46] Art. 103. of the Regulation

[47] Art. 104. of the Regulation

[48] Art. 105. of the Regulation

[49] Art. 20-23. of the Law on Organization and Jurisdiction of State Authorities in the Suppression of Organized Crime, Terrorism and Corruption, Official Gazette of the Republic of Serbia, No. 94/2016 and 87/2018-another Law provides for the obligation and manner of delegation of liaison officers, and Art. 19. the possibility of establishing a financial forensic service at the competent prosecutor's offices

tigations conducted by the European Public Prosecutor's Office.[50] However, apart from specialization, for the suppression of criminal offenses against the financial interests of the European Union professional development of people involved in the detection, investigation and prosecution of perpetrators of such acts is very important.[51]

## 11. CONCLUSIONS

The perpetrators of criminal offenses against the EU financial interests are becoming more inventive, and the EU is making efforts, with its regulation and its overall action, to prevent and punish those violators. EPPO is one of the attempts to improve this fight. The basis for the establishment of the EPPO was created by the adoption of Regulation 2017/1939 on implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. Although a high level of agreement has been reached in many years before the establishment of such a body, it seems that skepticism is still present regarding its establishment. We believe that the European Public Prosecutor's Office is a kind of specialization of national public prosecutors. Given that they are delegated to work in the European Public Prosecutor's Office, and that they act before the competent national courts, states do not renounce their sovereignty in criminal matters. The establishment of the EPPO not only contributes to the specialization of the public prosecutors, but also raises awareness of the activities in the common interest, which is reflected in the protection of the financial interests of the European Union. The specialization of public prosecutors contributes to the improvement of cooperation with other institutions, both at the level of the European Union and with the relevant institutions of the member states and third countries. Considering the diversity of offenses in order to gather evidence of relevance to criminal proceedings, it is often necessary to possess specific knowledge and skills. Some of these skills can only be possessed by individuals who have a special experience in certain jobs. Therefore, it is a positive solution to the provisions of the Regulation, which provides that delegated public prosecutors in their work may rely on the work of financial forensics officers of the European Anti-Fraud Office. In addition, cooperation with Europol and with the institutions of countries that do not participate in the establishment of EPPO, as the non-EU countries, is of great importance for the dissemination of knowledge and experience in this fight. The manner of cooperation with the competent bodies and institutions is defined by the Regu-

[50] Art. 101. (3), subitem (a) of the Regulation on implementing enchanced cooperation on the establishment of the European Public Prosecutor's Office

[51] Marchuk, I., *Strengthening the EU Legal and International Framework to Combat Transnational Financial Crimes,* Faculty of Law, University of Copenhagen, Copenhagen, 2011, p. 50

lation establishing closer cooperation between them and EPPO. Given that the manner of committing criminal acts of financial character, as well as different area in which these acts are made, is conditional upon geographical, economic, and cultural circumstances, the delegation of prosecutors from each member state is a well solution. Situation in once country is best known to its inhabitants, who are at the same time citizens of the European Union.

However, in order for the concept of the European Public Prosecutor to be widely adopted, it seems that a provision should be amended, which provides that the final decision on the indictment is not passed by a delegated European prosecutor, but the Permanent Chamber of the EPPO. Although the Regulation provides for the possibility of judicial review of procedural documents of the EPPO, it appears that the indictment is unnecessary by the Permanent Chamber. We therefore consider that such a provision is not necessary, given that the delegated public prosecutors in the member states act on behalf of the Office and that the control of the indictment in accordance with Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union belongs exclusively to the court. In addition, the existence of such a provision indicates the supranational character of the EPPO, which is unacceptable for the member states. Instead, it is necessary to strengthen the awareness that the suppression of criminal offenses at the expense of the financial interests of the European Union is in fact important action of the member states in order to achieve the common interests.

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Topic 5

# EU civil law and procedure

# FREEDOM OF SERVICES BY CORRESPONDENCE AS THE “FIFTH FREEDOM” FOR THE DIGITAL SINGLE MARKET – LIMITATIONS BY THE TFEU

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***ABSTRACT***

*The freedom of services by correspondence should be one of the most important market freedoms in the EU legislative politics and the CJEU jurisprudence. The announcement of the establishment of a fifth market freedom on data flow is directly addressed by the freedom of services by correspondence. The growing importance of the freedom of services in general is in line with the rise of the EU service sector as the main contributor to growth and employment in the EU, accounting for about two thirds of both EU employment and value added. In addition, since 2015 the Digital Single Market is one of European Commission's political priority that aims at providing free access to online services. Online services are in most part services by correspondence, where neither provider nor recipient travels cross border. The truth is that the freedom of services by correspondence is barely ever mentioned explicitly neither by EU legislator nor by the CJEU. The EU legislator has rather chosen a sectoral approach to the Digital Single Market, fragmenting the fifth market freedom to several narrow pieces of legislation. The paper deals with the question why the freedom of services by correspondence has not acquired the same position as the freedom of goods. The analysis will focus on answering this question on the grounds of the theory of convergence of market freedoms and its limits.*

***Keywords****: freedom of services by correspondence; digital service; Digital Single Market; geo-blocking*

## 1. INTRODUCTION

In the digital era, when the intangible goods cross the border without the service provider or customer moving away from their computer or smartphone, it is the freedom of services by correspondence which is most suitable to take the leading role in abolishing restrictions to the access of online goods and services. The EU Digital Single Market strategy of 2015[1] confirms that it will be foremost the role of the freedom of services and to some extent the freedom of establishment, to

[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, COM(2015) 192 final

fulfill the set goal. At the same time, this strategy does not mention the services by correspondence even once by its name. On the contrary, the Digital Single Market Strategy has contributed to a great activity of EU legislator and that is why secondary law took over the primary role in the application of market freedoms to digital content. In addition, the EU Parliament advertised that the free flow of non-personal data regulated by the Free Flow of Non-Personal Data Regulation[2] shall become the fifth freedom of the EU Internal Market[3]. The title of the "fifth market freedom" is misleading. Firstly, the question arises if we do not already have four, five or six freedoms, considering that the freedom of persons consists of the freedom of workers (Art. 45 TFEU) and the freedom of establishment (Art. 49 TFEU) and the freedom of payment has an independent scope of application from the freedom of payment[4]. Secondly, the free flow of non-personal data clearly falls within the scope of application of the freedom of services by correspondence, as the digital (non-tangible) content crosses borders without movement of the service provider or recipient, as will be discussed in the paper. Insofar, the Free Flow of Non-Personal Data Regulation may only regulate in more precise manner what is already understood by the freedom of services by correspondence. As will be further elaborated, Non-Personal Data Regulation does not go beyond the level of protection already guaranteed by the freedom of services by correspondence. The term "fifth freedom" should be rather understood as a justified emphasize of the importance of the digital content on the EU market today. The use of the term does not have any legal consequences and surely does not create any "new" market freedom. Its aim is to give a new name to existing freedoms or an important part of one freedom. The focus of this analysis will be the question if the freedom of services by correspondence is capable of taking a more important role in the digital era, considering the limitations by the TFEU. The analysis of the content of the Digital Single Market only serves the purpose of analyzing the TFEU limitations of the provision of services by correspondence and does not have an independent purpose. The developments in the EU legislation within the Digital Single Market strategy since its adoption in 2015 will be taken into account. A comparison to the freedom of tangible goods as a possible convergent market freedom to the services provided by correspondence will be made. Considering that the freedom

[2] Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union, [2018] OJ L 303/59

[3] European Parliament, "Free flow of non-personal data: Parliament approves EU's fifth freedom" [http://www.europarl.europa.eu/news/en/press-room/20180926IPR14403/free-flow-of-non-personal-data-parliament-approves-eu-s-fifth-freedom] Accessed 11.05.2019

[4] Barnard C., *The Substantive Law of the EU-the Four Freedoms*, Oxford 2016, p. 521; Gramlich L., *Freier Kapital – und Zahlungsverkehr*, in Pechstein M.; Nowak C., Häde U. (eds.), Frankfurter Kommentar, Frankfurt 2017, 1042

of services by correspondence is not directly regulated by Art 56 and 57 TFEU, there is a lack of clarity in regard to its scope of application and its application to non-discriminatory market restrictions. The need for interpretation by the CJEU is much greater than with regards to the active or passive freedom of services.

When analyzing the freedom of services by correspondence in light of the Digital Single Market, the common structure of the market freedoms will be used: scope of application, discrimination/restriction and justifications. Therefore, this analysis is conducted under the premise of the theory of convergence of market freedoms. Arguments in favor or against convergence and divergence of market freedoms will not be discussed, because this has already been done elsewhere.[5] In general, the analysis will show that the potential "fifth market freedom" is unnecessarily narrowed down to the free flow of non-personal data by EU secondary law or the understanding thereof. Contrary to the main division emphasized by the EU Parliament and also followed by the EU legislator in general, to personal and non-personal data, it is clear that both economically and legally both personal and non-personal data need to be a part of a "fifth freedom of the EU internal market". From the internal market law perspective personal data enjoy insofar a special status as they are under the scope of application of the fundamental right to privacy under Art 8 ECHR or even as a special fundamental right to personal data protection under Art 8 Charter of Fundamental Rights, which need to be taken into account a part of the justification of limitations to the free data flow. Accordingly, this will be presented under the subchapter of justifications of market restrictions. However, personal data are thereby not excluded from market freedoms. Fundamental rights have in the jurisprudence of the CJEU served as both limitations to market freedoms[6], but also for widening the scope of application of market freedoms[7]. One of the points to be proven by this analysis is that the free flow of digital goods should profit from the convergence of the market freedoms and great development of the market freedoms by the CJEU jurisprudence. This is foremost related to the freedom of goods, as it one of the ideas of this paper to put into question to which extent digital goods should be distinguished in their treatment within the internal market in comparison to tangible goods covered by the freedom of goods. Namely, the current secondary legislation adopted within the Digital Single Market, is mostly limited to the prohibition of (direct and indi-

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5 Kingreen Th., *Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts*, Berlin 1999; Trstenjak V.; Beysen E., *Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung*, Zeitschrift für Europarecht, *Vol.* 45, 2012, pp. 265-284, 275

6 CJEU, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003], C-112/00, I-5659, par. 82

7 CJEU, *Commission v. France*, C-265/95, [1997], I-6959

rect) discrimination and does not extend to non-discriminatory restrictions. This is surprising considering that a better access to online goods and services, as one of the goals of this strategy, will hardly be accomplished without encompassing unjustified non-discriminatory restrictive measures. Even the prohibition of geo-blocking, where the discriminatory nature of the measures is most visible, would not be solved in the long run just by prohibiting discrimination, as geographical restrictions may be executed through many non-discriminatory means.[8] Again, such non-discriminatory measures would be prohibited by primary law, within the jurisprudence of the CJEU on the freedom of services. A more detailed analysis on this question will be conducted in the subchapter on discrimination and non-discriminatory measures.

The paper is divided into three parts. *Firstly*, it will be established what the understanding of the freedom of services by correspondence is under the TFEU as interpreted and developed further by the CJEU; *secondly*, in light of the market freedom structure what element of the scope of application, discrimination/restriction and justification have now been regulated within the Digital Single Market and how; and *thirdly* what is the conclusion so far on the contribution of the secondary legislation to the EU digital single market and its relationship to the freedoms of services by correspondence.

## 2. FREEDOM OF SERVICES BY CORRESPONDENCE AS A MODALITY OF THE FREEDOM OF SERVICES

The freedom of services today is far beyond what the fathers of the Treaties had in their mind when drafting the articles on the free movement of service in 59-66 of the EEC. Although this statement is very true for every market freedom, it was only with regards to the freedom of services that several modalities of the market freedom have been developed. The modalities do not only apply to the restrictions of the home or host state, but rather also to the other party to the contract, the recipient of the service or the service itself. The original intent of the Treaty makers was to prevent restrictions to the service provider when providing services in another Member State. It was not before the CJEU in 1984 in *Luisi and Carbone*[9] held that freedom of services includes the "passive freedom of services", that such modality of the freedom of services was acknowledged. The wider interpretation

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[8] Schmidt-Kessen M.J., *EU Digital Single Market Strategy, Digital Content and Geo- Blocking: Costs and Benefits of Partitioning EU's Internal Market*, Columbia Journal of European Law, *Vol.* 24, 2018, p. 561-576, 570

[9] CJEU, *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro*, Joined cases 286/82 and 26/83, [1984] ECR 377*,* par. 16.

of Art 59 EEC meant that the recipient of services also enjoys the right not to be restricted when receiving the service in another Member State. Later the passive freedom of services and the corresponding jurisprudence became the driving force behind the development towards the EU citizenship.

Interestingly, the freedom of services by correspondence was established much earlier by the CJEU. Already in 1974 the CJEU held in *Sacchi*[10] that a television signal by its nature falls under the freedom of services, although in the case at hand naturally neither the provider nor the recipient of the service where crossing the border. The classis fields of application of this freedom was initially related to the media (radio and television), and later to the banking and insurance sector.[11] With the progress of digitalization, it was only easy to assume that the freedom of services by correspondence will become even more important, if not the most important freedom in the digital era. It needs to be examined if the provisions of the TFEU allow for such development.

## 3. FREEDOM OF SERVICES BY CORRESPONDENCE UNDER THE TFEU

The freedom of services by correspondence is not defined by primary law of the EU and therefore also the criteria for its scope of application is not clear. It is derived from the criteria for the scope of application of the active and passive freedom of services. Therefore, first the criteria for the application of the active and passive freedom of services needs to be discussed in order to establish the scope of application of the freedom of services by correspondence. It is the position of this paper that the lack of clear definition of the freedom of services by correspondence in the EU primary law and the lack of clarifying jurisprudence by the CJEU is one of the reasons that the freedom of services by correspondence did not take the expected role of the fifth freedom for the Digital Single Market.

### 3.1. Service

The term "service" is an autonomous EU term defined by the elements contained in Art 56 and 57 of the TFEU. The cross-border requirement can be taken out of Art 56 TFEU, while Art 57 TFEU clearly requires a remuneration for the service provided. In addition, the Art 57 TFEU sets the criteria of the temporariness and pursue of the activity where some examples of the business activity can also be found. The other elements of the service definition arise out of the differences

10 CJEU, *Giuseppe Sacchi*, 155-73, [1974] ECR 409, par. 6

11 Oppermann Th.; Classen C. D.; Nettesheim M., *Europarecht*, München 2009, p. 467

between services and other market freedoms, and these are the “intangibility” of the service in distinction from tangibility of the goods, and the service provider as a self-employed person in distinction to the freedom of workers. By taking into account all of the abovementioned elements, a “service” within the meaning of the freedom of services means a intangible service provided within a self-employed activity temporarily pursued for renumeration on the territory of another Member State.[12]

### 3.2. Personal scope of application

The freedom of services is exclusively reserved for the nationals of a Member State. The legislator of the EU may in accordance with Art 56 (2) TFEU widen the personal scope of application with the acts of secondary law but did not do so thus far. Differently than with regards to the freedom of workers and the primary (but not the secondary) establishment, the personal scope of application requires not only the nationality of a Member State of the service provider, but also that he is established on the territory of another Member State. In accordance with Art 56 (1) TFEU the provider and recipient of the services need to be established in different Member States.

Here a difference between the active and the passive freedom of services needs to be made. The active freedom of services requires that the service provider, as the holder of the rights from this freedom, needs to be a national of one Member State with his establishment on the territory of the EU. His contractual partner, the recipient of the service, needs to have an establishment on the EU territory as well, but does not need to have nationality of the EU.[13] Therefore the cross-border element is exclusively defined over the criteria of „establishment“ in another Member State.[14]

The situation covered by the passive freedom of services causes more uncertainty. It is clear that the recipient of the services which, as a holder of the rights, relies on the freedom of services, needs to have the citizenship of the Union. Although there are contrary opinions in the literature, the recipient of the service in addition needs to have establishment on the territory of the EU, because otherwise there is no cross-border element within the EU.[15] At the same time there is consent that

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[12] Haratsch A.; Koenig Ch.; Pechstein M., *Europarecht*, Tübingen 2010, p. 452

[13] Holoubek M., in: Schwarze J. (ed.), *EU-Kommentar*, Baden Baden 2009, Art. 49/50 EGV, par. 49

[14] Bordaš B., in: Etinski R. *et al.* (eds.), *Osnovi Prava Evropske unije*, Novi Sad 2010, p. 298

[15] Randelzhofer A.; Forsthoff U., in: Grabitz E.; Hilf M. (eds.), *Das Recht der Europäischen Union-Kommentar*, München 2009, Art. 49/50 EGV, par. 25; Haratsch; Koenig; Pechstein, *op. cit.,* note 12, p. 457; Opposite view in Rolshoven M., *„Beschränkungen“ des freien Dienstleistungsverkehrs*, Berlin 2002,

the provider of services needs to have establishment on the territory of the EU, but there is no uniform opinion on the question if the provider of services needs to have the nationality of the EU as well. In favor of the more liberal approach to apply the passive freedom of services even when the provider of services is not a national of a EU Member State, it should be argued that the recipient of a service must not be taken away his rights under EU law just because the service provider with establishment in the EU is not a national of a Member State.[16] The same argument serves as justification why under the active freedom of services, the nationality of a service recipient with establishment within the EU should be irrelevant.

Within the freedom of services by correspondence it is questionable why the nationality or establishment of the service provider or service recipient should be relevant. The freedom of services by correspondence is here in line with the freedom of goods, which applies equally to third state nationals and EU nationals regardless of their establishment. The only difference is that the goods here are intangible and therefore fall under the freedom of services. On the other hand, while goods cross the border in real world and thereby establish a connection with the territory of the EU, online services have no real and tangible connection to the territory of the EU. Obviously, the EU freedom of services by correspondence should only be applicable if there is a certain connection to the territory of the EU. If we follow the analogy of the active and passive freedom of services, if a provider of services relies on the freedom of services by correspondence he should have establishment on the territory of the EU and if it is the recipient, than the domicile/establishment criteria needs to be fulfilled on his/her side. Until today, there are no CJEU decisions where this question was of relevance. In a digital era it is a crucial question to be answered in order to determine who may rely on the freedom of services by correspondence.

### 3.3. Temporariness

The question arises if the temporariness criteria should also apply to the freedom of services by correspondence. The temporariness referred to in Art 57 (3) TFEU is related to the movement of persons, whereas within the freedom of services by correspondence neither the service provider not the service recipient are moving, but rather only the service itself. Therefore, the temporariness of the service is not

108; Kluth W., in: Calliess Ch.; Ruffert M. (eds.), *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, Kommentar, München 2007, Art. 49/50 EGV, par. 36

16 Pache E., in: Ehlers D. (ed.), *Europäische Grundrechte und Grundfreiheiten*, Berlin/Boston 2009, p. 372; Randelzhofer, Forsthoff, *op.cit.*, note 8, par. 24

a requirement under Art 56 and 57 TFEU to apply the freedom of services by correspondence[17]. This is of great importance, because television and radio services, and most digital service are not provided temporarily, but permanently. If the requirement of the service to be provided temporarily would be required for the digital services, the provisions of the TFEU would simply be unfit to liberalize the digital single market. Consequently, a narrow interpretation of the temporariness requirement only to the active and passive freedom of services shall be applied.

### 3.4. Competition with other market freedoms

Within the Digital Single Market strategy, beside the freedom of services, usually the freedom of establishment is considered to be especially important. The freedom of establishment can hardly be in conflict with the freedom of services by correspondence, because the freedom of establishment requires a cross-border movement of a person.[18] Differently, the freedom of services by correspondence and the freedom of goods can be difficult to distinguish. On the one hand, the freedom of services only encompasses intangible services and thereby has a distinct criteria from the goods. However, if an activity is connected with both tangible and intangible things, the distinction may become difficult. Here the important distinction lies within the answer if the activities are separable or not.[19]

The CJEU decided very early that a data transfer without a durable medium incorporating the digital content, such as television signal, falls within the freedom of services, while the free movement of material, durable medium and other products needed for a television show fall under the freedom of goods. [20] Therefore, if the activities related to the movement of tangible and intangible things are separable, the movement of tangibles will fall under the freedom of goods, and the movement of intangibles under the freedom of services, If the activities are not separable, a characteristic performance needs to be determined that would make the focus of that activity, and if it is impossible, resort to the application of the rules on solving competition between market freedoms.

## 4. THE SECTORAL APPROACH IN THE DIGITAL SINGLE MARKET

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17 Rolshoven, *op.cit.,* note 15, p. 71.

18 Waldheim S., *Dienstleistungsfreiheit und Herkunftslandprinzip-Prinzipielle Möglichkeiten und primärrechtliche Grenzen der Liberalisierung eines integrierten europäischen Binnenmarktes für Dienstleistungen*, Göttingen 2008, p. 7.

19 Haratsch; Koenig; Pechstein, *op. cit.* note 8; Randelzhofer; Forsthoff, *op.cit.* note 8, par. 35

20 CJEU, *Giuseppe Sacchi*, 155-73, [1974] ECR 409, par. 6

The digitalization has not contributed to a larger usage of primary EU law on freedom of services by correspondence in the practice of the CJEU. On the contrary, the focus shifted to the secondary law. This approach is not entirely new, because already with the Services Directive of 2006[21] the EU legislator tried to cover most part of the scope of application of the primary law by a directive. The freedom of services by correspondence is, however, not directly regulated by the Services Directive of 2006 and under Art. 2 (2)(c) the electronic communications services and networks, and associated facilities and services are excluded from its scope of application, as well as audiovisual services under Art. 2 (2) (g) of the Services Directive of 2006[22]. In addition, within the Digital Single Market the EU legislator took a much more fragmented approach. The Digital Single Market Strategy according to the EU Commission communication is to be based on three pillars:

1. Better access for consumers and businesses to online goods and services across Europe;
2. Creating the right conditions for digital networks and services to flourish; and
3. Maximizing the growth potential of our European Digital Economy.[23]

In each of these pillars the EU has adopted several EU Regulations and/or Directives taking a sectoral approach and fragmenting the freedom of services by correspondence into small pieces.[24] The most important legislation with the aim to ensure better access for consumer and business to online goods and services include the Geo-Blocking Regulation[25], Consumer Protection Cooperation Regulation[26], Digital copyright directive[27], Digital contracts directives[28] etc. Under the

[21] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36

[22] See Bodiroga-Vukobrat N.; Horak H.; Martinović A., *Temeljne gospodarske slobode u Europskoj Uniji*, Zagreb 2011, p. 228

[23] Communication from the Commission, A Digital Single Market Strategy for Europe, COM/2015/0192 final

[24] A more comprehensive overview of the secondary legislation within the Digital Single Market Strategy in Samardžić D., Fischer T., *European Integration from a Single to a Digital Single Market*, Zeitschrift für europarechtliche Studien, *Vol.* 21, No. 3, 2018, pp. 329-351, 336

[25] Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market [2018] OJ L60I/10.

[26] Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation [2017] OJ l 345/1

[27] Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - approved by the Council of the EU on 15 April 2019

[28] Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final; Proposal for a Directive on certain aspects concerning contracts for the online

second pillar of digital networks and services it is the Directive (EU) establishing the European Electronic Communications Code[29], the amended Audiovisual Media Services Directive[30], Regulation on Privacy and Electronic Communications[31] etc. The European Digital Economy of the third pillar shall be maximized with the Free Flow of Non-Personal Data Regulation.[32]

The EU Commission has taken a rather governmental approach by dividing the Digital Single Market into three pillars, which does not correspond to traditional legal fields and disciplines.[33] The interdisciplinary approach quite significantly ignores also already established concepts of EU internal market law and may be somewhat irritating for a clean legal analysis. In order to conclude to what extent the secondary legislation truly solves problems of the digitalization under the freedom of services by correspondence, the content needs to be put in the perspective of the traditional three step test of the market freedoms: 1. Scope of application; 2. Discrimination and non-discriminatory measures and 3. Justification.

### 4.1. Scope of application

The Services Directive of 2006 is rather conservative with its scope of application, confirming in its Art 4 that both provider and recipient of services need to have both nationality and establishment in a EU Member State. As already discussed above with regards to the primary law of the EU, for the freedom of services by correspondence such a restriction makes no sense. The Geo-blocking Regulation 2018/302 brings an enormous change and widens the scope of application to all services provided on the territory of the EU, regardless of the nationality or establishment of the provider. As correctly stated in the Recital 17 of the Geo-blocking Regulation: "The effects for customers and on the internal market of discriminatory treatment in connection to transactions relating to the sales of goods or the provision of services within the Union are the same, regardless of whether a trader is established in a Member State or in a third country. Therefore, and with a view

and other distance sales of goods, COM/2015/0635 final

29 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, [2018] OJ L 321/18

30 Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2018] OJ L 303/69

31 Proposal for a Regulation 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

32 Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union, [2018] OJ L 303/59

33 Samardžić; Fischer, *op. cit.,* note 16, p. 346

to ensuring that competing traders are subject to the same requirements in this regard, this Regulation should apply equally to all traders, including online marketplaces, operating within the Union." Here the EU announces, what should have been clear a decade ago. Services by correspondence are in convergence with the freedom of goods, which applies irrespective of the nationality or establishment of the seller or buyer. When it comes to the other party of the transaction, it arises out of the definition of a customer in Art 2 (12) of the Geo-blocking Regulation 2018/302, which is a term used for the recipient of the service, that an establishment of the customer within the Union is required. A nationality of the customer, however, is not required. Therefore, the Geo-blocking Regulation 2018/302 applies to services provided to any recipient with an establishment within the Union, regardless of the nationality of the service provider or recipient, and regardless if the service provider is established within the Union or not. This is a remarkable improvement in comparison to the Services Directive of 2006, which is in line of the Art 56 and 57 TFEU. This is confirmed in the latest Regulation 2018/1807 on the free flow of non-personal data. It states in its Art 2 (1)(a) that it applies to a service to users residing or having an establishment in the Union, regardless of whether the service provider is established or not in the Union.

When it comes to the cross-border element, it is made clear in the Recital 7 of the Geo-blocking Regulation 2018/302 that it will still be required. Namely, the Regulation does not apply to situations which are purely internal to one Member State where all the relevant elements of the transaction are confined to a single Member State, "in particular the nationality, the place of residence or the place of establishment of the customer or of the trader, the place of execution, the means of payment used in the transaction or the offer, as well as the use of an online interface".

The scope of application of the secondary law within the Digital Single Market confirms that the freedom of services by correspondence does not require temporality as a precondition of its application. It is not required by any of the secondary law within the Digital Single Market.

### 4.2. Discrimination and non-discriminatory measures

The secondary law adopted within the three pillars only prohibits discriminatory measures. Under Art 4 of the Geo-blocking Regulation 2018/302, discrimination based on the nationality, place of residence or place of establishment of the customers are prohibited.[34] This is the exact definition of the prohibition of direct

[34] See Schmidt-Kessen, *op.cit.*, note 9, pp. 561-576

and indirect discriminatory measures. Such prohibition is naturally far behind the protection granted under the freedom of goods, where the market access criteria from Keck and beyond[35], encompasses prohibition of non-discriminatory measures related to market access. Already after the case of Italian trailers for motorcycles[36] and Swedish jet-ski[37], it was clear that under the freedom of goods it is enough to have a non-discriminatory measure with "a considerable influence on the behavior of consumers, which, in its turn, affects the access of that product to the market of that Member State". This is a much higher level of freedom provided for goods, than currently granted to the digital services under the freedom of services by correspondence. On the other hand, it took the freedom of goods several decades to understand all the ways in which governmental measures take "a considerable influence on the behavior of consumers" and a step-by-step approach cannot be criticized too heavily.

In addition, when examining the content of the secondary law within the first pillar of the Digital Single Market Strategy, it needs to be restated that its named goal of "better access for consumers and businesses to online goods and services across Europe" does not correspond to the legal concept of "market access". Namely, all of the other legal acts except from the Geo-blocking Regulation 2018/302 do not regulate discriminatory or non-discriminatory measures or restrictions of market access but aim to build a solid basis and the legal environment for a future regulation of free access to online services. Or even more generally, many of the secondary law acts do not directly relate to the freedom of services by correspondence, but rather address digitalization in the broadest economic and social context. The development of free access to online services is still in its early phase.

### 4.3. Justification

Although the Digital Market in the EU is very far from its goal to become a Digital Single Market, the fast development of digital services has already raised a lot of concerns within the Member States. Obviously, the threat to privacy and personal data is the number one threat to be mentioned. There not only the CJEU developed a strict necessity test for the restriction of the fundamental right to personal data under Art 8 of the EU Charter of Fundamental Rights (CFR)[38], but also the

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35 Snell J., *The notion of market access – a concept or a slogan*, Common Market Law Review, *Vol.* 47, 2010, pp. 437-472, p. 457

36 CJEU, C-110/05, *Commission vs. Italy* [2009], I-519, par. 57

37 CJEU, C-142/05, **Åklagaren** *vs. Percy Mickelsson and Joakim Roos,* [2009], I-4237, par. 26

38 Meškić Z., Samardžić D., *The Strict Necessity Test on Data Protection by the CJEU: A Proportionality Test To Face The Challenges at the Beginning of a New Digital Era in the Midst of Security Concerns,* Croatian Yearbook of European Law and Policy, *Vol.* 13, 2017, p. 133-168

(in)famous GDPR[39] was adopted. Personal data is therefore in accordance with Art 8 of the CFR a written ground of justification for a restriction of freedom of services by correspondence. The same is true for intellectual property rights, which may serve as a justification ground for the restrictions of the freedom of services.[40] This has also quite recently been confirmed by the CJEU in the *Murphy* case on television broadcasting of sports events.[41] The EU legislator has a narrower legislative discretion in these areas, as restrictions of the free movement of services which are proportional to the goal of personal data protection or intellectual property rights are allowed.

In addition to that, the EU legislator within the three pillars of the Digital Single Market was quite busy codifying grounds of justification. Many secondary law acts relate to consumer protection such as Consumer Protection Cooperation Regulation, Digital Contracts Directive and the Audiovisual Media services Directive. On the other hand, Regulation 2018/1807 on the free flow of non-personal data attempts to ensure the visibility of the distinction between data which does and does not fall within the fundamental right to personal data under Art 8 of the CFR. At the same time, the Regulation 2018/1807 on the free flow of non-personal data names public security as the most important ground of justification of a restriction to the freedom of non-personal data and thereby creates a link to the GDPR.

## 5. CONCLUSION

The EU freedom of services by correspondence has the potential to become the most important market freedom in the digital era. The title of the fifth freedom for the Digital Single Market was given by the European Parliament to a secondary legislation on Free Flow on Non-Personal data, which falls within the much broader scope of application of services provided by correspondence. Services provided by correspondence include also free movement of personal data and access to digital services provided cross-border in general. Regardless of the question if

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[39] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ [2016] L 119/1; See Boban M., *Digital single market and EU data protection reform with regard to the processing of personal data as the challenge of the modern world*, in: Proceedings of 16th International Scientific Conference ESD 2016*,* „The legal challenges of modern world, *Vol.* 1-2 2016, p. 191-201; *Škrinjar* Vidović M., *EU Data Protection Reform: Challenges for Cloud Computing*, Croatian Yearbook of European Law and Policy, *Vol.* 12, 2016, p. 171-207

[40] See Schmidt-Kessen *op.cit.*, note 9, p. 561-576, 572

[41] CJEU, *Football Association Premier League Ltd v. Karen Murphy,* Joined Cases C403/08 and C429/08 [2011], I-09083, par. 89

the title of a new "fifth freedom" may be given to any freedom without changes in the primary law, the name raises a lot of attention and correctly emphasizes the growing importance of the free flow of digital content. From the perspective of the market freedoms, however, personal data as a fundamental right under Art 8 of the EU Charter of Fundamental Rights and the GDPR, are just a ground for justification for the restriction on the market freedoms. They are part of a group of justification grounds such as intellectual property rights, consumer protection and public security as the most important justification grounds in the digital market. Justification grounds do not exclude digital content such as personal data or content related to intellectual property rights from the freedom of services but only justify its restrictions under the conditions of proportionality.

The sectoral approach chosen by the EU under the Digital Single Market Strategy therefore leaves many gaps and lacks a clear system of regulation. On the other hand, the much broader services by correspondence is limited by the conditions set by the TFEU, originally formulated for the active freedom of services. The scope of application of the freedom of services by correspondence in EU primary law is by its wording limited to EU nationals with establishment in the EU under Art 56 and 57 TFEU. Within the freedom of services by correspondence it is questionable why the nationality or establishment of the service provider or service recipient should be relevant. The freedom of services by correspondence is here convergent with the freedom of goods, which applies equally to third state nationals and EU nationals regardless of their establishment. The only difference is that the digital goods in question are intangible and therefore need a certain real-life connection ot the territory of the EU in order for EU law to be applicable .. The Geo-blocking Regulation 2018/302 makes the necessary changes in the right direction, by widening the scope of application to customers with establishment within the EU, regardless of the nationality or establishment of the services provider. This is confirmed in the latest Regulation 2018/1807 on the free flow of non-personal data, which applies to a service to users residing or having an establishment in the Union, regardless of whether the service provider is established or not in the Union. Art 57 (3) TFEU even requires the service to be of temporary nature, which would exclude any permanent digital service from the freedom of services. The CJEU in its jurisprudence never applied the criteria of temporariness to the freedom of services by correspondence and the secondary legislation adopted within the Digital Single Market also did not take it over from Art 57 (3) TFEU. Thereby it implicitly confirms that the temporariness does not apply to freedom of services by correspondence.

While the focus of this analysis is the regulation methodology and its scope of application chosen by the EU legislator, in the future the main question will be if

the current legislative measures are with regards to the level of protection sufficient to reach the goals of the Digital Single Market. Such development has already been seen with regards to tangible goods within the freedom of goods. The methodology used by the CJEU is far more effective and all-encompassing than the fragmented EU secondary legislation. The newly adopted secondary law within the Digital Single Market still focuses only on discriminatory measures and is far behind the *Dassonville*, *Keck* and later jurisprudence on market access applicable not just to the freedom of goods, but also to the most other market freedoms. The Digital Single Market is interdisciplinary, and many acts of its secondary law only address the digital legal environment and some foundations of a digital market but are still far away from abolishing non-discriminatory restrictions of free access to online services. It is a development that took the freedom of goods several decades and the freedom of services by correspondence will need some more time.

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# DOES THE RIGHT TO USE DIGITAL CONTENT AFFECT OUR DIGITAL INHERITANCE?

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***ABSTRACT***

*Rights in the digital world affect our property in a special way. This paper aims to explain how users right in a digital world reflect on user's estate of inheritance. Firstly, it is explained what digital content is and what digital services are. After that, digital content and services are discussed from the user's point of view having in mind rights that users have in a digital world. Although those rights contain a right to use data or services they are created and regulated through different provisions (copyright, intellectual property, ownership or licences).*

*Under the principle of universal succession, everything that belonged to decedent can belong to his or her heirs unless it is explicitly regulated otherwise or rights are strictly personal. Despite this principle there are some rights in the digital world that cannot belong to the heirs. Also, existence of a digital inheritance might cause some practical problems.*

***Keywords***: *digital content, digital data, right to use, inheritance, copyright, licences*

## 1. INTRODUCTION

Digitalisation and technologies have changed our everyday lives. A variety of digital contents and digital services, free or for consideration, have already changed our property. Every user of digital content has a special legal position concerning digital content and special rights and obligations under a digital service contract or a contract of supply of digital content. Nevertheless, there is a question what happens with the digital content and access to digital services after user's death. In Croatian Law, the estate of inheritance "represents the totality of rights and obligations that belonged to the decedent at the time of death if they are inheritable and

free for succession".[1] What belongs to someone during his or her life is in Croatian private law explained through a definition of property by which property means anything which belonged to the decedent in the moment of death, including all subjective inheritable rights and other legal entities[2]. To understand what could affect someone's digital estate of inheritance it is necessary to explain what digital is. It means that this research should before stepping into inheritance law, focus on legal nature of users rights in digital world during his life.

Firstly, this article will explain the term "digital content" taking into account existing European Union legislation[3] along with new directives proposals[4] that aim to provide legal solutions for protection of consumer concerning digital content. So far, numerous and various digital content services have been available for users in Croatia.[5] To explain legal nature of rights that users in Croatia have it is necessary

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1 Gliha, I.; Josipović, T., Chapter 6: *Succession Law*, in: Josipović, T. (ed.), Introduction to the Law of Croatia, Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014, p. 196

2 Definition of property in inheritance law see: Matanovac, R., *Nasljeđivanje autorskog prava*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 54, No.3-4, 2004, p. 619

3 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 (hereinafter: Directive 2011/83/EU on consumer rights), OJ L 304, 22.11.2011, p. 64–88, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083, last accessed: 30.01.2019. This directive is implemented in Croatian private law through Consumer protection Act, Official Journal (Official Gazette ), 41/2014, 110/2015, hereinafter: CPA). Also, of importance is Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (hereinafter: Directive (EU) 2015/2366 on payment services), OJ L 337, 23.12.2015, p. 35–127, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2366&from=HR, last accessed: 30.01.2019. This directive is implemented in Croatian private law through the Act on Payment Services, Official Gazette , 66/2018, (hereinafter: APS)

4 Proposal Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (hereinafter: Digital Content Directive Proposal), COM/2015/0634 final - 2015/0287 (COD), Brussels, 9.12.2015, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634] Accessed 02.02.2019. Another proposal that shall be taken into account is Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (hereinafter: New deal for consumers), COM/2018/0185 final - 2018/090 (COD), available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185] Accessed 06.02.2019

5 In Croatia 90% of population uses Internet (December 2017) and 1, 8 million people have Facebook accounts (https://www.internetworldstats.com/europa.htm, last accessed on: 02.02.2018.). Croatian Internet users read news online (91%, 2nd in Europe), listen to music, watch videos and play games

to explain rules applicable to relations concerning digital content with a special research of terms and conditions of such services. Each digital service provider has its own terms or conditions of use, prepared in advance, impossible for users to change them.[6] At the first sight, it might seem that users have only the right to use but it seems that users rights are not exhausted only in usage of data, that there is something more.[7]

That part would be a base for a discussion on digital inheritance. On the one hand, it has to be explained what is meant by digital inheritance. On the other hand, from the aspect of Croatian national inheritance law, it has to be seen what is inheritable in general and then it shall be discussed on digital inheritance.

## 2. DIGITAL CONTENT

### 2.1. Defining digital content

There are several different definitions of digital content in the European Union directives already in force or just proposed. The Directive 2011/83/EU on consumer rights briefly defines digital content as "data which are produced and supplied in digital form".[8] In addition to this brief definition, the preamble to this Directive gives some examples of digital content, such as "computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means".[9] Some authors imply that this definition was left broad because the intention was to include all possible kinds of digital content and digital services. The idea was

online, watch films and make video calls over the Internet. This fact has been taken from: Digital Economy and Society Indeks (DESI) 2018 – Country Report Croatia, p. 6, available at: [http://ec.europa.eu/information_society/newsroom/image/document/2018-20/hr-desi_2018-country-profile_eng_B4406AEC-AC62-A67B-2B7B633077700C13_52224.pdf] Accessed 02.02.2019

6 See more on standard contracts in the digital market: De Franceschi, A., *European Contract Law and Digital Single Market: Current Issues and New Perspectives* in: De Franceschi, A. (ed.): European Contract Law and Digital Single Market – The implications of the Digital Revolution, Intersentia, Cambridge, Antwerp, Portland, 2016, p. 11

7 Beside use, rights could be a right to copy, a right to distribute or analysing the data. See more: Zech, H., *Data as a tradeable commodity* in: De Franceschi, A. (ed.): European Contract Law and Digital Single Market – The implications of the Digital Revolution, Intersentia, Cambridge, Antwerp, Portland, 2016, p. 59

8 Art. 2 (11) of Directive 2011/83/EU on consumer rights. The same definition could be found in art. 5 (2) of the CPA

9 See more recital 19 in the preamble to Directive 2011/83/EU on consumer rights

also to escape from standard contract typology and to avoid mentioning specific types of contracts, such as contracts on sale, rent, commission, licence or similar.[10]

There is another definition of digital content in the Directive (EU) 2015/2366 on payment services. According to this Directive, digital content "means goods or services which are produced and supplied in digital form, the use or consumption of which is restricted to a technical device and which do not include in any way the use or consumption of physical goods or services". Preamble to this Directive does not contain any additional examples of digital content. Here, the focus is on digital goods and services and not on data.[11]

Important definition of digital content is proposed in the Digital Content Directive Proposal, which aims to regulate consumers remedies in case of lack of conformity. In the first part of the definition, this proposal regulates digital content as a "data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software".[12] This part of the definition of digital content is similar to the definition of digital content from the Directive 2011/83/EU on consumer rights. Nevertheless, the Digital Content Directive Proposal further continues defining digital content as "a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer"[13] and as "a service allowing sharing of and any other interaction with data in digital form provided by other users of the service".[14] Preamble to Digital Content Directive Proposal emphasized that "the definition of digital content is deliberately broad and encompasses all types of digital content, including, for example, downloaded or web streamed movies, cloud storage, social media or visual modelling files for 3D printing, in order to be future-proof and to avoid distortions of competition and to create a level playing field".[15] This definition seems to be very broad while it includes all types of digital content. The examples contained within give very important tool for clear understanding of the broad concept of digital content.

Some novelties concerning digital content are also proposed under the New deal for consumers where improved definitions of digital content, contract for the sup-

[10] See more: Lehmann, M., *A European Market for Digital Goods* in: De Franceschi, A. (ed.): European Contract Law and Digital Single Market – The implications of the Digital Revolution, Intersentia, Cambridge, Antwerp, Portland, 2016. p. 117

[11] *Ibid.*, p. 112

[12] Art. 2, p. 1 (a) of Digital Content Directive Proposal

[13] Art. 2, p. 1 (b) of Digital Content Directive Proposal

[14] Art. 2, p. 1 (c) of Digital Content Directive Proposal

[15] See more under detailed explanation of the specific provisions of the proposal, Preamble to Digital Content Directive proposal

ply of digital content, digital service and digital service contract are given.[16] This means that the existing Article 2 of Directive 2011/83/EU on consumer rights should be changed. Article 2 (1) of New deal for consumer proposes the definition of the digital content as "data which are produced and supplied in digital form, including video files, audio files, applications, digital games and any other software". Furthermore, the New deal for consumers proposes to define digital service as a service "allowing the consumer the creation, processing or storage of, or access to, data in digital form or service allowing the sharing of or any other interaction with data in digital form uploaded or created by the consumer and other users of that service, including video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media."[17] Since both proposals aim to create a high level of consumer protection, providing different rights and remedies for them, it would be of crucial importance to have the same definitions of digital content and digital services. This approach would assure and safeguard legal certainty in consumer protection.

At this moment, in the Croatian legislation, definitions of digital content were introduced in the CPA, following the transposition of the Directive 2011/83/EU on consumer rights and in the APS, following the transposition of the Directive (EU) 2015/2366 on payment services.[18] The same situation is, presumably, in other EU member states, since only United Kingdom[19] and Netherlands have regulated more specific rules on digital content and related contracts.[20] Taking into consideration that the Directive 2011/83/EU on consumer rights is a directive of maximum harmonisation, it should be transposed in the way that the definition of digital content should not be changed or upgraded.

After comparing definitions of digital content, it is obvious that they differ from each other. This situation does not contribute to the unique application Europe wide and should be reconsidered. At the same time, the definition of the digital content should be as broad as possible. Moreover, it should be supported by an open list of examples, which would leave an open way for future digital content

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16 See more: art. 2, p. 1, (d) of New deal for consumers

17 Article 2 (1) of New deal for consumers

18 Beside definitions of digital content, there is a definition of computer data in the Criminal Code (Official Gazette , 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, hereinafter: CC). The Criminal Code defines computer data as any expression of facts, information or idea in a form suitable for processing in a computer system (art. 87. p. 19)

19 See more: Giliker, P., *The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive*, European Review of Private Law, Issue 1, 23, 2015, pp. 5–28

20 See more: Preamble to the Digital Content Directive Proposal and the Consumer Rights Act 2015, 2015 c. 15, available at: [https://www.legislation.gov.uk/cy/ukpga/2015/15/notes] Accessed 02.02.2019

and services and flexible jurisprudence. At the end of the day, the courts shall be competent to give the last word on the decision whether the concrete example shall be treated within the regime of the digital content or not.[21] It is, nevertheless, also obvious that the spectrum of types of digital content is growing practically on a daily basis.

### 2.2. Legal position of users towards digital content and digital services

Digital content can be created by various persons: by the users of digital services, providers of those services and by the third parties. Depending on the creator of the digital content, also varies the legal position of users towards this content. Various legal acts should be consulted when assessing the rights belonging to the users in relation to the digital content and digital services, such as: CPA[22], Obligations Act[23], Act implementing General Data Protection Regulation[24], Electronic Communications Act[25], Electronic Commerce Act,[26] Copyright and Related Rights Act[27] and others. Nevertheless, none of those acts has any specific provisions which would expressly determine and define the object, the content and the scope of the users rights towards the digital content and digital services. In most of the cases the content and the scope of the users rights is regulated and defined through terms and conditions prepared in advance by the service provider for each digital service.[28] The user is in the position to accept or to refuse the terms and conditions prepared by the service provider, without possibility of changing or amending them. Within this research, different types of service providers and different varieties of digital services and digital content have been explored.[29]

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[21] For example, German court has decided that virtual money in a game is a digital content. See: LG Karlsruhe, judgement from 25.05.2016 – 18 O 7/16

[22] Only CPA has special rules for digital services, which are applicable in cases where users are consumers. See more on pre-contractual information in art. 57 p. 1. of CPA and right to withdrawal in art. 75. p 5. and art. 77. p. 9. of CPA

[23] Obligations Act, Official Gazette , 35/05, 41/08, 125/11, 78/15, 29/18, hereinafter: OA

[24] Act implementing General Data Protection Regulation, Official Gazette , 42/18

[25] Electronic Communications Act, hereinafter: ECA, Official Gazette , 73/08, 90/11, 133/12, 80/13, 71/14, 72/17

[26] Electronic Commerce Act, Official Gazette , 173/03, 67/08, 36/09, 130/11, 30/14

[27] Copyright and Related Rights Act, 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17, 96/18, hereinafter: CRRA

[28] When it comes to other elements of legal position of a user in some cases it could be questionable whether Croatian law is applicable. Many service providers do not have their business headquarters in Croatia, they mostly have it in one of member states. This would mean that from consumer protection point of view they would have the same protection as in Croatia

[29] Services that were taken into account are: Facebook and Instagram (as social media); iTunes (including iBooks store), Amazon Kindle and Deezer (books and music services); Neflix, evotv, OyoTV, Pickbox

After analysing them, it can be concluded that those service providers are usually legal entities and traders. Users, on the other hand, are mostly natural persons under a certain age, usually consumers or even prosumers. This new name for the consumers in digital world, comes from the situations where consumers are also creators of a new digital content or data and therefore are called consumers as producers or prosumers. Digital content created and produced by the users is therefore also very often referred to as users generated content.[30] According to the general terms and conditions, consumers are usually allowed to use digital content or digital service for their personal or private use only, while the public use is strictly prohibited.

The basic relation existing in the use of digital services and digital content is the one between the service provider and the user. Nevertheless, services in digital world have more than one relation. Additional relations, along with the basic one, are relations between the user and the third parties, and the relation between the provider of the service and the third parties. Third parties are, for example, holders of a copyright who have licensed their copyright to the service providers with the possibility to sublicense it to the end users.[31] Usually, one contract for supply of digital content or digital service shall give a user only one right.[32] Nevertheless, there are examples where, under the same contract, user has two or more different rights.[33]

Usually, before entering into a relationship with regard to the digital service and the digital content, each user is asked, by the general terms and conditions, to create an account with an user's name and a password. It seems that in the digital world, creating an user account technically means to "possess" data stored or accessed in relation to this account. This user account is a new way of possessing

(as video streaming services); Google Cloud and Dropbox (as cloud services); Google Gmail and Yahoo mail (as e-mail services); Steam, Origin (Electronic Arts) and Blizzard Entertainment (as gaming platform services), web hosting and domain services ([https://www.posluh.hr], [http://cro-cloud.com/uvjeti-poslovanja/] both last accessed on 28.02.2019

30 For example such data can be created on gaming platforms and terms and condition refer to as „user generated data". See more: Navas Navarro, S., *User-Generated Online Digital Content as a Test for the EU Legislation* in: Schulze, R.; Staudenmayer, D.; Lohsse, S. (ed.): Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps, Hart Publishing, Nomos Verlagsgesellschaft, Baden-Baden, 2017, p. 236, 242. There are different aspects on term prosumers, see more: Hatzopoulos, V.; Roma, S., *Caring for sharing? The collaborative economy under EU law*, Common Market Law Review, Issue 1, 54, pp. 81–127

31 An example of such services is Deezer or song stored on iTunes (author of the song is third person not service provider) or Neflix where service provider does not hold copyright or intellectual property rights on movies

32 For example a right to use an e-book for personal purposes (to read it on Kindle)

33 Creating an account on a gaming platform and „buying a game" gives to user a licence to use a game" but also a possibility to create new digital content – user generated content on the same platform (see: Steam, Blizzard Entertainment and Origin)

data, so to say. In other words, username and password are means to reach the data and only the person who knows them is in the position to access data and to "possess" data. Usually, there are two categories of data. The one given to the user (such as an e-book given to the user on Kindle) and the other, data given by the user (such as any document put by the user in a cloud). Nevertheless, this does not say anything about the legal nature of user's right with respect to the said types of data, but only about the origin of the data.

Taking into consideration everything said in this chapter, the users' rights, according to their content, scope and the object, might be divided into three separate groups. Those groups might be: copyright, ownership and licence.

a) copyright

When users generate the content, they might be the holders of copyright and / or related rights regarding this content. For example, videos, photos or texts published on social media, such as Instragram and Facebook, data created as user generated data or even documents saved in a cloud that contain such data could be within this category.[34]Content may be protected by copyright only if it contains copyright works, namely original intellectual creations in the literary, scientific and artistic domain, having an individual character, irrespective of the manner and form of its expression, its type, value or purpose, unless otherwise provided for in the CRRA.[35] Protected works can also be so-called derivative works whichare created as alterations or adaptations of the previously existing works.[36] Also, it is possible that more than one author creates one work protected as copyrighted work.[37] The objects of related rights may be performances, phonograms, videograms. The users shall have related rights in those objects if the conditions for protection regulated in the CRRA are fulfilled.

Web hosting services and internet domains, are protected through other intellectual property rights.[38] Under Croatian law, user shall have a right to register

[34] See more: Reinemann, S.; Remmertz, F., *Urheberrechte an User-generated Content*, ZeitschriftfürUrheber- und Medienrecht, Heft 3, 2012, p. 217 – 227; Babovic, M., *The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media*, Cybaris® An Intellectual Property Law Review, *Vol.* 6 : Iss. 1, Article 6, available at: [https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1046&context=cybaris] Accessed 04.03.2019

[35] See art. 5 p. 1 (and p. 2) of CRRA

[36] Navas Navarro, S., *op. cit.* note 30, p. 246

[37] See more: art. 11 of CRRA

[38] Maeschaelck, B., *Digital Inheritance in Belgium*, EuCML, Heft 1, 2018, p. 39

one domain for free, and additional only if he pays.[39] Registration of an internet domain gives an user a right to exclusively use the registered domain, organize it, shape it and control its content.[40]

b) ownership

Users may own data *i.e.* data files. Ownership of data means that the user has the possibility of control of data and its possession through technical means applied in relation to the storage of and access to the data. Data are owned by the user in a special way *i.e* .the user is usually a possessor of the account where the data are stored or through which data may be accessed. At the same time those data may be protected by copyright or related rights, or by trade secrets or by some other right. Within this another legal framework, such rights might belong to the user or to third persons or to the service provider. This does not affect ownership of digital data within the sense of the possibility of technical control of the access and of the use of respective data. Some authors imply that the users acquire ownership of data through contract of supply of digital content, by having in mind Digital Content Directive Proposal.[41] Nevertheless, owning intangible data may in some way be similar to owning tangible things. Two elements are important here: possibility of the access and possibility of the control of data which lead to the concept of possession of data. For example, when data are in cloud or stored on a server, access is achieved through user name and password, which are known only to the user. On the other hand, control of such data can be seen through user's right to change such data or even to destroy it.[42] Naturally, owning data files can be compared to the ownership of tangible goods, but may not be equalized. Nevertheless, according to the Croatian Property Act,[43] the definition of ownership implies the possibility for the owner to exclude anyone else from the use of the object of his right. Ownership, under the Croatian Property Act, is an exclusive and absolute right. With relation to data, the exclusivity actually does not work in the same way since data are intangible and data ownership does not necessarily imply the possibility of the exclusion of others and absolute effect towards others. Neverthe-

39 Art. 6 of Regulation of administration and management with the top national Internet domain (hereinafter: Regulation on TLD), Official Gazette 38/2010, 81/2015, 5/2017. See more: Dragičević, D., *Pravna informatika i pravo informacijskih tehnologija*, Narodne novine, Zagreb, listopad 2015, p. 27

40 See art. 24 para 1 of the Regulation on TLD

41 Tai Tjong Tjin, *Data ownership and consumer protection*, Journal of European Consumer and Market Law, Heft 4, 2018, p. 137

42 More on possible problems which might happen in case of *reivindicatio* see: *ibid.*, p. 138 – 140

43 Croatian Property Act, Official Gazette , 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14. For definition of ownership, see art. 30

less, a kind of ownership in relation to the digital data does exist, also according to regulation of criminal offenses concerning computer data which regulate a situation when someone damages computer data that belong to others.[44] Such belonging can be explained through ownership. Even more, the Act on Data Secrecy explicitly uses the terminology "data owner".[45] However, the ownership of data files may be transferred. There are no obstacles for transferability of data files. The effect of the transfer of data files would be the same as in the case of the transfer of tangibles. The same legal principles[46] would be applied and would not be in danger. So, it might be concluded that there is a kind of right of the user towards data, which might be called a "specific ownership" or "ownership like" right.[47]

For example, Bitcoin and other virtual currencies would fit within the category of ownership on the side of other users. Nevertheless, other situations would rather lead to the concept of licence, which shall be discussed infra, than to the concept of ownership. For example, the virtual goods. It is questionable whether virtual goods are actually owned by users or they have the right to use, only. The examination of the terms and conditions applied in gaming industry shows that some digital goods can be bought in a video game, such as weapons, clothes or other items needed in a game or even money that can be used in a game. For users, it might seem that they are owners of those virtual goods, but this is not true.[48] In such cases, users have only licences to use those digital goods in a game although they used a button "purchase" or "buy now" which led them to a conclusion that they are owners.

### c) licences

The most usual user's right arise from licences.[49] Users have licences to use their accounts and to use data. Research has shown that in most of the cases, terms and conditions given by the providers are in fact licensing terms. There are two different ways of accepting and agreeing to those terms. The first would be through "click-wrap" licence, when users accept terms by clicking on a box which says "I

[44] See art. 268 of Criminal Code

[45] See art. 2, 14, 15 and other articles of Act on Data Secrecy, Official Gazette , 79/2007, 86/2012. This act also defines data in art. 2. Among everything else, data can be in electronical or digital form

[46] Klarić, P., Vedriš, N., *Građansko pravo*, Narodne novine, Zagreb, 2014, p. 10; Gavella, N., *Privatno pravo*, Narodne novine, Zagreb, 2019, p. 18

[47] Similar is concluded in article / opinion of Hoeren, T., *Big data and the Ownership in data: Recent Developments in Europe*, European intellectual property review, n°12, *vol.* 36, 2014, p.753

[48] Kenneth, W. E., *Content Creators, Virtual Goods: Who Owns Virtual Property?*, Cardozo Arts & Entertainment Law Journal, *Vol.* 34, num. 1, 2016., p. 261

[49] In Croatian law licence contract is regulated in art. 699 – 724 of OA

agree" and the other is "browse-wrap", where acceptance is presumed and the terms are available on providers website.[50] Generally, the provider is the one who gives licences but in cases of social media services (such as Facebook an Instagram) user is the one who gives licences to service provider to use user's photos and videos without any payment. Licences given by the provider are mostly limited, revocable, non-exclusive, personal and non-transferable, without possibility of sub-licensing.

## 3. DIGITAL INHERITANCE IN CROATIA

### 3.1. Generally on Inheritability in Croatian Private Law

In Croatian private law inheritance is regulated in the Inheritance Act (hereinafter: IA).[51] Croatian inheritance law recognizes the rule of universal succession. Article 5. p. 1. of IA regulates that a person who inherits someone is his universal successor. According to the principle of *ipso iure* succession (art. 3. p. 1., art. 129 IA) heirs inherit decedent upon his death. Object of their inheritance is estate of inheritance.[52]

In general, the estate of inheritance consists of everything that belonged to decedent at the moment of his death. It might seem that all subjective property rights that belonged to decedent during his life are part of his estate of inheritance, but this is not completely true since there are rights which are not transferable *mortis causa*.[53]Although the most of the subjective property rights are transferable it does not always mean that they are inheritable. By this reasoning, we come to the conclusion that the estate of inheritance consists of everything that belonged to descendant, if it is inheritable. This is explicitly regulated in the Art. 5 Para. 3 of the IA. Some subjective rights may not be inheritable because of their legal nature or according to the explicit provision of the law.[54]

The debts of the decedent burden the estate of inheritance and are inherited together with his or her economic and non-economic rights.[55] Some authors classify the estate of inheritance through decedent's patrimonial rights (ownership, limited property rights, claims, leasehold interests, except for strictly personal rights), the decedent's obligations, and other decedent's legal goods and entities not hav-

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50 Helberger, N; Loos, M. B. M.; Guibault, L., Mak, C., Pessers, L., *Digital Content Contracts for consumers*, Journal of Consumer policy, Issue 1, Volume 36, March 2013, pp. 37-57

51 Inheritance Act, Official Gazette 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019

52 See more: Gavella, Nikola, *Nasljedno pravo*, Narodne novine, Zagreb, 2008, pp. 55-64

53 See more on similarities and differences between property or assets and estate of inheritance in Klarić; Vedriš, *op. cit.*, note 46, p. 716 and Gavella, *ibid.* p. 59, 60.

54 For example, see art. 2 p. 3 of Act on Humanitarian Aid (Official Gazette, 102/15) and decision of Croatian Constitutional Court from 12th of June 2018, U-III/1237/2018

55 See more: Gavella, *op. cit* note 52, p. 62

ing the character of subjective rights (possession of things, legal effect of an offer, limitation periods)”.[56]

### 3.2. Inheritability of subjective property rights in a digital world

Digital inheritance is not regulated by specific provisions in Croatian private law. Also, there are no special provisions applicable specifically to inheritance of data, digital content or legal position of any kind for contract of supply of digital content in Croatian private law. Therefore, only the general principles of universal succession may be applied to inheritance of user's rights in digital world. As it has been already emphasized, most relations in digital world are, in a way, dualistic, since there is one set of rules for user's account and another for data that are connected to these accounts. It has to be emphasized that those relations are before everything – contractual relations. According to the Art. 213 of the OA, death of a debtor or creditor shall end the obligation only if it has been created concerning personal qualities of a contracting party or personal ability of the debtor.[57] This means that the general rule for inheritability of contractual relations in case of user's death would leave an open way for his heirs to inherit decedent's legal position also with regard to the contracts related to the digital world, unless regulated otherwise. For example, the Regulation on TLD regulates that a right to use a domain name terminates upon user's death.[58] Inheritability of rights in the digital world will be furtherly discussed having in mind the abovementioned differentiation between account and data provided through the account and classification of a legal base for the use (ownership, copyright and licences).

a) ownership an copyright

Some could argue that there is a difference between data stored on decedent's personal computer, USB Disk or internal hard disk and data stored online. Nevertheless, it seems that there should be no difference. The same principles should apply in both of the cases. Namely, if data are inheritable, they shall be inheritable, if data are by their nature or by the explicit provision out of the possibility to be inherited, it shall not be inheritable. It is not important how data are stored

[56] Gliha; Josipović, *op. cit.*, note 1, p. 196

[57] See more: Gorenc, V.; Belanić, L.; Momčinović, H.; Perkušić, A.; Pešutić, A.; Slakoper, Z.; Vukelić, M.; Vukmir, B., *Komentar zakona o obveznim odnosima*, Narodne novine, Zagreb, 2014, str., 320, 321

[58] See more on domains in this article: 2.2 Legal position of users towards digital content and digital services) along with art. 24 p. 3 of the Regulation on TLD. This special domains regulated under Croatian law are transferable (art. 28 of the Regulation on TLD) but uninheritable. This might not be the case if a person registers a domain in case where rules of another country apply

or accessed. Nevertheless, technically, if heirs would like to access data that is online, under some password, they would have to prove to the provider that they are user's legitimate heirs. But the question of technical accessibility data for the heir is not relevant since the heir steps into the position of his decedent *ipso iure*, by the law itself, the possession or access is not relevant for the inheritance. On the other hand, if the heir would have a password, he could access data, but it does not necessarily mean that he inherited those data. Technical means are not relevant for inheritance of data. Data that could be accessed offline might also be inherited just like any other thing or right[59] unless otherwise stipulated by the decedent or regulated by the law. For example, cryptocurrencies such as Bitcoin can be inherited just like the ordinary money.[60]Another example are copyright in data. No matter if the data is online, in a cloud such as Dropbox, or offline, it could be protected under copyright. Croatian CRRA explicitly regulates that copyright is inheritable.[61] On the other hand, inheritability of owned data – data that is not protected under the CRRA -need to be furtherly discussed.

As it was already mentioned, it is possible that within one service exist different types of users' rights. One example for such a service is Facebook. Data stored on Facebook account might be in different legal regimes with respect to the users. Videos and photos created by the user might be protected by copyright and as such inheritable, along with contractual position of user as a licensor of the licences issued to Facebook. The question remains whether the same might be applied to messages sent and received via Facebook. The answer to this question should presumably be the same as in the case of the messages sent through an e-mail or another way of electronic communication. It is clear that this content is personal and the answers to the question of inheritability of such personal communication should be assessed not only through provisions of inheritance law but also through provisions on the protection of privacy and personal data.

One might argue that e-mail and messages are actually the same as personal letters. Croatian private law does not contain any special provision on inheritability of personal letters, which means that the general principles should apply here. On the other hand, Croatian CC has a special part on criminal offenses against privacy. In the Art. 142. CC regulates that access to someone's letters, e-mails or similar without permission is considered as a criminal offence against the right

59 See: art. 79 of the IA

60 Čičin-Šain, N., *Oporezivanje Bitcoina*, Zbornik pravnog fakulteta Sveučilišta u Zagrebu, *Vol.* 67, No. 3-4, 2017, p. 657

61 See Art. 41. p. 1. CRRA. Although copyright is non-transferable right, it is inheritable (art. 42 p. 1 of the CA). On inheritability of copyright, see more: Matanovac, *op. cit.*, note 2, pp. 607-650

to privacy.[62] This provision does not make any difference between ordinary mail and any other kind of electronic communication, when it comes to the breach of someone's privacy. This difference should neither exist under inheritance law. Another point of view should be seen here through the protection of privacy and protection of personal data. Privacy protection and secrecy of electronic communication are regulated in the ECA.[63] However, this regulation, just like the CC, aims to protect privacy in different way and during someone's life. There are no provisions in the ECA which should be understood as providing that the messages and e-mail content should not be inheritable. Clearly, reading others messages and emails is a breach of user's privacy, but saying that they are uninheritable would be wrong. The aim of the said provision is to protect someone's privacy. However, privacy and protection of personal rights *post mortem*[64] should not be in the same regime, since there is no need for such a protection. This would mean that after user's death, his heirs could inherit his messages and e-emails even though they did not receive the permission of the decedent to access to this content. For heirs, this would mean that they would have to prove that they are user's heirs in order to get access from the provider. On the other hand, protection of personal data*post mortem* is not the same as the protection of privacy in electronic communication *inter vivos*.[65] Although Croatian legislator had the opportunity to regulate processing of personal data of deceased persons[66] through Act on implementation of General Data Protection Regulation[67] it decided not to do so and therefore the general principles should apply.

At the moment, relevant court decisions on this topic still does not exist in Croatia. That is way this part of the discussion will take into account an important decision of German Federal Court of Justice (*Bundesgerichtshof*, hereinafter: BGH)

62 Art. 142 of the CC

63 See articles 99a, 100 and others of ECA. Among other directives, in regulation is transposed 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), Official Journal L 201, 31/07/2002 P. 0037 – 0047

64 Gavella, N., *Osobna prava*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb 2000, pp. 33, 34

65 See more: Resta, G., *Personal Data and Digital Assets after Death: a Comparative Law Perspective on the BGH Facebook Ruling*, EuCML, *Vol.* 7, Issue 5, 2018, pp. 203, and Klas, B.; Möhrke-Sobolewski, C.: *Digitaler Nachlass – Erbenschutztrotz Datenschutz*, NJW 2015, p. 3476

66 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (hereinafter: General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679] Accessed 03.03.2019

67 Act implementing of General Data Protection regulation, see note 24

from July 12 2018, III ZR 183/17 - KG[68] in which existence of digital inheritance is confirmed. Plaintiffs were the parents of a minor daughter who died under strange circumstances. Respondent in this case was Facebook. Parents wanted to read their daughter's messages on Facebook in order to find out whether their daughter committed suicide or not. They had her user name and a password but her status was transformed into a memory status so they were not able to see her messages. BGH allowed the plaintiff the access to their daughter messages. The most important argument was that their daughter's contract position is transferable according to principle of universal succession.[69] BGH explained that the provisions of terms and conditions do not explicitly exclude inheritability and that a provision on transformation to Memorialized status upon the death is not valid as it is unfair.[70] Additionally, in opinion of BGH, although messages are personal data, German Act on Electronic Communications Act[71] and General Data Protection Regulation are not obstacles for inheritability of the Facebook account.[72] Those arguments are of significance as a confirmation of the conclusions given in previous paragraphs because of similarities of existing legal solutions in German and Croatian law.

b) licences

Many[73] terms and conditions regulate that licences given by provider to a user are non-transferable or they have a non-transferability clause. Additionally, in some cases accounts such as Facebook, are upon the death of a user turned into a memorialized status and a user can determine during his life one person that is allowed to take care of such an account. In case of non-transferable licences situation is not as simple as in case of Facebook account where it would not have any sense for heirs to step in his decedent's legal position. There are opinions that licences which

[68] Decision in available thought this link: [http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=763e32ddffeac8a10c62fbc1bd813c35&nr=86602&pos=0&anz=1] Accessed 03.03.2019

[69] See: § 1922 of German Civil Code (*Bürgerliches Gesetzbuch*), BGBl. I S. 42, 2909; 2003 I S. 738

[70] BGH decision from July 12 2018, III ZR 183/17 – KG, p. 32. See also: Resta, *op. cit.*, note 68, p. 2014.; Mackenrodt, M. – O.; *Digital Inheritance in Germany*, EuCML, *Vol.* 7, Issue 5, 2018, p. pp.44, 45; Leipold, D., Band 10: *Erbrecht* §§ 1922-2385, Münchener Kommentar zum BGB, 7. Auflage 2017, pp. 24 – 25 (online version of book available on: [https://beck-online.beck.de] Accessed 09.03.2019).

[71] *Telekommunikations gesetz*, BGBl. I S. 1190. As in Croatia, in this act is implemented through the Directive on privacy and electronic communications (*op. cit.* in note 66)

[72] See more: Etteldorf, C., *About Dashcams and Digital Estate - German Federal Court of Justice Weighs Up Data Protection Interests*, European Data Protection Law Review, *Vol.* 4, Issue 3, 2018, pp. 370 – 374.

[73] For example, terms and conditions for Yahoo, Netfix, Dropbox, and data used under iTunes apps

are given under the non-transferability clause might, despite this, be inheritable. Some authors argue that the judgement UsedSoft GmbH v Oracle International Corp,[74] in which contractual clause on non-transferability of the software licence is considered void, puts another light on the possibility of inheritance of software licences.[75]Additionally, licences are in Croatian Private Law inheritable unless otherwise agreed (art. 724 p. 1. of the OA). Even if accounts are not inheritable, it should not mean that the data is also inheritable.

Although someone's contractual position is generally inheritable, a problem of inheritability lies in this contractual provisions on non-transferability of the licences. It could be agreed that such a clause is very important in cases where the service is strictly connected to a person, such as social media accounts like Facebook. On the contrary, in relations that are not connected to a person and are quite similar to rent or lease, such as iTunes, Deezer or Netflix, those clauses do not have the same purpose. In the last cases, the main aim of non-transferability clause is protection of interests of service providers. The difference between inheritance of a CD, which is a tangible thing, and a licence to access and stream or download the music online comes from the difference between legal regimes applied *inter vivos*. In the first case, there is inheritance of the thing which contains copyright works in relation to which the right of distribution was exhausted and therefore there is no obstacle for inheritance. In the second case, the licence is expressly non-transferrable and this could be an obstacle for inheritance. Nevertheless, it is questionable whether the non-transferability clauses should be interpreted as to be applied *mortis causa* if the license has not expired. Licence as such should also be inheritable, despite to the fact that it was given under the non-transferability clause. It should be remembered that a right to inherit is a right guaranteed by the Croatian Constitution.[76] It is to be understood that subjective rights existing in digital world are inheritable if they are not strictly personal or not inheritable according to their nature or to the special provision.[77] So, the protection of interests of service provider would not fall within any of the said categories. Additionally, in cases where users are also consumers, it could be argued that non-transferability clause is an unfair contract term.[78] Consumers do not have the opportunity to ne-

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74 Judgement from 3 July 2012, C-128/11, UsedSoft GmbH v Oracle International Corp, ECLI:EU:C:2012:407

75 Berlee, A., *Digital Inheritance in the Netherlands*, Heft 6, 2017, EuCML, p. 259

76 Art. 48 p. 4 of Constitution, Official Gazette, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

77 See more on this provision in: Gavella, *op. cit.* note 52, p. 31

78 Art. 49 of CPA

gotiate[79] on licence terms and from the point of inheritability, it creates imbalance between the interests of the service provider and the consumer. Such behaviour of the trader could be considered as behaviour contrary to the principle of good faith since it unnecessarily hinders inheritability of digital property.

### 3.3. Possible problems with digital inheritance

Problems concerning digital inheritance are not only connected with the clauses on non-transferability of licences. Heirs could be confronted with some other practical issues. First of all, usually heirs do not even know that their decedents had any kind of digital property. Secondly, in cases when they know that decedent used digital services which could contribute to the increase of the value of the estate of inheritance, they might not be able to access them since they do not know the access codes. Those problems could be prevented.

One of the ways for preventing the said problems could be a notarial deposit.[80]Public notary is obliged to take for deposit any kind of document.[81] This means that a user of digital content and services can create a document with a list of his accounts along with a user name and a password. Public notary would have to make a note in a record that this deposit is made for client's heirs or someone else who could claim the document after his death. On the one hand, user might feel unsecure with this kind of revelation of his important passwords. On the other hand, since passwords should be changed from time to time, by their change, the document given to the notary would lose its purpose.

Since idea is to create legal effects *mortis causa*, the said problems could be resolved in the will. Both, private and public wills would be adequate to fit this purpose. However, the international wills[82] would be even better especially in cases where Croatian private law might not be the applicable law. When it comes to the content of the will, testator can name a person as an executor of the will.[83] The testator could entitle the will executor to transfer data to heirs or to legatee's accounts or even to close accounts.

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79 See more on how licence contracts are concluded in this article under: 2.2. Legal position of users towards digital content and digital services

80 Notarial deposit is regulated in Public Notary Act in art. 109 - 113 (Official Gazette, 78/93, 29/94, 162/98, 16/07, 75/09, 120/16)

81 Under document is meant a regular paper but it can also be for example a Word document saved on an USB which could be an object of a deposit

82 Gavella, *op. cit.*, note 52, pp. 141 – 144

83 Gliha; Josipović, *op. cit.* note 1, p. 210

Besides the will, users might opt for special services (for example Safe Haven[84]) that provide digital property management. This property management also covers situations of user's death, which means that the service has to follow user's orders given for the case of his death.

In a case where heirs know about the digital content owned by their decedents, in order to access them, they shall regularly need to prove to the service provider that they actually are the heirs. One way of proving this fact could be the certificate of succession. Under Croatian Law probate proceeding is *ex officio* conducted only in case where a real estate is a part of the property. In other cases, conduction of probate proceeding depends on the heirs or other persons with legal interest.[85] Still, even if heirs have certificate of succession, it is questionable whether service provider will give the access to decedent account or not.[86]

The last possible problem which can be mentioned here is the determination of the value of the part of the property that is digital. It might be a problem for judges or public notaries to determine this value. There are situations where it is important to know the value of decedent's property. For example, when it comes to responsibility for debts, heir's responsibility limit is determined through the value of the estate of inheritance.

## 4. CONCLUSION

Rights in the digital world originate from the contract for the supply of digital content in order to use digital content or digital data. Although different legal sources on the EU level define digital services and digital content, a unique definition still does not exist and it should be introduced by amending active directive proposals (New deal for consumers and Digital content directive proposal). Position of a user of the digital content or digital data can be explained through two different points of view. Firstly, one set of rules regulates their position towards the account. In the most cases it is determined by the terms and conditions prepared by digital service provider. Secondly, another set of rules is relevant for the right to use digital content or data regulated through another set of rules - copyright,

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[84] See more:[ https://safehaven.io/] Accessed 10. 03.2019

[85] Art. 215 p. 2 of the IA

[86] This problem has been discussed in a case of Supreme Judicial Court of Massachusetts, *Ajemian v. Yahoo!* (Inc. 987 NE.2d, see more: [https://www.mass.gov/files/documents/2017/10/16/12237.pdf] Accessed 10.03.2019) which opens a way for users representatives of an estate to access decedent e-mails. When it comes to inheritance and digital property in the USA see also special rules applicable in this cases: Revised Fiduciary Access to Digital Assets Act (available at: [https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=112ab648-b257-97f2-48c2-61fe-109a0b33&forceDialog=0] Accessed 10.03.2019)

ownership or licences. This is why inheritability of rights existing in the digital world depends on many factors.

Concerning the account, as it is a contractual relation, it can be concluded that it is in general inheritable according to art. 213 of the Obligations Act and the principle of universal succession (art. 5. p. 1. of the Inheritance Act). However, inheritability and the possibility to access such accounts after user's death is often confronted with obstacles. The first obstacle is non-transferability of licences for such accounts which are usually determined by terms and conditions of the service provider. Such clauses are justified in those cases where accounts are strictly personal (like social media). In other cases, for example in case of accounts created for purchase and music listening, there is no such justification for non-transferability. Courts should declare such clauses unfair and accordingly null. Additionally, it can be argued that the principle of universal succession should in some cases prevail over the non-transferability clauses.

Another obstacle is the heir's possibility to access the account. Without user name and password, accessibility depends on a discretionary decision of a service provider given after heirs request to access the account. Also, only a few service providers have special solutions for case of user's death. In most of the cases, users are not aware of non-transferability clause imposed by digital service providers. This problem could be solved, at least for the consumers, through the content of pre-contractual information which could be achieved by amending a proposal New deal for Consumers. Consumers should be informed on possible transferability of the account or even inheritability in advance.

When it comes to the inheritability of digital data and digital content, since there are not any special rules in the inheritance law in Croatia applicable in this case, principle of universal succession also applies. It can be concluded that e-mails, photos published on social media, messages accessible through social media accounts, data in a cloud etc., although they were private and personal to decedent, they could fall under the same regime as copyrighted work or other owned things. Also, in these situations access to the digital content and data depends on the access to the account which leads to a conclusion that the accessibility to such data is again problematic. Because of the importance of this problem, amendment to the New deal for consumer, in a part that amends Directive 2011/83/EU on consumer rights, is necessary. It should introduce special solutions for the contract of the supply of digital content in case of user's death in favour of inheritability. This is of a mayor importance especially in those cases where it is justified by nature of the accounts and data and digital content to belong to the heirs or to continue with the heirs. Without those rules, inheritability of digital data and digital con-

tent might still depend only on behaviour of digital service providers or on court decisions after long court procedures.

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# CERTAIN ISSUES CONCERNING CONTRACTS ON SUPPORT FOR LIFE AND CONTRACTS ON SUPPORT UNTIL DEATH

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***ABSTRACT***

*Contracts on support for life and contracts on support until death are two very similar contracts that are concluded between a provider of support and a recipient of support. Its purpose is to procure support to a person that needs it, until his/her death. The provider of support will, according to the contract that was concluded, receive his/her payment either right after the drafting of a contract or after the receiver of support dies. The payment will be comprised of a part or of whole of recipient's property. The first part of this paper will deal with these contracts in general.*

*Since contracts on support for life and support until death are somewhat controversial due to certain problems that are related to them, the second part of that paper will outline these issues. First, it will deal with the fact that the heirs of recipient of support will not inherit the property that will be received by the provider of support, since that property is not inheritable. Therefore, this contract is sometimes concluded with the sole purpose of bypassing forced heirs and transferring recipient's property to those he/she wants to inherit it. For that reason, forced heirs will often try to annul these contracts, even if contractual parties did not try to bypass them unlawfully. The second problem is connected to the fact that senior citizens, usually due to their lack of legal knowledge, are not aware of all of the rights they have according to these contracts. Because of that, they will sometimes end up without the support they expected but also without the property that was meant to be a remuneration for that support. Even if some of them had the right to seek legal help, due to their advancing age, they might not have enough time to wait for a court to reach its decision.*

*This paper will also explore whether these types of contracts exist in other countries in the EU and how are they different from contracts on support for life and support until death in Croatia.*

***Keywords:*** *contract on support for life, contract on support until death, provider of support, recipient of support, real estate, land registry*

## 1. INTRODUCTION

An obligation to support another person may arise from law, court decision, a will or a contract.[1] Contractual support in Croatia can arise from a contract on support for life and a contract on support until death. The main difference between these two contracts is that the contract on support for life is a *mortis causa* contract, because the transfer of the property, which is the remuneration for the provided support, comes after the death of the recipient of the support. On the other hand, contract on support until death is an *inter vivos* contract, since the transfer of the property happens while the recipient of support is still alive, usually shortly after the conclusion of the contract.[2]

These contracts have had an interesting history in Croatian legal system.[3] The contract on support for life was, until the entry into force of the Civil Obligations Act on January 1, 2006[4], regulated by the provisions of Inheritance Act[5], probably because it has certain things in common with inheritance law. However, this is a typical bilateral contract of the law of obligations.[6]

Contract on support until death was not even regulated by Croatian legislation before 2006; however, its conclusion was possible if it was in accordance with the general rules of the law of obligations concerning validity of contracts[7]. According to case law, all of the issues related to termination of this contract, the influence of changed circumstances and the possibility of continuation of this contract after the death of the provider of support, were dealt with analogously to the provisions regulating the contract on support for life.[8]

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1 Gavella, N., *Nasljedno pravo*, Informator, Zagreb, 1990, p. 368

2 Crnić, J., *Ugovori o doživotnom i dosmrtnom uzdržavanju – de lege lata et de lege ferenda – O nekim (ne samo spornim ) pitanjima*, Pravo u gospodarstvu, *Vol.* 6, 2005, p. 159-160

3 Three periods are significant for these contracts - the first one is a period of the old Inheritance Act, the second period of the Inheritance Act currently in force (see note 5) and the third period started when a contract on support for life and support until death became regulated by the Civil Obligations Act (see note 4). For a more extensive review of these periods, *cf. ibid*, p. 148-150

4 Civil Obligations Act (further: COA), National gazette, 35/05, 41/08, 125/11, 78/15

5 Inheritance Act, National gazette 48/03, 163/03, 35/05, 127/13, 33/15. Prior to the entry into force of this Act (in 2003), a contract on support for life was regulated by the provisions of the "old" Inheritance Act, National gazette 52/71, 48/78, 56/00

6 Even then, Gavella commented that provisions of the COA, which relate to other contracts of the law of obligations, should regulate this contract. For more see: Gavella, at 1, p. 369. Also: Belaj, V., *Ugovor o doživotnom uzdržavanju prema novom Zakonu o nasljeđivanju*, Pravni vjesnik, *Vol.* 1-2, 2003, p. 213, 217; Bevanda, M.; Čolaković, M., *Ugovor o doživotnom uzdržavanju i ugovor o dosmrtom uzdržavanju u sudskoj praksi*, Zbornik radova Aktualosti građanskog i trgovačkog zakonodavstva i pravne prakse, *Vol.* 10, 2012, p. 277

7 Belaj, *cf. ibid, p*. 213

8 Klarić, P., Vedriš, M., *Građansko pravo*, Narodne novine, Zagreb, 2014, p. 513

All of this changed on January 1, 2006, when the provisions of the Inheritance Law relating to contract on support for life ceased to be valid, since from that day this contract became regulated by the provisions of the Civil Obligations Act. From then, contract on support until death, for the first time, started to be regulated by Croatian legislation and now its conclusion is no longer permitted under general rules of law on obligations and case law, but on the basis of provisions of Art. 586-589 of the Civil Obligations Act.

Both of these contracts are somewhat controversial.[9] For example, parties that conclude these contracts could do so in order to manipulate inheritance and bypass forced heirs. This is possible because the property that represents remuneration for the support is excluded from inheritance and is transferred to the provider of support, either after the recipient's death or immediately after the conclusion of the contract. Therefore, contracting parties will sometimes conclude these contracts with the sole purpose of bypassing forced heirs.

Furthermore, recipients of support, but sometimes also the providers too, are often not familiar with all the rights and obligations that arise from these contracts. The reason usually being that the recipients of support are older people who are sick and depend on someone else's help, and often accept the conclusion of such contracts without having investigated all of their consequences. Some may conclude these contracts even when they are aware that all of the provisions are not in their best interest, because they think they have no choice and are desperate. An additional issue is that, if there are problems arising from these contracts which need to be resolved in court, the court proceedings will take too long, which often results in the death of a plaintiff, before a court decision in his/her favor could be reached.

Because of this, many individuals exploit recipients of support, in order to acquire their property without much effort.[10] Therefore, various associations of elderly persons (i.e. Pensioners' Association of Croatia) are extremely opposed to these types of contracts, especially to a contract on support until death. Pensioners' Association of Croatia strongly advocate the introduction of certain changes into legislation, aimed at protecting the recipient of support, and even the abolition of

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9 As one commentator stated, a contract on support for life is one of the most complex contracts known to Serbian legal theory and practice. Although, this commentator is not from Croatia, this statement can also apply to contracts on support for life and contracts on support until death, concluded in Croatia. Krstić, N., *Kako ostavinski sud treba da postupi kada u toku postupka za raspravljanje zaostavštine učesnici ospore ugovor o doživotnom izdržavanju?*, Zbornik radova Pravnog fakulteta u Nišu, *Vol.* 72, 2016, p. 278

10 Bevanda; Čolaković, *op. cit.,* note 6, p. 276

contract on support until death.[11] For example they want the legislators to limit the number of contracts on support for life that one provider of support may conclude; they also want a register of these contracts to be established. They propose that court proceedings related to these contracts become urgent procedures. They also suggest that persons who provide social services (homes for elderly people, foster families, etc.), but also physicians, attorneys and public notaries, should be banned from the conclusion of these contract as providers of support.[12]

The first part of this paper will deal with basic characteristics and particularities of both of these contracts, while the second part will look into certain problems concerning these contracts. The problems that will be addressed in more detail in the second part of this paper have to do with:

1. Conclusions of simulated contract on support for life and support until death, with the purpose of disinheriting forced heirs,

2. Failure to create and register a real estate encumbrance and the failure to register the existence of contract on support for life in the land registry,

3. Lengthy court proceedings in connection with these contracts.

## 2. CONTRACTS ON SUPPORT FOR LIFE AND SUPPORT UNTILL DEATH

### 2.1. Contract on support for life

A contract on support for life is a contract whereby one party - the provider of support - undertakes to support the recipient of support (or a third party) until his/her death, and in turn, he/she receives a part or all of recipient's property, but only after he/she dies.[13] The recipient of support can only be a natural person, while the provider may be both a natural and a legal person. In the case of legal persons providing the support, support can consist of, for example, providing accommodation, food and care to the recipient.[14]

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[11] [http://www.narodni-list.hr/posts/209835001] Accessed 26.02.2019

[12] For more see: [http://www.glas-slavonije.hr/259376/1/Starcima-obecaju-skrb-do-smrti-a-onda-im-sve-uzmu-i-izbace-ih-na-ulicu (February 13, 2019) and http://www.glas-slavonije.hr/322148/1/Umirovljenici-Ukinite-dosmrtno-uzdrzavanje-stalno-nas-varaju] Accessed 03.02.2019

[13] Art. 579, COA
The recipient of support could conclude a contract on support for life or support until death even with the person who has the obligation to provide him/her with support according to provisions of the Family Act. Crnić, *op. cit.,* note 2, p. 153

[14] Jelčić, O., *Treća životna dob – kako raspolagati imovinom,* Projekt: „Sigurnost u trećoj dobi: Kako izbjeći rizike pri raspolaganju imovinom", Republika Hrvatska, Ministarstvo socijalne politike i mladih, elektroničko izdanje, Izdavač: Hrvatski pravni centar, 2016, p. 18-20

### 2.1.1. *Why is this contract strictly formal?*

In order for a contract on support for life and all its subsequent amendments to be valid, Art. 580 of The Civil Obligations Act requires it to be written and certified by a judge or solemnized by a notary public or composed in the form of a notary public act.[15] A judge or notary public who participates in the drafting of

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According to Social Welfare Act (SWA), National gazette 157/13, 152/14, 99/15, 52/16, 16/17, 130/17, there are certain limitations concerning the providers of support. Art. 192 stipulates that, in the event that one or more members of the household conclude more than three contracts on support for life and/or support until death, and provide recipients of support with housing, nutrition, care and health care, and help them satisfy other basic living needs, in their residential or business premises (regardless of whether they do it personally, through a third person or employees of a natural or a legal person owned by the provider of support and/or members of his/her household), such persons will be deemed to be unlawfully providing the accommodation services in the field of social welfare. The sanction for this misdemeanor is between 10.000,00 and 50.000,00 kn, according to Art. 260, Paragraph 1, SWA. This provision is in line with one of the requests that, for many years, have been set by the Pensioners' Association of Croatia, in connection with the limitation of the number of contracts on support for life and support until death, that one provider of support can conclude. In their media statements, Pensioners' Association of Croatia, advocates that one person should not conclude more than three of these contracts, justifying that request with the fact that some individuals "have concluded a lot of these contracts, turning it into a kind of a profession" (http://www.glas-slavonije.hr/322148/1/Umirovljenici-Ukinite-dosmrtno-uzdrzavanje-stalno-nas-varaju (February 13, 2019). It seems the number of contracts on support for life and support until death that one provider of support can conclude should certainly be limited, given that if one provider provides support to too many recipients, the question of the quality of the support that he/she can provide, arises.

Furthermore, SWA also stipulates that a person employed in the field of social welfare will severely violate obligations arising from his/her employment, if he/she (or his/her spouse or a descendant concludes a contract on support for life or support until death with the social welfare beneficiary, as long as he/she is employed in the field of social services (Art. 214, Paragraph 1, SWA)

15 According to Art. 53 and 59, Notary Public Act, National gazette, 78/93, 29/94, 162/98, 16/07, 75/09, 120/16.

Often, in case of termination of contracts on support for life (also contracts on support until death), only the signature of the parties is verified. Since the termination of these contracts may have far-reaching consequences (as well as their conclusion and subsequent amendments), it would seem advisable for the termination to be required to be in the same form as is necessary for their conclusion. More in Butković, M.: Neke specifičnosti kod sklapanja ugovora o doživotnom i dosmrtnom uzdržavanju, Hrvatska pravna revija, 1/2013, p. 22

It has to be noted that the contract on support for life can never become valid under provisions of Art. 294 COA. According to this article, a contract can become valid if the written form was requested for its validity, but it was not concluded in a written form. Such a contract should otherwise be null and void, but if, in spite of this, the obligations arising from it were completed, Art. 294 allows it to become valid. More in Gavella, N., *Privatno pravo,* Zagreb, Narodne novine 2019, p. 322

This is also confirmed in case law:

"*…the contract for which the conclusion requires a written form is deemed to be valid even if it is not concluded in that form, if the contracting parties have concluded, in whole or in part, the obligations arising therefrom, unless from the objective for which the form is prescribed something else arises. A contract on support for life is, according to the provision of Art. 122. Inheritance Act (National gazette, No. 52/71, 47/78 - hereinafter referred to as "IA") a strictly formal contract that needs to be made in a written form and verified by the judge. The judge is, according to the provision of Paragraph 5 of aforementioned article, obliged*

this contract should read the contract to both parties and warn them of its consequences.[16] Both parties do not have to be present at the same time for certification of a contract by a judge or its creation before a notary public or its solemnization. If they are not present at the same time, the contract will be considered certified, created or solemnized only after it is certified, created or solemnized for the second contracting party.[17]

At this point, it is necessary to clarify what are such serious consequences of a contract on support for life (and contract on support until death), because of which contracting parties are not allowed to conclude it alone, without the participation of a judge or a notary public.

**a)** The first important consequence of this contract is that all or a part of the property that belongs to recipient of support becomes the remuneration for provided support. This means that the provider of support becomes a singular legal successor to the recipient of support, concerning that property.[18] Since the property constitutes a remuneration for provided support, it cannot become a part of the

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*to read the contract and warn the contracting parties about its consequences, so it is obvious that the purpose of the prescribed form is to prevent possible abuse, as well as the protection of the rights of third parties (for example, forced heirs who lose their forced share because of contract on support for life). Therefore, according to the position of this court, a contract on support for life that is not written and verified by the judge cannot become valid, even when it is fully executed."*

*„…ugovor za čije se sklapanje zahtijeva pismena forma smatra se pravovaljanim iako nije zaključen u toj formi, ako su ugovorne strane izvršile, u cijelosti ili u pretežnom dijelu, obveze koje iz njega nastaju, osim ako iz cilja zbog kojeg je forma propisana očito ne proizlazi što drugo. Ugovor o doživotnom uzdržavanju je prema odredbi čl. 122. Zakona o nasljeđivanju ("Narodne novine", br. 52/71, 47/78. - dalje ZN) strogo formalni ugovor za čiju pravovaljanost je propisana pored pismenog oblika i ovjera suca. Sudac je, prema odredbi st. 5. navedenog članka, dužan pročitati ugovor i upozoriti ugovornike na posljedice ugovora, pa je očito da je cilj propisane forme sprečavanje eventualne zloupotrebe, kao i zaštita prava trećih osoba (npr. nužnih nasljednika, koji otuđenjem imovine temeljem ugovora o doživotnom uzdržavanju gube pravo na nužni dio). Stoga prema stajalištu ovog suda ugovor o doživotnom uzdržavanju koji nije sastavljen u pismenom obliku i ovjeren od suca ne može konvalidirati ni kad je izvršen.*" (VSRH Rev 898/1994-2, 21.10.1998.) All case law in this paper is downloaded from [http://www.iusinfo.hr/]

16 Art. 580, Paragraph 2, COA

17 Šeparović, V., *Ugovor o doživotnom uzdržavanju*, Aktualnosti hrvatskog zakonodavstva i pravne prakse, 1992, p. 183-184

18 Gavella, N.; Belaj, V., *Nasljedno pravo*, Narodne novine, Zagreb, 2008, p. 435, note. 43
Although, a judge is obliged to read the contract on support for life and warn the parties of its consequences, it should be noted that, according to court practice, this does not need to be specifically identified in the act in which the contract is certified. The lack of such information does not make this contract invalid (VSRH, Rev-2671/86, 31.1.1990, cited according to Crnić, J.; Končić, A.M.*, Zakon o nasljeđivanju s komentarom*, Organizator, Zagreb, 2003, p. 331
However, if the contract is drafted in front of a notary public or solemnized by a notary public, the lack of this note will result in such a contract not having the power of a public document**.** Art, 69., Paragraph 1/5 and Art. 70, Paragraph 1 of a Notary Public Act, National gazette 78/93, 29/94, 162/98, 16/07, 75/09, 120/16.)

estate, because it is not inheritable. At the moment of the death of the recipient of support, this property is passed on to the provider of support, instead of his successors.[19] Because of this, contract on support for life cannot be annulled for violation of forced share (more about this *infra*).[20]

**b)** Furthermore, this contract is different from most other contracts because it is aleatory. Most other contracts are not, so at the time of their conclusion, all of their elements, including their duration and parties' obligations are known. When it comes to contract on support for life (and contract on support until death) this is not the case. It is not known (nor should it be) how long the recipient of support will live and in what state he/she will be before he/she dies.[21] Consequently, only the obligation of the recipient of support can be defined, since the contractual

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[19] Gavella, Belaj, *cf. ibid*, p. 57

[20] More in Klasiček, D., *Nužno nasljedno pravo kao ograničenje slobode oporučnog raspolaganja,* doctoral dissertation, Zagreb, 2011, p. 209-215; Klarić; Vedriš, *op. cit.,* note 8, p. 512

The question arose as to whether it is possible to know for certain whether a contract on support for life or a concealed donation contract was concluded, which is of great importance to forced heirs, because they can contest a donation contract due to a violation of forced share, but not the contract on support for life. The case law has taken the view that a part of the contract on support for life may be considered to be donation, in the event that there is an obvious disproportion between what the person giving the property (recipient of support) gave, and what the provider of support did in turn:

"*Contract on support for life shall be deemed partly to be a donation, if a value between parties' obligations was obviously disproportionate when it was concluded, and if the contracting parties were aware of that and agreed to it at the time of the conclusion of the contract*."

„*Ugovor o doživotnom uzdržavanju smatrat će se djelomično ugovorom o darovanju ako je pri njegovu zaključenju bila svjesna i nerazmjerna korist za davatelja uzdržavanja i ako su ugovorne strane u vrijeme sklapanja ugovora svjesne postojanja nerazmjera i na njega dobrovoljno pristaju*" (VSRH, Rev-2335/89, 27.12.1989.), cited according to Jelčić, *op. cit.,* note 14, p. 10

"*…in order to raise a claim for the return of donations, in this case, it is not necessary to presume that the contract on support for life should be annulled, even only in part, because the plaintiff acknowledges the validity of the concluded contract, and his claim is based on the assertion that it is a mixed contract, as previously pointed out*."

„*…a podizanje tužbe za vraćanje dara u konkretnom slučaju nije nužna pretpostavka da se traži poništenje ugovora o doživotnom uzdržavanju, makar i djelomično jer tužitelj priznaje valjanost zaključenog ugovora, a njegov zahtjev se temelji na tvrdnji da se radi o mješovitom ugovoru, kao što je već ranije istaknuto*." (VSRH, Rev-252/94, 29.5.1997.)

Also see Svorcan, S., *Raskid ugovora o doživotnom uzdržavanju,* doctoral dissertation, Beograd, 1987, p. 64-74

[21] The fact that this contract is aleatory is an extremely important characteristic. If the contract lacked this feature, and, for example, the provider of support was aware that the recipient will die very soon, it will not be considered a contract on support for life. It might be considered to be some other type of contract (e.g. service contract), to which the provisions relating to contract on support for life do not apply. More in Gavella, *op. cit.,* note 1, p. 369

Case law: „*According to this court, irrespective of the fact that it cannot be disputed that this contract on support for life is a "good luck contract", the very fact that the recipient of support died shortly after the conclusion of the contract is by itself no reason for its invalidity. But on the other hand, if it was certain that the death of the recipients of support would occur soon, and the contract was concluded for the purpose of*

parties must determine which property will be received by the provider of support as remuneration for provided support. The obligation of the provider of support is impossible to define precisely at the moment of concluding of the contract. Also, nobody can know, in advance, how long this agreement will last, and when will the remuneration occur. It is not even certain if the provider of support will receive it, because there is a possibility that he/she will die before the recipient of support. Of course, in that case there is a chance of his/her spouse and/or descendants continuing with the contract, but this might not happen (*infra*).[22]

Except that it is not known how long the contract will last, it is not known what exactly the provider will have to do in the name of support. This largely depends on the circumstances sorrounding the recipient of support, but the circumstances souronding the provider of support might also be important. Considering the nature of this contract, the changed circumstances have, it seems, a much bigger role than in some other contracts (more *infra*). For example, at the time of signing the contract on support for life, the recipient of support may be relatively healthy, and the support may consist of only grocery shopping, driving to a doctor when necessary, occasional visits, etc. However, his/her condition might deteriorate, in which case the provider of support may even have to start living with the recipient; feeding, dressing, bathing him/her, etc. It is also possible that the provider

*achieving an inadmissible objective, then it could be considered immoral and contrary to good faith, and therefore, void*."

„*Prema ocjeni ovog suda bez obzira na što se ugovor o doživotnom uzdržavanju ne može oduzeti niti osporiti elementi „ugovora na sreću" sama činjenica da je primateljica uzdržavanja umrla uskoro nakon zaključenja ugovora, nije sam po sebi razlog ništavosti. No s druge strane ako je bilo izvjesno da predstoji smrt primaoca uzdržavanja pa je ugovor zaključen radi postizanja nedopuštenog cilja, onda bi se mogao smatrati nemoralnim i protivnom dobrim običajima, dakle ništavim.*" (VSRH Rev 2043/2012-2, 20.7.2016.)

However, the fact that the provider of support is aware that the recipient is severely ill, according to the position of case law, does not mean that the element of aleatoricism is lacking.

"*It is therefore a correct conclusion of the lower courts that the fact that the provider of support knew of the serious and incurable sickness of the recipient, in itself, cannot exclude the existence of the element of aleatoricism.*

*Precisely from the fact that the defendant had previously solely taken care of her parents, prior to the conclusion of the contract on support for life, and after the mother's death, took care of her father, it is indisputably indicated that the provider of support did not conclude a contract in order to exploit another person for the sake of achieving disproportionate property benefits*."

"*Stoga pravilan je zaključak nižestupanjskih sudova, da činjenica što je davateljica uzdržavanja znala za tešku i neizlječivu bolest primatelja uzdržavanja sama po sebi ne može isključiti postojanje elementa aleatornosti.*

*Naime, upravo iz činjenice da je tuženica i ranije isključivo sama i prije sklapanja ugovora o doživotnom uzdržavanju brinula i skrbila o roditeljima, a nakon smrti majke, o ocu, nedvojbeno ukazuje da davateljica uzdržavanja nije sklopila ugovor u cilju iskorištavanja tuđe nevolje radi postizavanja nerazmjerne imovinske koristi*." (VSRH Rev x 548/2009-2, 3.2.2010.)

[22] Art. 585 COA

of support falls seriously ill, or, for example, moves to another city or country.[23] Contracting parties will not be able to forsee or avoid all of these circumstances. Of course, because of those circumstances, the contract on support for life can be terminated or, in order to avoid that, the court can decide to modify it (for example, change the obligation of provider of support into annuity which he/she will have to pay regularly).[24]

**c)** It is possible that the obligation to support the recipient lasts relatively short and requires little engagement from the provider of support, but the value of the property which he/she receives as remuneration is extremely large (of course, the opposite is also possible). However, as this is an aleatory contract, it cannot be annulled because of disruption of equivalence of obligations' value, like most other contracts can, pursuant to Article 375, Paragraph 5, Civil Obligations Act.[25]

On the other hand, if the contracting parties are aware, at the time of drafting of the contract, that the property, which the provider of support will receive, is much more valuable than the support he/she will provide, and they agreed to enter into such a contract regardless of that, this contract will not be considered aleatory, in whole or in part. On the contrary, it will be considered to be a donation made by the recipient of support to the provider. This situation could be resolved through the rules regulating simulated conclusion of contract on support for life, in which case it would be null and void and donation contract would be valid (more *infra*).[26]

### 2.1.2. *Obligations of contracting parties*

Only the obligation of the recipient of support can and must be precisely defined by this contract. He/she may, as a remuneration, give the provider of support all or part of his/her property, of course, provided he/she has the right to dispose of such property. Future assets of the recipients of support could also be agreed upon as remuneration, which should be explicitly stated when concluding the contract: e.g. "all real estate owned by the recipient of support at the moment of death" or "all of the property recipient of support has at the moment of death".[27]

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23 Klasiček, D.; Ivatin, M., *Modification or dissolution of contracts due to changed circumstances (clausula rebus sic stantibus)*, Pravni vjesnik, *Vol.* 2, 2018, p. 46-47

24 Klarić; Vedriš, *op. cit.,* note 8, p. 512

25 Cf. *ibid*, p. 430

26 Jelčić, *op. cit.,* note 14, p. 18

27 "*As it is apparent from the contract on support for life concluded between the applicant and now deceased G.S., the object of that contract is be an entire property that the recipient of support will have in his possession at the time of his death, and it is undeniable that the recipient acquired a co-ownership of real estate regis-*

As far as the provider's obligation is concerned, as already stated, when concluding a contract, it cannot be precisely known what it will consist of. However, various commentators suggests the usual content of support: giving accommodation, food and/or clothing; health care; organizing the funeral; annuity that will be paid by the provider of support; community of life or community of property; obligation of the provider to take care of the recipient of support; cultivation of the land, etc.[28]

As a rule, the provider of support will not be responsible for the debts of the recipient, after his/her death, but it may also be otherwise agreed. For example, the contracting parties may agree that the provider of support will be liable for the debts existing at the time of conclusion of the contract or only the debts belonging to certain creditors.[29]

#### 2.1.3. *Registration of contract of support for life in certain registries*

The problem that might occur on the side of the provider of support is the fact that the recipient of support might dispose of the property that the provider is to receive as remuneration for the provided support. He/she will become owner of the said property (usually real estate) only after the recipient of support dies. Therefore, he/she cannot register his/her ownership of real estate into land registry immediately after the signing of the contract. In view of this, it is entirely possible for the recipient of support to dispose of part or all of the property that is agreed upon as remuneration for provided support, thereby preventing the provider of support to become its owner, after his/her death. For this reason, the provider of support is authorized to request the registration of this contract into the land registry, provided that the property that represents remuneration is real estate.

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*tered in the land registry, c.p. 814 in cadastral municipality D. while he was still alive, in May of 2009, it was necessary to adopt the complainant's appeal, to amend the contested decision and to allow the proposed registration in favor of the applicant, and on the basis of the aforementioned contract concluded in front of the the notary public R.B. on July 9, 2007."*

„*Kako je iz sklopljenog Ugovora o doživotnom uzdržavanju zaključenog između predlagateljice i sada pok. G. S. jasno vidljivo da je predmet tog ugovora cjelokupna imovina koju će primatelj uzdržavanja imati u svom vlasništvu u času svoje smrti, te kako je nesporno da je primatelj uzdržavanja suvlasništvo na nekretninama upisanim u zk. ul. 814 k.o. D. stekao za svog života u svibnju 2009. godine, to je valjalo usvojiti žalbu predlagateljice i preinačiti pobijano rješenje, te dozvoliti predloženi upis u korist predlagateljice, a na temelju predmetnog Ugovora o doživotnom uzdržavanju zaključenog kod javnog bilježnika R. B. 9. srpnja 2007. godine*." (Županijski sud Varaždin, Gž-1128/2009, 9.11.2009.)

Alo see Crnić, *op. cit.,* note 2, p. 154-156

[28] Klarić; Vedriš, *op. cit.,* note 8, p. 511; Tuhtan Grgić, I., *Specifičnosti ugovora o doživotnom uzdržavanju u korist trećega*, Hrvatska pravna revija, *Vol.* 4, 2015, p. 18

[29] Art. 582 COA

That way, he/she can protect real estate from being disposed of by the recipient of support.[30]

In the event that the property consists of movable assets, for which a public registry is kept (boats, motor vehicles, shares etc.), the provider of support is authorized to request a registration of the contract on support for life into that register.[31]The function of this registration is to publicize the existence of the contract on support for life, so all those interested can learn that the asset in question will be transferred to the provider of support after the death of its owner (the recipient of support).[32] Only after the recipient of support dies, the provider will be able to request the registration of his/her ownership, which will have to be accompanied by a copy of a contract on support for life and the evidence of the death of the recipient of support.[33]

It is possible that the real estate that represents the remuneration for provided support is in the co-ownership of spouses who are recipients of support – one of which has concluded the contract in favor of him/herself and his/her spouse.[34] However, it can be possible that only one of them is registered as the owner of real estate. If that spouse dies first, the provider of support could immediately register his/her ownership, and then the support to the remaining recipient (surviving spouse) would depend exclusively on his/her conscience. In order to protect the surviving spouse, two solutions are possible: 1) it is possible to include in the contract on support for life a provision according to which registration of the ownership of provider of support could only occur after the death of both recipients of support (both spouses). 2) the provider of support could register as the owner

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[30] According to Art. 70 of Land Registry Act**,**National gazette 91/96, 68/98, 137/99, 114/01, 100/04, 107/07, 152/08, 126/10, 55/13, 60/13

The rule pertaining to registration of this contract in the land registry cannot be applied analogously to the contract on support until death, as confirmed in the case law:

"*…if the object of contract on support for life is real estate, the provider of support is authorized to request the recording of that contract in the land registry. On the contrary, this is not possible for a contract on support until death*."

"*…ako je predmet ugovora o doživotnom uzdržavanju nekretnina, davatelj uzdržavanja ovlašten je zatražiti zabilježbu tog ugovora u zemljišnu knjigu. Naprotiv, mogućnost zabilježbe nije predviđena za ugovor o dosmrtnom uzdržavanju*." (Gž 3019/11-2, Varaždin, 25.5.2011.)

[31] Klarić; Vedriš, *op. cit.,* note 8, p. 511

[32] Gavella, N. *et al*, *Stvarno pravo*, Narodne novine, Zagreb, 2007, p. 320-322

[33] Butković, *op. cit.,* note 15, p. 23

[34] It should be noted that it is not clear at which moment the assets are transferred to the provider of support: at the time of death of the person who is a contracting party and also the recipient of support; at at the time of death of the third person who is a beneficiary of the contract and also the recipient of support or at the time of death of the last recipient of support, regardless of whether he/she was a contracting party. More in Tuhtan Grgić, *op. cit.,* note 28, p. 17

of real estate immediately after the death of the (first) recipient of support, but only with the simultaneous registration of the lifelong *ususfructus* in favor of the surviving spouse, as a real estate encumbrance. This stipulation should be put into contract on support for life at the time of its conclusion.[35]

### 2.1.4. *Termination of contract on support for life*

The contract on support for life can be terminated in many different ways. Some of these are typical for this contract, while the others represent common reasons for termination of any other contract. Apart from the fact that this contract will regularly terminate after recipient of support dies, after which the transfer of the property to the provider of support will happen, the contract may be terminated by agreement of both parties at any time, even if they have already started fulfilling their obligations. One party can ask the court to terminate the contract in two cases: if one side fails to fulfill his/her obligations and if the contracting parties live together and their life together becomes unbearable.[36]

Termination due to changed circumstances (e.g. sudden impoverishment of the provider of support or his/her health deteriorating[37]) is also possible. Any contractual party may ask the court to modify or terminate the contract due to changed circumstances. However, instead of terminating the contract, the court can always modify the contract and replace the obligation to support the recipient of support into lifetime annuity, provided it is acceptable to both parties.[38]

Furthermore, it is possible for the provider of support to die before the recipient of support. Due to the nature of this contract, it cannot be treated as any other contract in which the rights and obligations of the deceased party automatically transfer to his/her successors – this contract is inheritable, but not unconditional-

[35] Butković, M., *Neka pitanja vezana uz uknjižbu prava vlasništva na nekretnini koja je bračna stečevina, a predmet je ugovora o doživotnom uzdržavanju*,, [http://www.iusinfo.hr/Article/Content.aspx?SOPI=-CLN20V01D2014B656] Accessed 01.03.2019

[36] Living together does not necessarily mean sharing a home or meals. It can also mean that contracting parties live in separate households, but in such close proximity, which requires everyday close contacts. Bevanda; Čolaković, *op. cit.,* note 6, p. 290

The right to ask for termination of the contract due to parties' life together becoming unbearable and/or failure of one side to fulfill his/her obligations, also belongs to a third party, if contract on support for life was concluded in favor of a third party. Tuhtan Grgić, *op. cit.,* note 28, p. 16

[37] Belaj, V., *Raskid ili izmjena ugovora o doživotnom uzdržavanju zbog promijenjenih okolnosti*, Pravni vjesnik, *Vol.* 17, 2001, p. 15

[38] Belaj, *op. cit.,* note 6, p. 219

ly.[39] Only the provider's spouse and descendants can continue fulfilling his/her obligations arising from this contract. However, this will happen only if they agree for this obligation to be transferred to them, either directly or indirectly. If they do not agree to this, an *ex lege* termination of the contract will occur (Article 585, Paragraph 1, Civil Obligations Act).[40] It should be borne in mind that if spouse and descendants refuse to continue the contract on support for life, they will lose the remuneration for the support provided by the deceased so far.[41] If they are willing to continue providing the support, but are, for some objective reasons unable to do so (for example, they themselves are old and ill or they are in a difficult financial situation), they are in a somewhat better position. Termination of contract will also happen, *ex lege*, but they will at least be able to claim remuneration for the support provided so far. The court will decide about the amount, taking into account the financial state of both, the recipient of support and the persons who were authorized to continue with this contract.[42]

### 2.2. The contract on support until death

This contract is very similar to the contract on support for life, and by 2006, it did not even have a special name, but was considered only one variation of contract on support for life.[43] However, this contract differs in one very important detail from the one explained earlier, and that detail entails some additional consequences. When concluding the contract on support until death, the provider of support undertakes to support the other contracting party or a third person - the recipient of support - until his/her death. Recipient of support undertakes to transfer all or part of his/her property, but according to this contract: <u>while the recipient of support is still alive</u>, usually immediately after the conclusion of the contract.[44] Considering the great similarity between these two contracts, it should be noted that the provisions of the Civil Obligations Act that regulate contract on support until death contain only the definition of this contract and two characteristics arising from above mentioned difference. These two characteristics have to do

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[39] Belaj, V., *Prestanak ugovora o doživotnom i ugovora o dosmrtnom uzdržavanju*, in: Liber amicorum Nikola Gavella, Građansko pravo u razvoju, Zagreb, 2007, p. 702

[40] If there were no spouse and/or descendants left behind the provider of support, the contract terminates at the time of his/her death, and the other heirs of the provider of support are not entitled to claim the remuneration for the support that was provided so far. If any of these other heirs would be willing to continue with this contract, they would have to conclude a new contract on support for life with the recipient of support. Šeparović, *op. cit.,* note 17, p. 205

[41] Art. 585, Paragraph 2, COA

[42] At. 585, Paragraph 3 and 4, COA

[43] Gavella, *op. cit.,* note 1, p. 368-369

[44] Klarić; Vedriš, *op. cit.,* note 8, p. 512-513

with 1) the right of recipient of support to establish a real estate encumbrance on property that is transferred to provider of support as remuneration, and 2) with the situation when the provider of support dies before the recipient.[45] In the last article(Art. 589), which regulates the contract on support until death, it is stated that the provisions of the Civil Obligations Act, that regulate contract on support for life, apply to contract on support until death, accordingly.[46]

Like contract on support for life, this contract is a bilateral and strictly formal contract (the same form is required for its validity, as for the contract on support for life). The reasons for the termination are also the same as for the previously discussed contract. Therefore, this part of the paper will only deal with the aforementioned two specifics, one of which is of great importance for further parts of this paper.

### 2.2.1. *Real estate encumbrance of obligation to support the receipient of support*

If the object of this contract is real estate, the provider of support may, immediately after the conclusion of the contract, request registration of his/her ownership.[47]

And this is the first characteristic of this contract - the possibility of the recipient of support, who in this case is in a more unfavorable position, to burden the real estate with the obligation of support in his favor and to register this encumbrance in the land registry. This encumbrance is contracted in such a way that the provid-

[45] Art. 586-588, COA

[46] On account of the great resemblance between these two contracts, it is possible that because of the ignorance of the parties, they conclude the contract on support until death, but name it contract on support for life. The provisions that apply to contract on support until death will be applied to this contract, regardless of the name the parties gave it.
"*... it has been established that the parties concluded a contract on support until death. This contract was clearly concluded because the parties have agreed that the plaintiff, who is the recipient of support, will give the defendants, as providers of support, the ownership and the possession of an apartment immediately after the signing of that contract on May 10, 1999. The fact that the parties have called that contract a contract on support for life, which was wrong, does not cast any doubt on its legal essence, that it is, in fact, a contract on support until death.*"
„*... utvrđeno je da su stranke sklopile ugovor o dosmrtnom uzdržavanju. Riječ je očito o takvom ugovoru jer su stranke ugovorile da tužiteljica kao primateljica uzdržavanja daje tuženicima kao davateljima uzdržavanja vlasništvo stana i posjed stana odmah nakon potpisa tog ugovora od 10. svibnja 1999. Činjenica da su stranke nazvale taj ugovor ugovorom o doživotnom uzdržavanju, zbog pogrešnog naziva ugovora, ne dovodi u sumnju njegovu pravnu bit, tj. da je riječ o ugovoru o dosmrtnom uzdržavanju.*" (VSRH, Rev 865/2005, 6.4.2006.)

[47] This contract has to meet all of the requirements that are necessary for contracts on transfer of ownership on real estate. Therefore, it has to contain *clausula intabulandi*, without which the registration of ownership would not be possible. For more on requirements these contracts have to meet, see: Gavella, *op. cit.,* note 32, p. 305-307

er of support commits to giving support to the recipient, until he/she dies, and in turn, he/she transmits ownership of real estate to the provider. At the same time, while transferring the ownership of real estate; it is burdened with obligation of support in the favor of the recipient of support. In this case, there are two registrations that are entered into the land registry–1. the ownership of real estate, which the provider of maintenance is entitled to, and 2. the real estate encumbrance, which the recipient of support is entitled to.

If the provider of support ceases to execute his/her obligation, the recipient of support could ask the court to settle his/her claim from the value of the real estate that was transferred to the provider of support as remuneration and was burdened with the above mentioned encumbrance.[48]

It has to be noted that, if the provider of support, once he/she becomes the owner of real estate, disposes of it and ceases to provide support to the recipient, or continues to provide him/her with it in an inadequate manner, the recipient could ask the court to terminate the contract (Art. 583. Paragraph 3 of Civil Obligations Act[49]). But in addition to the fact that the recipient of support, due to old age, will probably not live long enough for the termination to occur, there is another problem. The usual consequence of any termination of contract is, among other things, *restitutio in integrum*.[50] According to the Civil Obligations Act, if the return of received assets is not possible (because, for example, they were sold), the contracting party who has the obligation to return it to its previous owner, must pay its corresponding monetary value.[51] However, the provider of support may not have sufficient means to settle the recipient of support. Therefore, the only possibility to prevent this situation is for the recipient of support to burden the real estate with an abovementioned encumbrance and register it into land registry. That way, even if real estate is sold to a third party, the burden to provide support will encumber the new owner of real estate.[52]

#### 2.2.2. *The death of the provider of support*

The following distinction from the contract on support for life arises when the provider of support dies before the recipient. It is not possible to apply the provi-

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[48] Jelčić, *op. cit.,* note 14, p. 46

[49] Termination of a contract due to one party refusing to fulfill his/her obligations

[50] For more on this and other consequences of termination of contracts, see Golub, A., *Pravne posljedice raskida ugovora*, Aktualnosti hrvatskog zakonodavstva i pravne prakse, Godišnjak 23, Zagreb, 2016, p. 557-559

[51] Art. 323 and 332, COA

[52] Klarić; Vedriš, *op. cit.,* note 8, p. 513

sion relating to the same situation in the contract on support for life because, according to this contract, the property is already owned by the provider of support, when the recipient dies. In that case, if a spouse and descendants of the provider of support refuse to continue to provide support, the contract is *ex lege* terminated and they are obliged to return all that the provider of support acquired in the name of that contract. If they are unable to do so, they are obliged to reimburse the value of the property. They also suffer another consequence: they are not entitled to keep a part of the property as remuneration for the support provided so far.[53] If the spouse and descendants are unable to continue providing the support for some objective reasons, they are obliged to return all that they have received from recipient of support, but in this case they have the right to demand that he/she pays for support provided so far.[54]

## 3. ISSUES CONCERNING FORCED HEIRS DISINHERITANCE DUE TO THE CONCLUSION OF A SIMULATED CONTRACT ON SUPPORT FOR LIFE AND SUPPORT UNTIL DEATH

Persons who conclude contracts on support for life and support until death affect the result of inheritance that is supposed to happen after the provider of support dies. It has already been mentioned that one of the significant effects of contracts on support for life and support until death is that the property which transfers to the provider of support represents the remuneration he/she receives for the support given to the recipient of support. That is why that property is never a part of the estate, even when forced share is violated. Because of this, forced heirs will not be able to demand the return of this property in order to supplement their forced share, since it is neither a donation nor a testamentary disposal. Just as forced heirs could not contest, for example, a sale contract due to the fact that his/her forced share has been violated, he/she will not be able to contest a contract on support for life or support until death.[55]

That is precisely why some individuals will conclude these contracts with those they really want to inherit them, with the purpose of bypassing those that cannot otherwise be bypassed - forced heirs.[56] The freedom of testation is one of the

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53 Art. 588, Paragraph 2 and 3, COA

54 Art. 588, Paragraph 4, COA

55 Klasiček, *op. cit.,* note 20, p. 213

56 It is possible that one of these contracts is concluded for other reasons that are not in accordance with the law, for example, the transfer of a person's property, to another person, in order to damage his/her creditors. Thus, an example was found where the Križevci Municipal Court, on the basis of the Tax Administration's claim, annulled the contract on support for life concluded between a mother and a son. The mother had considerable debt towards the Tax Administration, and the court took the view

fundamental principles of Croatian inheritance law, but also of inheritance laws of other modern countries. However, like in most legal systems, this freedom is limited by the rights of forced heirs.[57] In the event that the decedent violated the right of a forced heir by dispensing with his/her entire estate, either testamentary or by donation agreement (concluded *inter vivos* or *mortis causa*), a forced heir will have the right to annul such dispositions, as much as it is necessary to settle his/her forced share.[58] Some commentators talk about two ways of violating forced share – complete violation (when the forced heir did not inherit anything) and partial violation (when the forced heir inherited less than what he should have obtained in the name of his/her forced share).[59] Regardless of the type of violation of a forced share, forced heirs will have the right to annul decedents' testamentary dispositions and/or donations, in order to obtain their forced share.[60]

As in other legal systems, according to Croatian inheritance law, it is possible to disinherit forced heirs only for reasons precisely stated in Inheritance Act.[61]The testator can disinherit forced heirs pursuant to Art. 85 of Inheritance Act or deprive them of their forced share, pursuant to Art. 88. If none of the reasons set out in Art. 85 and 88 exist, the testator will not be able to do anything to circumvent forced heirs. Because of that, he/she will not be able to leave all of the assets to those he/she wants to be his/her heirs.

It would be more correct to say that the testator will not be able to do anything according to Inheritance Act. However, it seems that according to provisions of Civil Obligations Act regarding contracts on support for life and support until death, this would be possible. By concluding a contract on support for life and support until death, the recipient of support will be able to bypass his/her forced heirs because the property transferred to the provider of support is not considered

that the parties did not want to achieve one of the basic effects of the contract on support for live – actual support and that they concluded the contract with the sole purpose of transferring the property to the son, as a "provider of support", so the mother would not have any property from which a Tax Administration would settle its claim. More athttps://podravski.hr/majka-sinu-prepisala-sve-nekretnine-kako-bi-izbjegla-placanje-poreznog-duga-no-morat-ce-ga-platiti/ (February 2,2019.)

[57] For more see Internetional Encyclopaedia of Laws, Family and Succession Law, Vol. 1-4, general editor: Blaipain, editor: Pintens, W., Kluwer Law Internetional

[58] Art. 69 and 70, Paragraph 2, IA

[59] Antić, O.B., *Sloboda zaveštanja i nužni deo*, doctoral dissertation, Beograd, 1983, p. 329

[60] Forced heirs decide for themselves whether they will use this right. It is also possible they will choose to respect the wishes of the testator, and do not ask for the reduction of testamentary dispositions and/or the return of donations. Gliha, I., *Family and Succession Law – Croatia,* Suppl. 28 (August, 2005) in International Encyclopaedia of Laws, Family and Succession Law, vol. 1, Kluwer Law International, 2005, p. 221

[61] Art. 85-88 IA

as part of the estate or donation. Therefore, forced heirs will not be able to request their forced share from that property, after recipient of support dies.

This circumventing of forced heirs is actually due to the fact that a simulated contract on support for life or support until death is concluded in order to hide the donation contract, which the parties really wanted to conclude. By concluding a simulated contract on support for life or support until death, parties only wanted to achieve certain effects of these contracts, while their other effects they wanted to avoid.[62]The desired effect is the transfer of property, and as a result, the impossibility of that property being considered a part of the estate or a donation. An undesired effect is providing the actual support. Therefore, this effect does not actually occur, since contractual parties never wanted it.

Clearly, this way of circumventing of the forced heirs, although possible according to provisions of Civil Obligations Act regulating contracts on support for life or support until death, is not in accordance with other provisions of the Act itself. This contract is simulated and it conceals a donation contract (*donatio mortis causa*) of all or part of the property of recipient of support, with the effect of the contract being linked to a deadline –*dies certus an, incertus quando*–the death of the donor (the recipient of support).[63]

The Civil Obligations Act states that simulated contracts will have no effect between the contracting parties, while the dissimulated contract will be valid, if all of the prerequisites for its validity were met.[64] Thus, in the event that it is proven that a simulated contract on support for life or support until death has been concluded, the underlying contract will be a donation contract. Simulated contract will be null and void and donation contract is valid and will have its legal effects. Given that, the forced heirs may seek the return of the donated property, due to violation of their forced share.[65]

The problem of simulated contracts on support for life or support until death that are composed in order to hide donation contracts, which the parties really wanted to conclude, will be difficult to resolve with today›s provisions relating to forced heirs. As long as freedom of testation is limited by the rights of forced heirs, certain persons will seek ways to bypass them and leave their property to those they

62 Monić, M., *Pobijanje ugovora o doživotnom uzdržavanju zbog povrede nužnog dijela*, Pravni život, *Vol.* 1-2, 1958, p. 46-47

63 Klasiček, *op. cit.,* note 20, p. 213

64 Art. 285, COA; Perkušić, A.; Ivančić-Kačer, B., *(Ne)dopušteni nasljednopravni ugovor ili ugovori nasljednog prava ili paranasljedni ugovori u hrvatskom pozitivnom pravu*, Pravni vjesnik, *Vol.* 1-2, 2006, p. 926; Gavella, *op. cit.,* note 15, p. 311-312

65 Art. 77 and 81, IA

really want as their heirs. Given that forced heirs in Croatian inheritance law exist and can only be disinherited for legally prescribed reasons, persons who want to bypass them will look for solutions to do so. These solutions will obviously not bi in accordance with themorale and law. It is possible that narrowing the circle of forced heirs might help, but still, as long as there is one person who is a forced heir, and the decedent does not want him/her as an heir, these things will happen.

The awareness of forced heirs that there is a possibility of them being bypassed by the conclusion of contracts on support for life or support until death has had an expected repercussion: forced heirs often try to annul these contracts, even when it is obvious that their conclusion was not simulated and that the parties actually wanted all of their effects that arise from them.[66] A number of court decisions were found in which it was taken into account that contracts on support for life and support until death were not simulated, and that there were no other reasons for the annulment, which the disgruntled forced heirs claimed existed.[67] Often, even

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[66] Forced heirs could certainly accept the wishes of the decedent (the recipient of support) and not try to dispute these contracts, but as a rule, their reactions will be completely the opposite - the first thing they will want to do is to seek to declare these contracts null and void. Krstić, *op. cit.,* note 9, p. 281

[67] I.e.: "*This court did not accept the allegations that the contract on support for life is simulated and that it actually conceals, at least in part, a donation contract (Article 66 COA), as this does not stem from the evidence presented. In this case, it was found that there was no significant disparity between the contributions of the maintenance provider (the plaintiff) and the value obtained on the basis of the aforementioned contract, because the plaintiff, with the help of his family, had taken care of his mother when necessary, not only during the term of this contract, but also prior to its conclusion, since they have lived for a long time in a common household*"

"*Ovaj sud nije prihvatio revizijske navode da se radi o prividnom ugovoru o doživotnom uzdržavanju koji ustvari prikriva, barem dijelom, darovni ugovor (čl. 66. ZOO), jer to ne proizlazi iz provedenih dokaza. U ovom predmetu je utvrđeno da ne postoji znatniji nesrazmjer između doprinosa davatelja uzdržavanja (tužitelja) i vrijednosti koju je dobio na temelju spomenutog ugovora, jer je tužitelj uz pomoć svoje obitelji skrbio o majci kada je to bilo potrebno, ne samo za vrijeme trajanja tog ugovora nego i prije njegovog sklapanja, budući da su dugi niz godina živjeli u zajedničkom domaćinstvu.*" (VSRH Rev 1516/2009-2, 28.2.2012.)

"*The plaintiff considers that this contract is a simulated legal affair and that it constitutes a donation contract,* according *to its legal nature, so in that regard has requested his forced share. The courts rejected such a request after having found, on the basis of the evidence provided, that a valid contract on support for life had been concluded because of which the defendants undertook to take care for and fully support, now deceased, M.K. and bury her after she dies, which they did for four years, while the recipient of support, lived.*"

"*Tužitelj smatra da je taj ugovor simulirani pravni posao i da predstavlja po svojoj pravnoj naravi ugovor o darovanju, pa je u tom smislu postavio zahtjev za utvrđenje tražeći pri tome nužni dio. Sudovi su odbili tako postavljeni zahtjev nakon što su temeljem provedenih dokaza utvrdili da se radilo o valjanom ugovoru o doživotnom uzdržavanju kojim su tuženice preuzele obvezu brinuti se i potpuno opskrbiti sada pok. M. K. do njezine smrti, te ju sahraniti, te da su one to kroz pune četiri godine, koliko je još živjela primateljica uzdržavanja, to činile.*" (VSRH, Rev 2419/1991-2, 13.7.1993.)

"*No circumstance has been established that would provide a basis for the conclusion that the provider of support did not intend to take care of the late T.M. and to assist him ... also no circumstances were established*

before the conclusion of these contracts, the provider of support actually assisted the recipient of support and enforced the content of his later obligations from the contract. Moreover, this was actually decisive for the courts to conclude that there was no simulation or any other reason for invalidity of these contracts. This all points to the conclusion that, although these contracts are sometimes concluded with the aim of bypassing forced heirs, this is obviously not as often as public, and especially forced heirs, think.

## 4. ISSUES CONCERNING FAILURE TO ESTABLISH AND REGISTER THE OBLIGATION TO SUPPORT AS A REAL ESTATE ENCUMBRANCE AND FAILURE TO REGISTER THE EXISTENCE OF CONTRACT ON SUPPORT FOR LIFE INTO LAND REGISTRY

As was stated in the introductory section, the contract on support until death was, before January 1, 2006, allowed only according to general principles and rules of the law of obligations, which sometimes resulted in situations in which the recipient of support was not sufficiently protected. He/she could have remained

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*under which it could be concluded that the only incentive to conclude a contract was to deprive a prosecutor of inheritance, nor would such a motivation improperly influence the decision of the recipient to conclude the contract...*

*Because of this, the Court finds that there is no basis for concluding that this contract on support for life is contrary to the legal order, law or morals, or that the incentive to conclude the contract has had an effect on the validity of the contract and its legal effects.*"

"*Nije utvrđena niti jedna okolnost, koja bi dala osnovu za zaključak da davateljica uzdržavanja nije imala namjeru voditi brigu o pokojnom T. M. i pomagati mu ... niti su utvrđene okolnosti na temelju kojih bi se moglo zaključiti je jedina pobuda kod sklapanja ugovora bila lišiti tužitelja nasljedstva, niti da bi takva pobuda bitno utjecala na odluku primatelja uzdržavanja da sklopi ugovor ...*

*Na temelju iznijetog ovaj sud je uvjerenja da nema osnove za zaključak da je prijeporni ugovor o doživotnom uzdržavanju protivan pravnom poretku, prisilnim propisima ili moralu, odnosno da bi pobuda za sklapanje ugovora imala učinak na valjanost ugovora I njegovih pravnih učinaka.*" (VSRH Rev 564/2016-2, 1.3.2016.)

"*The first-instance court found that the will of the contracting parties during the conclusion of the disputed contract was for the conclusion of precisely such a contract, that the defendants had previously performed the content of their obligation under the contract, i.e. cultivated their mother's property, and generally cared about their mother, which they continued after the contract was concluded ...*

*... For all those reasons, the prosecutors failed to prove that the disputed contract was a simulated legal affair and that in fact the contracting parties had intentions to conclude a donation contract, as previously stated.*"

"*Sud prvog stupnja je utvrdio da je volja ugovornih strana prilikom zaključenja spornoga ugovora bila za sklapanje upravo takvog ugovora, da su tuženici i prije toga izvršavali sadržaj svoje obveze iz ugovora, tj. obrađivali majčine nekretnine, te se općenito o majci brinuli, što da su nastavili i nakon što su ugovor zaključili…*

*… Iz svih prije navedenih razloga naime proizlazi da tužiteljice nisu uspjele dokazati da je sporni ugovor simulirani pravni posao, a da su zapravo ugovorne strane imale namjeru i zaključile ugovor o darovanju, kao što je to ranije navedeno.*" (VSRH Rev 3805/1993-2, 8.2.1994.)

without property or part of it, with great uncertainty as to whether the provider of support would fulfill the commitments assumed under that contract and provide him/her with the support until death. It cannot be denied that the recipient of support is better protected today, since Civil Obligations Act precisely defines that public bodies now have to participate in the conclusion of this contract. It also allows for the possibility of burdening the real estate with the obligation to support and registering that encumbrance into the land registry.[68]

Nevertheless, it seems that even today, despite all this, the same problems that occurred before 2006, still occur, because contracting parties fail to take advantage of all the possibilities provided by law. All of these problems appear to arise from the fact that the abovementioned registrations depend solely on the will of the contracting parties. Because of their ignorance and inexperience, they either fail to register the existence of contract on support for life into land registry, or they neglect to burden the real estate with the obligation to support the recipient and register that encumbrance into land registry.

This problem could easily be resolved. As was explained earlier, both of these contracts must, in order to be valid, be made with the presence of public bodies – judges or notaries public.[69] In this regard, the authors suggest that whenever a contract on support for life or support until death is certified by a competent court or solemnized by a notary public or compiled in front of notary public, these public bodies *ex officio* demand 1) the registrations of the existence of contract on support for life in the land registry or 2) establishment of a burden of obligation to support the recipient of support on the real estate and demanding registration of that encumbrance into land registry.

If the contract is to be verified before a court, the judge could, upon its verification, issue a decision ordering the registration, which, together with a copy of the contract, would be submitted to the competent land registry office, in order for it to be registered. Given that the real estate, which is the object of contracts on support for life or support until death, is mainly within the jurisdiction of the court certifying the contract, those entries could be carried out in a very short time.

If the contract is solemnized by a notary public or made up in the form of notary public act, then a notary public could submit a contract to the land registry department of the competent court, with the proposal to execute the above mentioned registration.

68 Art. 587, 589 (580), COA

69 Art. 580, COA

At present, there is also the possibility of an electronic delivery, prescribed by Art. 97 of the Land Registry Act. It allows for a proposal for registration to be submitted by the party's attorney, notary public or advocate, with an advanced electronic signature.[70] Therefore, during the solemnization or drafting of the contract on support for life or support until death, the notary public could electronically submit a proposal for registration to the land registry department of the competent court.

Registration *ex officio* of certain rights concerning real estate is nothing unusual, because it already exist in certain cases, according to the Land Registry Act and the Enforcement Act.[71]For example, Art. 82 Paragraph2of the Land Registry Act stipulates that the recording of the dispute about a land registry entry can be ordered *ex officio* by the body in front of which the procedure is being conducted, and the same is deleted, *ex officio*, after the expiration of a period of 10 years from the time it was permitted (Art. 84). Furthermore, according to Art. 88 of the same Act, it is possible to record the refusal of enforcement, so when the court rejects the proposal to allow real estate enforcement with the purpose to fulfill a claim, for which no mortgage was registered, the court that rejected the proposal will *ex officio* declare registration of the rejected proposal into the land registry. The court will do this by requiring that the registration of the rejected proposal on real estate in question be recorded. Also, according to Art. 89 of Land Registry Act, the court, which makes a decision on who is the buyer of real estate at a public auction (in the enforcement process), will, *ex officio*, order for the sale of a real estate to be recorded into the land registry. In addition, Art. 84, Paragraph 1of Enforcement Act prescribes that, as soon as a decision about real estate enforcement is issued, the court will *ex officio* request that the enforcement be recorded in the land registry.

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[70] Art. 26 of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC:
„An advanced electronic signature shall meet the following requirements:
(a) it is uniquely linked to the signatory;
(b) it is capable of identifying the signatory;
(c) it is created using electronic signature creation data thet the signatory can, with a high level of confidence, use under his sole control; and
(d) it is linked to the date signed therewith in such a way that any subsequent change in the data is detactable"
[https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32014R0910&from=EN] Accessed 11.03.2019
For more on advanced electronic signature see Pichler, D.; Tomić, D., *Electronic signature in legal theory and practice - new regulation*, in: Drezgić, S.; Živković, S.; Tomljanović, M. (eds.), Economics of Digital Transformation, Research Monograph – First Edition, University of Rijeka, Faculty of Economics and Business, 2019, p. 59-65

[71] Enforcement Act, National gazette 112/12, 25/13, 93/14, 55/16, 73/17

There is also something similar pursuant to Art. 18 of the *Real Estate* Transfer *Tax Law*.[72] A notary public, after solemnizing the signatures on the sales documents, or other means of disposition of the real estate (or by composing the notary public act), and at the latest within 30 days, is obliged to send electronically a copy of the document to the tax office of the area in which the property is located.

Contracts on support for life and support until death could be submitted to the land registry department of the competent court, in the same way. This does not require a lot of additional work or expenses, especially if these contracts would be delivered electronically.[73] If these contracts were registered *ex officio* in the land registry, there would no longer be any legal uncertainty about the real estate that is the subject of such contracts. It would be easy for all persons to find out whether a real estate they are interested in is the subject of a contract on support for life and the recipients of support in contracts on support until death would also be additionally protected this way.

This is obviously necessary because, for a certain number of people, the way this is done (or not done) today, does not work as it should, and it seems that such a category of persons – older, who are not acquaint with legal regulations and depend on someone else's help, should be additionally protected. Since today the creation and registration of real estate encumbrances is only possible if a contracting party proposes it, given that the recipient of support is often an older person with no legal knowledge, he/she may not understand the importance of that act, so he/she will fail to ask for it. The same can be said for some providers of support – they might not be old, but due to their ignorance and inexperience, they might not be aware of the importance of registering the existence of a contract on support for life into the land registry.

## 5. ISSUES CONCERNING LENGTHY COURT PROCEEDINGS REGARDING CONTRACTS ON SUPPORT FOR LIFE AND SUPPORT UNTIL DEATH

The next suggestion the authors of this paper have is to determine that the disputes arising out of contracts on support for life and support until death become urgent procedures. The reason is the specific position of the injured parties in these types of contracts. Generally, court proceedings, last for a very long time.

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72 *Real Estate* Transfer *Tax Law*, National gazette 115/16, 106/18

73 Art. 7 of Court Fees Act, National gazette 118/18, stipulates that only half of the fees prescribed by the Tariff shall be paid for filing, entries and decisions in electronic form

The injured parties in these contracts are predominantly older, and they often die before the court decision is made.

Urgent resolution of such disputes would certainly be in line with the particularities of these two contracts, which do not generally exist in any other type of contract – i.e. common life or at least constant contacts between the parties; sensitivity of their relationships; uncertainty regarding the duration of these contracts and the content of the obligation of the provider of support; the need for the obligation of provider of support to be fulfilled on a regular basis. Precisely for these reasons, Civil Obligations Act permits contractual parties to ask the court to terminate these contracts in case they live together and their common life becomes unbearable.[74]

Furthermore, a special treatment of these types of contracts is also supported by the views of certain commentators who even consider that, although *clausula rebus sic stantibus*[75] is otherwise a natural component of other types of contracts[76], it should actually be an essential ingredient of contracts on support for life and support until death. According to these commentators, the parties should not be allowed to waive in advance the right to modify or terminate these contracts in case crucial circumstances change (as they are allowed with any other type of contract).[77]So, it can be said there is a consensus that these contracts and their parties should be given special treatment and protection. Therefore, it would be advisable to resolve the disputes arising out of the contracts on support for life and support until death, urgently.

The same can be said about, for example, labor disputes and procedures in case of possession of property interference. These are all urgent procedures because legislators realized that parties in these disputes need urgent protection for certain reason. Urgent procedures take precedence over other cases, they are taken into consideration immediately, the lawsuit is urgently sent to be responded to, and upon receipt of the reply, a hearing is scheduled.[78]

By the provisions of the Civil Procedure Act[79]stipulated in Art. 434, in case of labor disputes, especially while determining the deadlines and hearings, the court

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[74] Art. 583, Paragraph 2, COA

[75] This clause allows for modification or dissolution of contracts due to changed circumstances, if certain prerequisites are fulfilled. Art. 369, COA. For detailed analyzis of this clause, see: Klasiček; Ivatin, *op. cit.,* note 23

[76] Art. 372, COA

[77] More in Crnić, I., *Zakon o obveznim odnosima, Napomene, komentari, sudska praksa i prilozi*, Organizator, Zagreb, 2006, p. 494

[78] Triva, S.; Dika, M., *Građansko parnično procesno pravo,* Narodne novine, Zagreb, 2004, p. 761, 803-804, 808-809, 837-838

[79] Civil Procedure Act, Official gazette of SFRJ 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, National gazette 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05,

will pay special attention to urgent resolution of these disputes. It was determined that in such proceedings, the deadline for responding to a lawsuit is 8 days.[80] Furthermore, a hearing must be held within 30 days from when the response to a lawsuit was received; the procedure before the first instance court must be completed within 6 months after the receipt of the lawsuit and the decision on the appeal must be made by the second instance court within 30 days after the receipt of the appeal. The deadline for appeal is 8 days.[81] In litigation for possession of property interference, the court is also required to take into account the urgent need to resolve such proceedings.[82]

Accordingly, with disputes arising from contracts on support for life and support until death, a certain time limit within which a first-instance decision must be made may be determined. The Pensioners' Association of Croatiaproposes a deadline of six months[83], which seems a sensible time for a hearing to be conducted; all necessary evidence carried out in order to correctly and fully establish the factual situation and a decision to be made. Furthermore, if it were to go in that direction, the time the decision of the second instance court must be made, in case of an appeal, should also be limited.[84]

In order to speed everything up, it could also be determined that only certain judges will be specialized in these types of proceedings, as they would be well aware of problems stemming from these contracts and case law concerning them, which would certainly contribute to faster and more correct resolution of these proceedings.

## 6. CONTRACT ON SUPPORT FOR LIFE AND SUPPORT UNTIL DEATH IN EU MEMBER STATES

While researching this topic, it was surprisingly difficult to find out whether these contracts exist in other EU member states. Slovenia, Bulgaria, Latvia and Por-

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02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14

80 In other types of procedures it is between 30 to 45 days. Art. 285, Civil Procedure Act

81 Art. 437, Civil Procedure Act

82 Art. 440 Civil Procedure Act; Gavella, *op. cit.,* note 32, p. 248-261

83 [http://www.glas-slavonije.hr/322148/1/Umirovljenici-Ukinite-dosmrtno-uzdrzavanje-stalno-nas-varaju] Accessed 11.03.2019

84 After a complaint is filled, files go to county courts throughout Croatia, whereby the e-filing system determines which county court will get the file by automatic assignment (the file goes to the one that is the least burdened by the number of cases), Art. 50 and 52 Rules on E-filing System, National gazette 35/15

tugal[85] are the only countries the authors found for certain to allow these types of contract. Like in Croatia, in Slovenia, contracts on support for life and support until death are regulated by Civil Obligations Act[86] and the provisions that regulate these types of contract are fairly identical to those of Croatian Civil Obligations Act. This is not surprising given that both Slovenia's and Croatia's legal systems come from the same source – they were both republics of Yugoslavia until not so long ago. It is to be expected that the same problems that exist in Croatia, concerning these contracts, also occur in Slovenia.

Concerning Bulgaria, it was found that only the contract on support until death can be concluded (or "transfer of the ownership right over a property in exchange for maintenance and care", as it is named on a webpage).[87] It is not specifically regulated by Bulgaria's Law of Obligations and Contracts[88], since only contracts on purchase, donation, lease, loan, manufacture and mandate are defined in this Act. However, when it comes to a contract on support until death, it can obviously be concluded if it is in accordance with general rules on validity of contracts. It is fairly similar to its Croatian counterpart and more or less the same problems that were dealt in this paper concerning contract on support until death, occur in Bulgaria, too.

When it comes to other EU member states, authors of this paper were not able to investigate in detail what the rules are concerning these types of contracts. However, if Croatian, Slovenian and Bulgarian provisions concerning this issue are

85 Latvia ([https://e-justice.europa.eu/content_maintenance_claims-47-lv-en.do?member=1] Accessed 27.03.2019) and Portugal ([https://e-justice.europa.eu/content_maintenance_claims-47-pt-en.do?member=1] Accessed 27.03.2019)) have explicitly stated in a survey about maintenance claims ([https://e-justice.europa.eu/content_maintenance_claims-47-en.do] Accessed 27.03.2019) that these claims can arise from certain family relations, but also from contracts where parties have agreed that one of them will give maintenance (support) to another. So it is obvious that these countries do allow these types of contracts. However, the fact that other countries have not mentioned anything about maintenance claims arising from contracts does not mean anything, since Croatia, Slovenia and Bulgaria, who allow these contracts, failed to mention them either

86 Art. 557-568 of Civil Obligations Act (Obligacijski zakonik, Uradni list RS, št. 97/07 – uradno prečiščeno besedilo, 64/16 – odl. US in 20/18 – OROZ631), full text: [http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1263#] Accessed 25.03.2019

87 [http://id-lawoffice.com/services/transfer-of-the-ownership-right-over-a-property-in-exchange-for-maintenance-and-care/[ Accessed 26.03.2019

88 Law of Obligations and Contracts, Corr. SG. 2/3 Jan 1950, prom. SG. 275/22 Nov 1950, amend. SG. 69/28 Aug 1951, amend. SG. 92/7 Nov 1952, amend. SG. 85/1 Nov 1963, amend. SG. 27/3 Apr 1973, amend. SG. 16/25 Feb 1977, amend. SG. 28/9 Apr 1982, amend. SG. 30/13 Apr 1990, amend. SG. 12/12 Feb 1993, amend. SG. 56/29 Jun 1993, amend. SG. 83/1 Oct 1996, amend. SG. 104/6 Dec 1996, amend. SG. 83/21 Sep 1999, amend. SG. 103/30 Nov 1999, amend. SG. 34/25 Apr 2000, suppl. SG. 19/28 Feb 2003, amend. SG. 42/17 May 2005, amend. SG. 43/20 May 2005. Full text: [http://www.bulgaria-law-of-obligations.bg/law.html] Accessed 25.03.2019

to be any indicators, it is to be expected that these types of contracts are allowed throughout EU, whether they are specifically defined in their respective legislations that regulate obligations and contracts, or whether they are allowed to be concluded under general rules on contract validity, as is the case in Bulgaria and was, until 2006, in Croatia. What can also be expected is that the same issues that arise in Croatia concerning these contracts, also occur in other EU member states.

## 7. CONCLUSION

One of the basic legal principles is *ignorantia iuris nocet* - not knowing the law is harmful. Without this principle, functioning of a "legal state" or "a rule of law" would be difficult, if not impossible. One of the basic questions this work provokes, is: should the recipients of support be protected from not knowing the law, especially if they are old, infirm, uninformed people, who depend on the help of others, and thus can be subject to their influence and demands? Or should they be treated equally as other subjects of civil law, who are expected to take care of their own interests?

The articles from the media, mentioned in this paper, are only a part of what was found while researching this topic. These articles might not be of a scientific value, but they were an irreplaceable source of issues that arise from these contracts in real life. In many of those articles, people (particularly older persons), were urged to take extreme care while concluding these contracts, because they are connected with many complications and might cause them great problems. Also, these articles brought many advices on how to bypass these problems and what could be done to solve them once and for all. The demands of pensioners, who are most often recipients of support, are always the same: abolish the contract on support until death; limit the number of contracts on support for life that one person can conclude at once, as a provider of support; prohibit persons of certain professions from being providers of support; shorten the court proceedings concerning the violation or termination of these contracts, etc. Some of these requests have already been incorporated into certain legal acts: for example, in Social Welfare Act, Art. 192 and 214, there are certain restrictions imposed on providers of support. Other requirements have not (yet) fallen on fertile ground.

Elimination of the contract on support until death from the Civil Obligations Act will not have any effect, since one of the fundamental principles of Croatian law of obligations – a freedom to contract – gives contracting parties the possibility of concluding contracts, even if they are not explicitly mentioned in the Civil Obligations Act. These contracts only need to be in accordance with general principles and provisions relating to the validity of contracts. It should not be forgotten that,

until 2006, this contract was not even regulated by any legal act in the Republic of Croatia, but the contracting parties could have concluded it, nevertheless. Except explicitly forbidding this contract, which will probably never happen, this way of solving problems will not be successful.

If it stands to reason that the recipients of support should be additionally protected, as a particularly sensitive category of persons, this protection must obviously go in some other direction. It is therefore apparent that the recipients, and also the providers of support, could be protected if the registration of the obligation to support, stemming from contract on support until death, was *ex officio* established and registered into the land registry as a real estate encumbrance. The same goes for the registration of the existence of contract on support for life. The possibility of these registrations already exists, according to Civil Obligations Act, but now it depends exclusively on contracting parties, which, it seems, does not function as intended. It also makes sense that due to the particularities of these contracts - the age of the parties, the need to regularly fulfill the obligations under the contract, their close contacts; the court procedures concerning these contracts become urgent procedures, which should be settled within no more than six months. Such changes would certainly help those who will, in the future, conclude contracts on support for life and support until death.

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# PRESUMPTION OF MOTHERHOOD ON CROSSROAD OF SURROGACY ARRANGEMENTS IN EU

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***ABSTRACT***

*The presumption "Mater semper certa est", that is known from Roman law, indicates that the mother is always certain as she was traditionally seen as the progenitor and the one who had given birth. However, traditional view on motherhood is lately changing due to new procreation techniques that made the content of motherhood depended on contractual arrangements and opened the possibility to differentiate the progenitor from the person who has given birth.*

*The surrogacy motherhood is considered as one of the new procreation techniques that made possible for single persons and couples with or without fertility problems to become parents. However, surrogacy motherhood made the notion of the mother interchangeable and depended on various arrangements between adults. It all represents a serious threat to various children's rights including their right to know their origin and to be cared for by parents.*

*Many Member States of the European Union (EU) realized the dangers of surrogacy arrangements and, in pursuit of the best interest of the child, enacted legislation to ban or restrict surrogacy. However, cross-border surrogacy arrangements, that are nowadays popular and untraceable, made possible to bypass those domestic legislations. The absence of any formal consensus within the EU on how to address the problem of cross-border surrogacy represents a serious threat to the protection of children's rights.*

***Keywords****: legal presumptions, motherhood, children's rights, cross-border surrogacy*

## 1. INTRODUCTION

The law traditionally recognizes the mother as the woman who gives birth to a child. Thus the gestational mother is presumed to be a legal mother with all her rights and duties towards the child.[1] However, the revolution in the sphere of reproductive technology increasingly confronted the law with possibilities that challenged the presumption of motherhood and made changes to the traditional meaning of the mother and a child bond.[2] This is especially noticeable in surrogacy arrangements where a woman (surrogate mother), for financial and/or compassionate reasons, agrees to bear and give birth to a child and then give up her parental rights and pass the child to another woman (commissioning mother) who is incapable or, less often, unwilling to do so herself or to commissioning parents.[3]

There are two types of surrogacy arrangements - genetic and gestational. In a genetic surrogacy arrangement, the surrogate mother is an ovum donor while in gestational surrogacy arrangements the child is conceived with an ovum of the commissioning mother or with an ovum of a third woman who donated an ovum.[4] Both types of surrogacy arrangements made possible that multiple women have an interest in being the mother of a child, which opens dilemmas regarding certainty and security of the legal status of a child and exercising his or her rights in the best interest.

The many EU states, including Croatia, realized the dangers of surrogacy arrangements and enacted legislation to ban or restrict surrogacy.[5] However, cross-border surrogacy arrangements, that are nowadays popular and untraceable, made possible that couples or single persons bypass domestic legislation that prohibits

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1 "*Generally, from a legal point of view, the mother who has given birth to the child is the legal mother.*" Boele-Woelki, K, *(Cross-border) Surrogate Motherhood: We need to take Action now!*, in: *A Commitment to Private International Law – Essays in honour of Hans van Loon*, The Permanent Bureau of the Hague Conference on Private International Law, Intersentia, Cambridge/Antwerp/Portland, 2013, p. 49

2 Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, pp. 132-134; Dolgin, J. L., *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, Connecticut Law review, *Vol.* 26, Issue 4, 1994, p. 1262

3 van Niekerk, A.; van Zyl, L. *The Ethics of Surrogacy: Women's Reproductive Labour,* Journal of Medical Ethics, *Vol.* 21, No. 6, 1995, p. 345

4 See Ovan den Akker, O., *Psychosocial aspects of surrogate motherhood*, Human Reproduction Update, *Vol.* 13, Issue 1, 2007, pp. 53–54; Boele-Woelki, *op. cit.* note 1, pp. 48-49

5 For example, Croatian Act on Medically Assisted Fertilization prescribes that all contracts concerning the birth of a child for another person (surrogate motherhood), either they are commercial or free of charge (altruistic), are null and void. See Article 31 of the Croatian Act on Medically Assisted Fertilization, Official Gazette, No. 86/2012

surrogacy.[6] The absence of any formal consensus within the EU on how to address the problem of cross-border surrogacy represents a serious threat to the protection of children's rights such as the right to identity, parentage, family environment, health and nationality.[7]

In order to justify the protection of above-mentioned children's rights, the article begins with setting out the relevance of the traditional presumption of the mother in the context of surrogacy arrangements. Secondly, the article presents analyses, from the perspective of the European Court of Human Rights (ECtHR), the extent to which the current cross-border surrogacy arrangements reflect the key elements of a children's rights protection and its importance from the standpoint of the best interest of children that are, unfortunately, the objects and not the subjects, of those agreements. Thirdly, the article considers children's rights perspective of surrogacy arrangements as subject of EU policy. In the final part of the paper key questions and concerns regarding the consequences of surrogacy arrangements are summarized.

## 2. TRADITIONAL NOTION OF MOTHERHOOD VS. SURROGACY MOTHERHOOD

Traditionally, biological and legal identity of a child's mother was embodied in the statement "*quia [mater] semper certa est*" written by *Paulus* in the Digest.[8] The statement illustrated the mother as a stable element of filiation.[9] The mother was always certain as only a woman who gave birth to a child (*mater est quam gestatio demonstrate*) could be the child's mother.[10] Thus, the fact of giving birth was "a constitutive element of the legal relationship between a woman (mother) and child".[11] In that case, there were no legal doubts who the mother was and was she the child's progenitor, as motherhood was an irrefutable presumption. This con-

6 In 2010 survey researchers counted that, approximately 5% of all European fertility care involves cross-border travel. *Cross-border reproductive care: an Ethics Committee opinion, Fertility and Sterility Dialog*, *Vol.* 106, No. 7, 2016, p.1627

7 Achmad, C., *Child rights in international commercial surrogacy*, [http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-891/child-rights-in-international-commercial-surrogacy] Accessed 10.02.2019

8 DIG. 2.4.5., Gruenbaum, D., *Foreign Surrogate Motherhood: mater semper certa erat,* The American Journal of Comparative Law, *Vol.* 60, No. 3, 2012, p. 475; Hrabar, D., Što je s podrijetlom djeteta ako "*mater non semper certa est*"?, in: Grubić, V. (ed.), Obiteljski zakon - novine, dvojbe i perspective, Zagreb, Narodne novine, 2003, pp. 24-25

9 *"Mater semper certa est": motherhood shaken by medically assisted procreation and surrogacy*, [http://www.genethique.org/en/mater-semper-certa-est-motherhood-shaken-medically-assisted-procreation-and-surrogacy-66673.html#.XGFJXUlK2Ul] Accessed 10.02.2019

10 Gruenbaum, *op. cit.* note 8, p. 475

11 Hrabar, *op. cit.* note 8, p. 25

ception of motherhood had positive effects on the protection of the child's rights and interests as the law needed nothing else but the childbirth to confirm the existence of a legal relationship between a woman (mother) and child.[12]

The revolutionary development of biotechnology and medicine and the application of new technologies in the sphere of human reproduction made procreation possible for many single persons and couples that were not able, or willing, to have children naturally. However, revolutionary developments have rendered the notion of motherhood as uncertain and weakened it. It is harder than ever to differentiate the woman who has given birth from the progenitor, as the woman who gave birth to a child may no longer have a genetic connection with that child.[13] This is especially evident in the case of the surrogacy arrangements, as a child may have a genetic connection with the surrogate mother, the commissioning mother or the woman who donated an ovum. Thus the notion of the mother becomes relative as the content of motherhood starts to depend on the choices and decisions of the various actors that are arranging procreation by contracts in which the child is considered as an object - a commodity.[14] It all made uncertain not only the biological basis of motherhood but as well the legal basis, as more than one woman may be genetically, legally, or socially understood as the mother.[15]

In the period of gestation and after the birth of a child the surrogate mother has the role that is closest to the traditional notion of the mother.[16] She is considered

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[12] Gruenbaum, *op. cit.* note 8, p. 475

[13] *Ibid.*, p. 476; Horsey, K., *Challenging presumptions: legal parenthood and surrogacy arrangements*, Child and Family Law Quarterly, *Vol.* 22, No. 4, 2010, p. 450

[14] "*Mater semper certa est*": *motherhood shaken by medically assisted procreation and surrogacy*, [http://www.genethique.org/en/mater-semper-certa-est-motherhood-shaken-medically-assisted-procreation-and-surrogacy-66673.html#.XGFJXUlK2Ul] Accessed 10.02.2019; Fenton-Glynn, C., *International surrogacy before the European Court of Human Rights*, Journal of Private International Law, *Vol.* 13, No. 3., 2017, pp. 546, 558; Surrogate Motherhood: A Violation of Human Rights Report Presented at the Council of Europe, Strasbourg, 26 April 2012, European Centre for Law and Justice, p. 5 [http://www.eclj.org] AccessED 10.2.2019; Micković, D.; Ristov, A., *Biomedical assisted fertilization in Macedonia, Serbia and Croatia: ethical and legal aspects*, SEE Law Journal, *Vol.* 1, No. 1, 2014, pp. 33-34; Beaumont, P.; Trimmings, K., *Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?*, p. 16 [https://www.abdn.ac.uk/law/documents/CPIL_2016-4.pdf] Accessed 20.02.2019; Achmad, C., *Protecting the Locus of Vulnerability, Preliminary Ideas for Guidance on Protecting the Rights of the Child in International Commercial Surrogacy*, in: Liefaard, T., Sloth-Nielsen, J. (ed.), The United Nations Convention on the Rights of the Child – Taking Stock after 25 Years and Looking Ahead, Brill Nijhoff, 2017, pp. 520-521, 524

[15] Achmad, C.I., *Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child right, public international human rights law perspective*, University of Leiden, 2018, p. 73, [http://hdl.handle.net/1887/63088] Accessed 15.02.2019

[16] Achmad, *op. cit.* note 15, p. 79

the legal mother because she gave birth to a child. Some domestic legal systems within the EU, such as Ireland and England, register the surrogate mother as the legal mother in the birth certificate.[17] That means that the commissioning mother cannot be recognized as the legal mother although she shares a genetic link with the child. For example, in the case of altruistic surrogacy arrangement in Ireland, both commissioning parents had a genetic link with children but they did not succeed in their intention to obtain a declaration that the commissioning mother was the legal mother of the children. The Irish Supreme Court ruled against the commissioning parents and held that the birth certificate of the children could not be changed in order to register the commissioning mother as the legal mother due to the irrefutable presumption that mother of children is the woman who gave birth to them.[18] In such situations, the surrogate mother keeps the status of a legal mother as long as the legal parent-child relationship is not established between the commissioning mother and the child (e.g. through adoption).[19]

If the surrogate mother has a genetic connection with the child, the content of her legal position of a mother corresponds exactly to the notion of natural parent that presupposes the existence of a genetic and gestational connection with the child.[20] In that case, the commissioning mother can fulfil only a role of the mother that is wholly socially constructed as it is not established through a genetic or biological link and often the law cannot recognize her as a mother at all.[21] Therefore, if she wants to become the child's legal mother, the commissioning mother has no other option than to apply to adopt the child or seek an alternative way to establish legal parentage of the child.[22]

On the other hand, if the commissioning mother donated an ovum she has a genetic link with the child, which can be important for recognition of the com-

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17 Fenton-Glynn, *op. cit.* note 14, p. 547; Similar standpoint is recognized also in legal systems outside the EU. Thus, in New Zealand "law always views the woman who gives birth to the child and her partner (if she has one) as the child's legal parents at birth, based on the principle of "*mater simper certa est*". See Achmad, *op. cit.* note 14, p. 523

18 Beaumont; Trimmings, *op. cit.* note 14, p. 10, footnote 61

19 In many jurisdictions, the surrogate is listed as 'mother' on the child's birth certificate. See Achmad, *op. cit.* note 15, p. 79.; Geist, C., *Motherhood*, [http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0110.xml] Accessed 13.02.2019

20 See a discussion about the Presumption of biology and the role of gestation in Hill, J. L., *What Does it Mean to be a Parent--The Claims of Biology as the Basis for Parental Rights,* New York University Law Review, *Vol.* 66, Issue 2, 1991, p. 371

21 Achmad, *op. cit.* note 15, p. 83

22 *Ibid.*, p. 83; Rintamo, S., *Regulation of Cross-Border Surrogacy In Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law*, University of Helsinki, Faculty of Law, 2016, p. 20, [https://helda.helsinki.fi/bitstream/handle/10138/164942/Sara%20Rintamo%20Masters%20Thesis.pdf?sequence=2&isAllowed=y] Accessed 19.02.2019

missioning mother as the legal mother in procedures through which she intends to acquire parental rights and responsibilities. In that case, the commissioning mother could be recognized under the law as the legal mother due to the fact that the child represents a genetic part of her.[23] Thus, the genetic link can give her legal entitlement to the child in the same way as she is entitled to anything that is considered part of her.[24]

Although the genetic link is considered important in establishing the legal parent-child relationship between the child and the commissioning mother (and father), it is not considered crucial for recognition of the same relationship between a woman who donated an ovum and the child. Usually, between her and the child could be established only a social relationship that is completely dependent on the willingness of commissioning parents to involve the ovum donor into the child's life. However, if the woman who donated an ovum acts anonymously, the social relationship remains impossible.[25]

## 3. CROSS-BORDER SURROGACY CHALLENGES FROM PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The traditional notion of mother meant that a woman who gave birth to a child had the genetic, social and legal link with the child. Changes in reproductive medicine made possible that different women (and men) may be genetically, socially or legally connected with the child. It adds to the complexity of traditional parent-child relationship as it is hard to prove who the legal mother and father of the child borne through surrogacy proceedings really are. The problem with detecting child's parents has implications on the rights of the child because during the time in which the child is without a legal parent-child relationship, his right to know and be cared for by his parents is undermined.[26] This is because the enjoyment of the rights of the child is related to parental responsibility to up bring and care for the child by having in mind the best interest of the child as prescribed in Article 3

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23 Still, the following question stands: Is there a legal ground to recognize the legal parent-child relationship between the child and the genetically unrelated commissioning parent, e.g. the husband of the aforementioned commissioning mother? See also: Beaumont; Trimmings, *op. cit.* note 14, p. 9

24 Hall, B., *The Origin of Parental Rights*, Public Affairs Quarterly, *Vol.* 13, No. 1, 1999, p. 76

25 Achmad, *op. cit.* note 15, pp. 81-82

26 Article 7 Paragraph 1 of the United Nations Convention on the Rights of the Child (1989) prescribes that the child has the right to know and be cared for by his parents. See Achmad, *op. cit.* note 14, p. 532

of the United Nations Convention on the Rights of the Child (CRC) and in Article 24 of the Charter of Fundamental Rights of the European Union (Charter).[27]

However, the cross-border surrogacy arrangements tend to deepen the problem as they can lead to situations that a child has a legal mother (surrogate mother), two other potential mothers (e.g. ovum donor and commissioning mother), two potential fathers (e.g. husband of the surrogate mother or the commissioning mother) and still end up without legal parents. It is especially noticeable when the commissioning mother and/or father cannot demonstrate a connection (e.g. genetic link) with the child that is needed under the law for creating a parent-child relationship or when the commissioning mother and/or father cannot gain entry to home state to begin such a process, or when they enter the home state, but the child is then removed into public care.[28]

Precisely such cases were recently the subject of dispute before the ECtHR. In this chapter we will present what conclusions has the ECtHR reached in its decisions and what is their potential impact on the human rights protection of the child and the commissioning parents, especially their right to private and family life as prescribed in Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in Article 7 of the Charter.[29] Taking into account the content of the provision of Article 52, Paragraph 3 of the Charter, we consider that the above-mentioned decisions of the ECtHR will have a significant effect on Croatia, as well as on all other member states of the Council of Europe and the EU regarding their domestic legislation on cross-border surrogacy.[30] The main question that arises is how should domestic authorities deal with cross-border surrogacy arrangements that have been carried out legally in another jurisdiction, but are contrary to mandatory rules of the domestic law of the commissioning parents?[31]

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27 See also Wade, K., *The regulation of surrogacy: a children's rights perspective*, Child and Family Law Quarterly, *Vol*. 29, No.2, p. 116

28 Achmad, *op. cit.* note 15, p. 85

29 There are several rights of the child that could be breached if above-mentioned situations came true – the right to citizenship, identity, nationality and to grow up in a family environment, all prescribed by the CRC. See Achmad, *op. cit.* note 14, pp. 514, 520-521, 524

30 Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2007/C 303/01, Scope and interpretation of rights and principles - Article 52, Paragraph 3: "*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.*"

31 See also Fenton-Glynn, *op. cit.* note 14, p. 547

### 3.1. THE TRAVEL RESTRICTION MECHANISM FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In situations where the domestic law of the commissioning parents completely prohibits surrogacy (domestic and international), paradoxically, it is still possible for the commissioning parents to bypass the domestic prohibition on surrogacy by travelling abroad to a jurisdiction where they can legally conclude and carry out the cross-border surrogacy arrangement, without having any connection whatsoever with that jurisdiction.[32] That kind of conduct leads to numerous problems that commissioning parents face while trying to return to their home country with the child that was borne through cross-border surrogacy arrangement, because their home county, as aforementioned, prohibits international surrogacy and therefore has legal ground to impose different mechanisms for restricting cross-border surrogacy arrangements, one of which is the travel restriction mechanism.[33]

Often, the source of the problem is that the domestic law of the commissioning parents determines the origin of the child in a different way than the law of the country of the child's birth. For example, under Croatian Family law, the starting point of which is the presumption "*mater semper certa est*", legal parents of the child would be the surrogate mother (and her husband) and not the commissioning parents.[34] [35] As a result, the child would not have the nationality of the commissioning parents[36] nor could he or she obtain a passport[37], leaving the child without the ability to travel with commissioning parents back to their home country thus creating the travel restriction mechanism.

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32 Yetano rightly concludes that by "*allowing citizens to bypass domestic law by simply travelling abroad leads to the irreparable erosion of that country's domestic prohibitions and often anticipates their reform*". Yetano, M. T., *The Constitutionalisation of Party Autonomy in European Family Law*, Journal of Private International Law, *Vol*. 6, No. 1, 2010, p. 179

33 Fenton-Glynn, *op. cit.* note 14, p. 547

34 Croatian Family Act, Official Gazette, No. 103/2015 (CFA), Article 58 prescribes: „*A child's mother is considered to be the woman who gave birth to the child*". More importantly, Article 82 prescribes: „*A mother of a child conceived by a donated ovum or a donated embryo, in the process of medically assisted fertilization, is the woman who gave birth*"

35 Concerning the origin of the child born through cross-border surrogacy, other countries of the Council of Europe and/or the EU have similar legal solutions. Who is considered to be the legal parents of the child born through cross-border surrogacy under English, Dutch, Irish and Norwegian law, see: Fenton-Glynn, *op. cit.* note 14, pp. 547, 550.; Boele-Woelki, *op. cit.* note 1, pp. 51, 55; Beaumont; Trimmings, *op. cit.* note 14, p. 10, footnote 61.; Achmad, *op. cit.* note 14, pp. 524-525

36 See Article 3 of the Croatian Act on International Private Law, Official Gazette, No. 101/2017, in connection with Articles 3 to 5 of the Croatian Nationality Act, Official Gazette, No. 53/1991, 70/1991, 28/1992, 113/1993, 4/1994, 130/2011, 110/2015

37 See Article 34 of the Act on Travel documents of Croatian citizens, Official Gazette, No. 77/1999, 133/2002, 48/2005, 74/2009, 154/2014, 82/2015

Such a mechanism could also be created and realized on a different legal ground. For example, surrogacy arrangements, be they commercial or free of charge are explicitly prohibited by the Croatian Act on Medically Assisted Fertilization making this a prohibition of public order.[38] Bearing in mind that all persons are obliged to abide by the law and respect the legal order of the Republic of Croatia[39], domestic authorities could refuse to issue a passport or visa for the child when commissioning parents would seek to return to Croatia, thus creating the travel restriction mechanism. That would be in line with the position that has been taken by some member states of the Council of Europe and the EU (e.g. Germany, France, Italy and Austria), which consider that public policy has been violated by the mere fact that a surrogacy arrangement has been performed.[40]

The legality of the use of the travel restriction mechanism on children borne through cross-border surrogacy was brought before the ECtHR in the case of D. and others v Belgium.[41] This case concerned a Belgian couple who had travelled to Ukraine to enter into a cross-border surrogacy arrangement. After the birth of the child, they asked the Belgian embassy in Kyiv to issue a Belgian passport for the child, but this was refused because they had not submitted sufficient evidence concerning the existence of a genetic link between at least one of them and the child. The core problem for the Belgian authorities was that there was no record of the pregnancy on the part of the commissioning mother, no information regarding a cross-border surrogacy arrangement was provided and the only evidence provided by the couple to show the genetic link between (just) the commissioning father and child was from an internet site.[42] This travel restriction mechanism was maintained until the applicants had submitted sufficient evidence to permit confirmation of a genetic relationship with the child and resulted in the child being

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38 Article 31. of the Croatian Act on Medically Assisted Fertilization is presented in more detail in footnote No. 5.; Concerning the prohibition of surrogacy arrangements as a prohibition of public order, other countries of the Council of Europe and the EU, like France and Germany have similar legal solutions. See Fenton-Glynn, *op. cit.* note 14, pp. 548, 550, 552; Beaumont; Trimmings, *op. cit.* note 14, p. 3

39 See Article 5 Paragraph 2 of the Constitution of the Republic of Croatia, Consolidated text, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014., [https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf] Accessed 05.03.2019

40 Fenton-Glynn, *op. cit.* note 14, pp. 548, 550, 558; Boele-Woelki, *op. cit.* note 1, pp. 55-56; Pluym, L., *Mennesson v. France and Labassee v. France: Surrogate motherhood across borders*, p. 4, [https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/] Accessed 20.03.2019

41 The case of D. and others v Belgium, Application no. 29176/13, Judgment 11 September 2014.; The travel restriction mechanism is also used in legal systems outside the EU (e.g. New Zealand and Norway). See Achmad, *op. cit.* note 14, pp. 521, 524, 526

42 See Fenton-Glynn, *op. cit.* note 14, p. 548

separated from the applicants in a period of three months because they were no longer able to remain in Ukraine and had to return to Belgium without the child.

The applicants claimed that the travel restriction mechanism caused the separation from the child and amounted to interference in their right to respect for their private and family life. The ECtHR dismissed their application as manifestly unfounded because it considered that the ECHR could not oblige the State Parties to authorize entry to their territory of children born through cross-border surrogacy arrangements without the domestic authorities had conducted relevant legal checks that were provided for by law and pursued a legitimate aim.[43] Furthermore, the ECtHR noted that the applicants could reasonably have foreseen the legal checks they would face in order to bring the child into their home country.[44] In the end, the ECtHR concluded that domestic authorities are permitted to use the travel restriction mechanism and simultaneously require evidence to prove the genetic link between the child and (at least one of) the commissioning parents. The eventual separation that has arisen because of and until such actions have been completed by the domestic authorities, is not contrary to their right to private and family life as prescribed in Article 8 of the ECHR and in Article 7 of the Charter.

This kind of reasoning by the ECtHR led some academics to conclude that the travel restriction mechanism is a legitimate way to screen children coming into the country for a genetic link to one of the commissioning parents, but once that is established, that mechanism can serve no further purpose. In other words, once the genetic link is established, the travel restriction mechanism could not be further used as a mechanism for restricting cross-border surrogacy arrangements because the consequences of its use wouldn't be in line with the best interest of the child principle as prescribed in Article 3 of the CRC and Article 24 of the Charter.[45]

We are fully aware that the child, not the commissioning parents, would bear the full rigour of a comprehensive use of the travel restriction mechanism after the establishment of a genetic link and that such an approach wouldn't be in line with the best interest of the child principle, considering the fact that the child wouldn't

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43 The ECtHR held that the legal checks were provided for by law and pursued several legitimate aims, namely the prevention of crime (e.g. trafficking in human beings) and the protection of the rights of others (e.g. surrogate mother and child).; Case of D. and others v Belgium, Application no. 29176/13, Judgment 11 September 2014., para 59

44 The case of D. and others v Belgium, Application no. 29176/13, Judgment 11 September 2014., para 60; The fact that lengthy procedures should be expected by the commissioning parents when they are trying to bring the child into their home country is often pointed out in academic literature. See Boele-Woelki, *op. cit.* note 1, p. 55

45 Fenton-Glynn, *op. cit.* note 14, p. 549; Beaumont; Trimmings, *op. cit.* note 14, pp. 15, 17; Achmad, *op. cit.* note 14, pp. 533-535

be allowed to enter the home country of the commissioning parents and would have to be placed in alternative care in the country of birth. However, the following questions require an answer: Is there a legal ground for the domestic authorities to use the travel restriction mechanism after it has been established that there is no genetic link between the child and the commissioning parents? Would such an approach be in line with the principle of the best interest of the child that has no connection with the commissioning parents nor with their home country, in which he or she is trying to enter?

On the other hand, the limitation of use of the travel restriction mechanism, as proposed by the aforementioned academics, would, in fact, encourage the commissioning parents to circumvent domestic legislation prohibiting surrogacy.[46] If the only requirement is to (illegally) establish a genetic link between the child and one of the commissioning parents for the domestic authorities to permit the child to enter the country, then it is clear that the commissioning parents will accomplish their goal (although not speedily), despite the fact that their conduct represents a breach of mandatory rules of the domestic law (e.g. rules on the origin of the child that originate from the presumption "*mater semper certa est*" and/or rules prescribing the prohibition of surrogacy arrangements). If that is the case, then it seems that the end does justify the means!?[47] The proposed resolution of this problem represents a misuse of the best interest of the child principle in favour of the commissioning parents whose conduct has placed the domestic authorities in a stalemate position. This is because the commissioning parents essentially create conditions (e.g. birth of the child through cross-border surrogacy, establishment of a genetic link with one of the commissioning parents, application to enter the country with the child) in which any action by the domestic authorities that would be in line with the domestic legislation (e.g. the use of the travel restriction mechanism) would endanger the position of the child and possibly counteract his or her best interests.

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46 Beaumont; Trimmings, *op. cit.* note 14, p. 15

47 One could wonder what is the cause of all these problems? Is it the use of the travel restriction mechanism by the domestic authorities that restrict cross-border surrogacy (as a reflection of the legitimacy of their choice not to recognize surrogacy arrangements, because they consider them as immoral and illegal) or could it be that the problem is in the conduct of the commissioning parents who, despite the aforementioned prohibition of public order, travel abroad to conclude and carry out the cross-border surrogacy arrangements?

### 3.2. THE MECHANISM OF NON-RECOGNITION OF LEGAL PARENTAGE FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The second mechanism for restricting cross-border surrogacy arrangements is the non-recognition of legal parentage mechanism. This has been the preferred mechanism in member states of the Council of Europe and the EU (e.g. Germany, France and Italy) whose domestic law explicitly prohibits cross-border surrogacy by a prohibition of public order.

Another state of the Council of Europe and the EU with similar legislation is the Republic of Croatia. Under the Croatian Act on Medically Assisted Fertilization, all contracts concerning surrogate motherhood are considered to be null and void.[48] Bearing in mind that the entry of the commissioning parents as the legal parents of the child in the register of births would give effect to a cross-border surrogacy arrangement that was, by operation of law, null and void, Croatian authorities could refuse to recognise the commissioning parents as the legal parents of the child, thus creating the aforementioned mechanism. It is very important to distinguish the registration of the child in the register of births, form the registration of commissioning parents in the register of births as the legal parents of that child. This is because to refuse to register the child in the register of births would mean to undermine the child's right to be registered immediately after birth as prescribed by Article 7 of the CRC and to violate the non-discrimination principle prescribed in Article 2 of the CRC.[49] On the other hand, to refuse to register the commissioning parents as the legal parents of the child in the register of births would mean to act in accordance with the aforementioned prohibition of public order prescribed by the Croatian Act on Medically Assisted Fertilization and with the presumption "*mater semper certa est*" that is woven in the mandatory provisions of the Croatian Family Act regulating the origin of the child.[50] Such actions of the domestic authorities would also be in line with the provision of Article 35 of the CRC which obliges all states parties to take appropriate measures to prevent the sale of children[51], as well as with the provision of Article 2, Paragraph 1(f)

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[48] See note 5

[49] See also Achmad, *op. cit.* note 14, pp. 529-534

[50] Croatian Family law, the starting point of which is the presumption "*mater semper certa est*", perceives the surrogate mother (and her husband) as legal parents of the child and not the commissioning parents. See Croatian Family Act, Official Gazette, No. 103/2015, Article 58 and 82 in note 34

[51] Tobin and Achmad rightly conclude that the argument that cross-border commercial surrogacy amounts to the sale of children is convincing in many aspects. Both authors point to the provision of Article 2(a) of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol). See Achmad, *op. cit.* note 14, pp. 520-521; Tobin, J., *To prohibit or permit: What is the (human) rights response to the practice of International Commercial Surrogacy?*,

of the UN Convention on the elimination of all forms of discrimination against women which obliges all states parties to take appropriate measures to modify or abolish existing customs and practices which constitute discrimination against women.[52] Finally, such actions of the domestic authorities wouldn't amount to a violation of the right to respect for family life of the commissioning parents, as determined in the case law of the ECtHR.

The legality of the use of the non-recognition of legal parentage mechanism was brought before the ECtHR in the cases of Mennesson v. France and Labassee v France.[53] The cases concerned the refusal of domestic authorities to recognise the legal parent-child relationship that had been established in the United States (US) between the child and the commissioning parents. Both the Mennessons and the Labassees obtained children through commercial cross-border surrogacy arrangements in the US. The children were conceived using the sperm of the commissioning father and the ovum of a donor. Courts in California and Minnesota ordered that the commissioning parents are to be considered the children's legal parents and not the surrogate mother. After returning to France, domestic authorities refused to enter the US birth certificates in the French register of births, marriages and deaths thus creating the non-recognition of legal parentage mechanism. Domestic authorities argued that recording such entries in the French register of births, marriages and deaths would give effect to a cross-border surrogacy arrangement that was null and void under French law and would recognize a practice that was explicitly forbidden by a prohibition of public order.

The couples then brought the cases before the ECtHR claiming that the non-recognition of legal parentage mechanism caused the inability to obtain recognition of their legal parent-child relationship in France, which had already been established in the US. They argued that the use of such a mechanism was in collision with their right to respect for private and family life (Article 8 ECHR and Article

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International and Comparative Law Quarterly, British Institute for International and Comparative Law, *Vol.* 63, Issue 2, 2014, pp. 319, 326, 332-333; See also Beaumont; Trimmings, *op. cit.* note 14, p. 16; Micković, D., Ristov, A., *op. cit.* note 14, pp. 33-34; The case of Paradiso and Campanelli v. Italy, Application no. 25358/12, Judgment 24 January 2017 – concurring opinion of Judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, para 6

52 Many academics point out the problem of exploitation of surrogate mothers especially in developing countries. See Tobin, *op. cit.* note 51, p. 319. and 344.; Beaumont; Trimmings, *op. cit.* note 14, p. 16; Pluym, *op. cit.* note 40, p. 4; Micković, Ristov, *op. cit.* note 14, p. 33-34; Boele-Woelki, *op. cit.* note 1, p. 51; Fenton-Glynn, *op. cit.* note 14, pp. 546, 558

53 The case of Mennesson v. France, Application no. 65192/11, Judgment 26 June 2014. This case was heard simultaneously with the case of Labassee v. France, Application no. 65941/11, Judgment 26 June 2014; The non-recognition of legal parentage mechanism is also used in legal systems outside the EU (e.g. New Zealand and Norway). See Achmad, *op. cit.* note 14, pp. 523-524

7 of the Charter). The ECtHR examined the issues separately from the perspective of the applicants and from the perspective of the children.

With regard to the right to respect for family life, the ECtHR took into account that the applicants admitted that the obstacles, caused by the failure to obtain recognition of their legal parent-child relationship, were not insurmountable. The ECtHR acknowledged that the applicants failed to demonstrate that they had been prevented from the enjoyment in France of their right to respect for their family life. Consequently, the ECtHR considered that the French authorities had struck a fair balance between the interests of the applicants (commissioning parents) and those of the state and, therefore, there was no violation of their right to respect for family life.[54]

A different conclusion was reached with regard to the right to respect for private life of children. As French law refused to recognise the legal parent-child relationship between the commissioning parents and the children, the ECtHR found that the children were in a state of "legal uncertainty" as they could not obtain the nationality of the commissioning parents, nor did they have the right to inherit the commissioning parents as descendants (just as legatees). Considering the fact that the ECtHR identified legal parentage, nationality and the right to inherit as relevant elements of children's identity and taking into account the fact that the right to establish identity is encompassed within the children's right to respect for private life, the ECtHR concluded that children's right to respect for their private life was considerably affected and that the situation was irreconcilable with the paramountcy of the best interests of the child principle as prescribed in Article 3 of the CRC and Article 24 of the Charter.[55] That is why the ECtHR held that by preventing the recognition of the legal parent-child relationship between the children and the commissioning father as their genetic father, France had overstepped the margin of appreciation and had violated the children's right to respect for their private life as prescribed in Article 8 of the ECHR and in Article 7 of the Charter.

The ECtHR's reasoning from Mennesson and Labassee was approved in the most recent cases of Foulon and Bouvet v. France.[56] The ECtHR reiterated that children's right to respect for private life had been violated by the refusal of domestic authorities to transcribe their foreign (Indian) birth certificates onto the French

[54] The case of Mennesson v. France, Application no. 65192/11, Judgment 26 June 2014., para 92-94; The case of Labassee v. France, Application no. 65941/11, Judgment 26 June 2014, para 71-73

[55] The case of Mennesson v. France, Application no. 65192/11, Judgment 26 June 2014, para 96-100.; The case of Labassee v. France, Application no. 65941/11, Judgment 26 June 2014, para 75-79

[56] The case of Foulon and Bouvet v. France, Application nos. 9063/14 and 10410/14, Judgment 21 July 2016

register of births, marriages and deaths, on the grounds that children were borne through cross-border commercial surrogacy arrangements that were considered to be null and void and were explicitly prohibited in France. In both these cases, the commissioning father was, in fact, the genetic father of the children concerned.

It appears that the genetic link with the commissioning father was framed by the ECtHR as the crucial component that was necessary and sufficient to provide protection for children's private life.[57] It is clear from the judgment that once the genetic link is proved, domestic authorities are obliged not to use the non-recognition of legal parentage mechanism.[58] This would mean that member states of the Council of Europe and the EU that prohibit both domestic and cross-border surrogacy, refusing to recognise the legal parent-child relationship that has been established abroad, will have to change course to act in accordance with Article 8 of the ECHR and Article 7 of the Charter (bearing in mind the content of the provision of Article 52, Paragraph 3 of the Charter).[59] It seems that the only way for member states to prevent a violation of children's right to respect for private life is to legally recognize the parent-child relationship established abroad between a child born through cross-border commercial surrogacy and his or her biological parent.[60]

However, the following question stands: Is there a legal ground to recognize the legal parent-child relationship between the child and the genetically unrelated commissioning parent, e.g. the commissioning mother? If we consider the fact that the final goal of the commissioning parents is for both of them to be entered into the birth registry of the child as his or her parents (despite the fact that only the father has a genetic link with the child), such a development would be contrary to the presumption "*mater semper certa est*" on which the establishment of legal motherhood is traditionally based.[61] Another problem with such a solution is that the child won't have any information available to him about his genetic mother (e.g. surrogate mother and/or the ovum donor). The situation in which the child cannot trace his or her origin is contrary to the right of the child to know his or her origin as guaranteed by Article 7 of the CRC. Given the fact that the biologi-

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57 See Beaumont; Trimmings, *op. cit.* note 14, p. 5; Fenton-Glynn, *op. cit.* note 14, p. 554; Pluym, *op. cit.* note 40, p. 3

58 See Beaumont; Trimmings, *ibid.,* pp. 9, 17; Fenton-Glynn, *op. cit.* note 14, pp. 555, 561-562; Pluym, *op. cit.* note 40, p. 4

59 See note 30

60 Beaumont; Trimmings, *op. cit.* note 14, pp. 9, 17; Fenton-Glynn, *op. cit.* note 14, pp. 555, 561-562; Pluym, *op. cit.* note 40, p. 4

61 Beaumont; Trimmings, *ibid.,* p. 10

cal parentage is a part of the child's identity, the child's right to preserve his or her identity, as prescribed by Article 8 of the CRC, would also be undermined.[62]

The Mennesson/Labasse approach of the ECtHR will have significant consequences on member states of the Council of Europe and the EU regarding their domestic legislation on cross-border surrogacy. Some academics have rightly observed that the ECtHR's approach indirectly challenges the member states choice to outlaw surrogacy and compels them to accept the legal effects of cross-border commercial surrogacy arrangements.[63] We believe that such a position of the ECtHR amounts in essence to a denial of freedom and legitimacy of each member states choice not to recognise surrogacy arrangements and to view them as immoral and illegal.[64] We wonder does the ECtHR have the authority to, albeit in an indirect way, interfere with a member states choice not to recognise the legal effects of surrogacy arrangements (especially the commercial ones) or is that a matter that falls within the exclusive competence of member states to regulate national substantive family law (e.g. the question of the origin of children)? We believe that systems of substantive family laws of member states of the Council of Europe and the EU are national systems in which member states continue to retain exclusive competence to create their national substantive family law as they see fit and that the ECtHR should resist the temptation to act as "a back door legalisation of surrogacy".[65] [66]

If we accept the Mennesson/Labasse approach of the ECtHR, which undermines the presumption "*mater semper certa est*" on which the establishment of legal

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62 Boele-Woelki, *op. cit.* note 1, pp. 49-50, Achmad, *op. cit.* note 14, pp. 527, 529; Beaumont; Trimmings, *ibid.,* pp. 9, 17

63 Beaumont; Trimmings, *ibid.,* p. 11

64 It should be noted that in both judgments (Mennesson/Labassee) freedom of the member states to outlaw surrogacy was in fact acknowledged by the ECtHR (see Mennesson v. France, no. 65192/11, 26 June 2014, § 79, and Labassee v. France, (no. 65941/11), 2 June 2014, § 58). See joint partly dissenting opinion of judges Raimondi and Spano in the Case Of Paradiso and Campanelli v. Italy, Application No. 25358/12, Judgment of 27 January 2015, para 15; Beaumont; Trimmings, *op. cit.* note 14, p. 11, foonote 65

65 See Yetano, *op. cit.* note 32, pp. 179-180; Beaumont; Trimmings, *ibid.*, p. 12; Majstorović, I., *Obiteljsko pravo kao različitost u jednistvu: Europska unija i Hrvatska*, in: Korać Graovac, A., Majstorović, I. (eds.), Europsko obiteljsko parvo, Narodne novine, Zagreb, 2013, p. 14; Majstorović, I., *Europski pravni kontekst i značenje za hrvatsko materijalno obiteljsko pravo*, Godišnjak Akademije pravnih znanosti Hrvatske, *Vol.* 4, No. 1, 2013, p. 88.; Šimović, I., Ćurić, I., *Europska unija i obiteljsko pravo međunarodnoprivatnopravni, procesnopravni i materijalnopravni aspekti*, Ljetopis socijalnog rada, *Vol.* 22, No. 2, 2015, pp. 176-177, 185

66 Some academics consider that "*The ECtHR jurisprudence will thus become a vehicle of the pro-surrogacy lobby groups that have commercial interests in the area of surrogacy in the receiving countries*". See Beaumont; Trimmings, *ibid.,* p. 12

motherhood is traditionally based[67], the ECtHR is *de facto* interfering in the creation of substantive family law of the member states. For example, if Croatia as a member state prohibits both domestic and cross-border surrogacy and, despite that, still has to legally recognize the parent-child relationship established abroad between a child born through cross-border commercial surrogacy and his or her biological parent, then the ECtHR has in fact introduced a new mode of acquisition of parental care which has not existed within Croatian family law – acquisition of parental care through cross-border surrogacy arrangements. So far, parental care has been *ex lege* acquired exclusively by: a) parents at the time of the birth, on the basis of the child's origin, through three different systems – presumption of maternity and paternity, acknowledgement of paternity[68] and the establishment of maternity and paternity by a court decision (Article 91 in connection with Articles 58-60. and Articles 82-83.), b) adoptive parents on the basis of the adoption decision that has become final.[69] It seems that the Mennesson/Labasse approach of the ECtHR has indeed introduced a fourth system of acquisition of parental care by the commissioning parents – through cross-border commercial surrogacy arrangements. We believe that the consequences of such an approach largely overreach beyond the ECtHR's authority, because it's competence concerning substantive family law of member states is clearly non-existent.[70] Finally, such an approach is not suitable to tackle a complex phenomenon such as surrogacy because it does

[67] Yetano rightly points out that such an approach is „*…especially contradictory in the domain of family law, which is, for the most part, composed of rules that are purportedly mandatory…*" and goes on to conclude that those rules of substantive family law, in fact, become "*semi-mandatory*". See Yetano, *op. cit.* note 32, p. 179; It has to be emphasized that one of the main characteristics of Croatian family law, including the regulation of the origin of the child, is regulated by mandatory rules. See Alinčić *et al.*, *op. cit.* note 2, p. 4

[68] The possibility of acquiring parental care through the system of acknowledgment of maternity has been abolished in the Croatian Family Act (Official Gazette, No. 103/2015) because the legislator was afraid of the possibility of misuse of this institute for the purpose of establishing maternity of a child borne through cross-border surrogacy in favour of the commissioning mother (bearing in mind that Croatian Act on Medically Assisted Fertilization explicitly prohibits domestic and cross-border surrogacy). See Explanation of the final draft of the proposal of the Family Act, p. 16, [https://mdomsp.gov.hr/userdocsimages/arhiva/files/71832/Obrazlo%C5%BEenje%20Nacrta%20prijedloga%20Obiteljskog%20zakona-11.9.2013..pdf] Accessed 26.03.2019

[69] See Korać Graovac, A., *Od zajedničkog do samostalnog ostvarivanja roditeljske skrbi i natrag – kako zaštititi prava djece i roditelja*, Godišnjak Akademije pravnih znanosti hrvatske, *Vol.* 8, No. special edition, 2017, p. 54

[70] Yetano rightly concludes that "*The ECJ and the ECHR are stopping states from effectively regulating family law issues, without nonetheless providing an alternative regulation, throwing the field into disarray. This is not something that should be encouraged, for whatever the view one may have on family law issues, this is a domain that needs limits and careful thought.*" See, Yetano, *op. cit.* note 32, pp. 180, 192

not address some serious issues that arise from cross-broder commercial surrogacy (e.g. dual treatment of surrogacy arrangements).[71]

## 4. CHILDREN'S RIGHTS AS THE SUBJECT OF EU SURROGACY POLICY

The practice of the ECtHR has shown that some mechanisms that aim to prevent cross-border surrogacy, which is prohibited by legal norms of the domestic legal systems, are not sufficient to protect the best interests of the child.[72] We find the reason for this standpoint in the notion that the ECtHR in its effort to protect the best interests of the child is actually legalizing surrogacy by enabling that the commissioning parents become legal parents.

As the EU law does not specifically regulate surrogacy, many questions regarding the authorization, prohibition or management of surrogacy arrangements and the protection of the parties involved have never been answered by the EU legislator. Although the legal regulation of the cross-border surrogacy arrangements remains largely absent, there is a series of recent recommendations that point to prohibit surrogacy arrangements from the standpoint of children's right protection.

Thus, in 2010, the Special Commission of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption expressed its concern over the uncertainty surrounding the status of the children who are born as a result of surrogacy arrangements.[73] That triggered the Hague Conference on Private International law (HCPIL) to start the "Parentage/ Surrogacy Project" with an aim to gather country information and draft reports with a view to the creation of an instrument regarding the cross-border surrogacy.[74] The HCPIL made announced report at the end of 2018 where it stressed that the absence of uniform rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for the

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[71] Concerning the problem of dual treatment of surrogacy arrangements in member states that prohibit such arrangements see: Beaumont; Trimmings, *op. cit.* note 14, p. 11-12; Fenton-Glynn, *op. cit.* note 14, p. 564-566

[72] According to recent comparative studies, only the United Kingdom, Greece, Romania and Portugal expressly allow surrogacy and even then exclusively within the confines of strict regulation. See Thomale, C., *State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?,* Journal of Private International Law, *Vol.* 13, Issue 2, 2017, p. 464

[73] Blauwhoff, R.; Frohn, L., *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, in: C. Paulussen *et al.* (eds.), Fundamental Rights in International and European Law, 2016, p. 218

[74] See the relevant documentation the website of the Hague Conference on Private International law, [www.hcch.net] Accessed 28.03.2019

children.[75] The report also recalled that uniform rules could assist the Member States in resolving cross-border surrogacy conflicts and could introduce safeguards for the prevention of fraud involving public documents while ensuring that the diverse substantive rules on legal parentage of the Member States are respected.[76]

In 2013, the European Parliament (EP) published a study on the regime of surrogacy in the Member States, which deal with some important aspects of the cross-border surrogacy arrangements of the EU regime.[77] Whatever the nature of the EU regime, the study suggested that one of the principal aims, which it should seek to deliver, is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.[78]

The European Parliament (EP), in its Resolution of 5 April 2011 on priorities and outlines of a new EU policy framework to fight violence against women (2010/2209(INI)) and in Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), stressed that surrogacy commodifies children, and violates the legal norm of the CRC, which protects a child's "right to know and be cared for by his or her parents".[79] Further, the EP pointed that the surrogacy also violates the European Convention on Human Rights and Biomedicine, which in Article 21 prescribes that "the human body and its parts shall not, as such, give rise to financial gain."[80]

Since 2014, the protection of children's right in cross-border surrogacy arrangements was the subject of discussion at Committee on Social Affairs of the Parlia-

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75 The Report of the Experts' Group on the Parentage / Surrogacy Project, [https://assets.hcch.net/docs/c25b558d-c24e-482c-a92b-d452c168a394.pdf] Accessed 28.03.2019

76 *Ibid.*; In March 2019 it will be determined whether work on "The Parentage/Surrogacy Project" will go forward. [http://conflictoflaws.net/2018/reports-of-hcch-experts-groups-on-the-surrogacy-parentage-and-the-tourism-projects-available/] Accessed 28.03.2019

77 Brunet, L.; Carruthers, J.; Davaki, K.; King, D.; Mccandels, J., *A comparative study on the regime of surrogacy in the EU Member States*, European Parliament, 2013, p. 191, [http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL] Accessed 28.03.2019.; Blauwhoff; Frohn, *op. cit.* note 73, p. 213

78 *Ibid.*

79 European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI)), [http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0127+0+DOC+XML+V0//EN]; Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), [http://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.html?redirect] Accessed 28.03.2019.; See Article 7(1) of the CRC

80 Article 21 of the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, [https://rm.coe.int/168007cf98] Accessed 28.03.2019

mentary Assembly of the Council of Europe (PACE). The PACE had a task to adopt the draft resolution "Human Rights and ethical issues related to surrogacy" that raised concerns about the practice of surrogacy, in particular commercial surrogacy, whose unregulated nature poses a serious problem regarding children's rights as it open opportunity for developing of the black market of baby selling.[81] The two versions of the report regarding the draft resolution were made and they were both rejected by the PACE Social Affairs Committee in 2016 as they were pure guidelines how to protect children born from surrogacy, without explicitly condemning the practice of surrogacy itself.[82]

The European citizens and the international collective group *No Maternity Traffic* had the decisive role in rejecting draft resolution as they gathered over 100,000 signatures requesting to explicitly condemn all forms of surrogacy.[83] This petition was validated by the Council of Europe and the Bureau of the Parliamentary Assembly and taken in to account during the debates.[84]

All these EU policy issues regarding cross-border surrogacy are only showing us that, although children's rights perspective takes an important role in prohibiting surrogacy arrangements, we can expect that EU will be soon affected with new efforts that will strive to legalize surrogacy arrangements by presenting to the public that the children's rights will be worthily protected. This kind of practice is actually *a "Trojan horse" which offers provisional protection of children's rights, without condemning the practice of surrogacy. Therefore, the EU institutions have to be very cautious as such practice is opposed to the child's best interest and abuses children by causing them irreparable damage.*[85]

## 5. CONCLUSION

Surrogacy is presented as a method of medically assisted reproduction, among others, which meant to help couples who cannot naturally have children. Although

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[81] Human rights and ethical issues related to surrogacy, [https://agendaeurope.files.wordpress.com/2015/04/surrogacy-preliminary-report-3.pdf] Accessed 28.03.2019; Council of Europe Rejects Surrogacy recommendations: Alliance VITA's reaction, [https://www.alliancevita.org/en/2016/10/council-of-europe-rejects-surrogacy-recommendations-alliance-vitas-reaction/] Accessed 28.03.2019

[82] *Ibid.*; On 11 October, the Council of Europe must reject the recommendation on surrogacy, 2016, [http://www.abolition-gpa.org/2016/10/07/on-11-october-the-council-of-europe-must-reject-the-recommendation-on-surrogacy//] Accessed 28.03.2019

[83] Maternité de substitution : No Maternity Traffic salue le rejet de la recommandation par le Conseil de l'Europe. [https://www.nomaternitytraffic.eu/cp-maternite-de-substitution-no-maternity-traffic-salue-le-rejet-de-la-recommandation-par-le-conseil-de-leurope/] Accessed 29.03.2019

[84] *Ibid.*

[85] *Ibid.*

surrogacy is prohibited among most of member states, cross-border surrogacy enables couples or single persons to bypass domestic legislation in order to become parents. However, the surrogacy arrangements create a situation that is not only legally but as well ethically doubtful as they contribute that humans are treated as commodities which, among others, disregards children's rights in many aspects.

Besides the notion that cross-border surrogacy arrangement treats the child as an object of a law, which raises deep ethical resentment in the many member states, they are calling into question the idea of the legal parentage especially in cases when there is no genetic link between the child and the commissioning parents. Thus, the surrogacy arrangements can lead to a situation where as many as five people can claim a parental status over the child: the commissioning parents, the genetic mother and father, and the surrogate.

The law considers as parents those persons who are entitled to the parenthood by the law. The maternal affiliation of the child is usually based solely on the fact of the birth of the child, so the birth mother is presumed to be the legal mother of the child (lat. *mater semper certa est*). On the contrary, the paternal affiliation may be established by acknowledgement or a juridical decision, if it is not established by marriage with the mother. However, the cross-border surrogacy arrangements represent the problem regarding the determination of legal parentage as the commissioning parents usually do not fulfil assumptions for creating a parent-child relationship; or they cannot gain entry to home state to begin such a process; or they enter the home state, but the child is then removed into public care.[86] In order to prevent bypassing of the legal norms that prohibit cross-border surrogacy member states created two mechanisms: the travel restriction mechanism and the mechanism of non-recognition of legal parentage. However, both mechanisms have a negative impact on the best interest of the child as they aim to protect the domestic legal system and leave children without legal parents. Such domestic practice is the subject of dispute before the ECtHR as it represents a serious threat to children's rights (e.g. right to know his/her parents or right to identity). The ECtHR took a stand that is in the child's best interest to seek for the genetic link between the child and at least one of the commissioning parents (usually the father) in order to create a legal relationship between them. Although this practice has a goal to protect the best interest of the child, this practice contributes to bypassing the domestic legal norms that prohibit surrogacy arrangements. Additionally, it opens the possibility for other commissioning parent (e.g. mother) who doesn't have a genetic link to become a legal parent. This is especially applicable in Croatia as the Article 185 of the Family Act prescribes that the child could be

86 Achmad, *op. cit.* note 15, p. 85

adopted either by spousal or non-marital partners together, by one spouse or non-marital partner if the other spouse or non-marital partner is the parent or adoptive parent of the child, and one spouse and non-marital partner with the consent of the other spouse.

The EU policy regarding surrogacy arrangements still aims to prohibit surrogacy but recently there were some unsuccessful attempts of introducing altruistic surrogacy under the notion of the protection of the best interest of the child. However, it is important for a legislator to have in mind that every type of surrogacy arrangement endangers the child's rights and his best interests. The reason for such a standpoint is arising from the notion that surrogacy separates the biological, social and legal relationship between the child and his/hers parents by introducing into their legal relationship persons who are not traditionally the legal subjects of that relationship and thereby contributing to the child's lack of the right "to know and be cared for by his / her parents". Therefore, when the ECtHR, with the best intentions for child's interests, "legalizes" surrogacy arrangements, its judgment is obligatory for the member states and creates the perfect environment for a "back door" approach in changing domestic legislation. For all those reasons, the prohibition of all forms of surrogacy would be the only complete solution in favor of respecting rights and dignity of not only a child but of every human being as well.

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# THE PROTECTION OF ADULTS IN THE EUROPEAN UNION

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***ABSTRACT***

*A far-reaching freedom of movement of persons in the European Union imposes the EU legislator's obligation to create a legal framework for regulating an increasing number of aspects arising from cross-border movements. The current legal arrangement of these aspects is to a great extent related to the protection of family life and the rights of children. However, strong migrations have also affected people who are considered vulnerable in terms of their disability or age. Travelling that has become easier, medical treatments available abroad, a desire to live in more attractive or more affordable countries in retirement, and a change of lifestyle in general, have made the elderly move more frequent during the past decade. Cross-border proceedings arising from the movement of older people have become more common before the courts of Member States. It is necessary to ensure that protective measures directed at vulnerable adults, which have been imposed by the authorities of one Member State, have their effect in another Member State. This situation implies the adoption of the rules of private international law that will regulate the issues as to authorities of which Member States are responsible for adopting protective measures, which law is applicable to such measures, under which conditions these measures are to be recognized in that other Member State and the cooperation of the competent authorities. These issues are regulated by the Convention on the International Protection of Adults, adopted within the framework of the Hague Conference on Private International Law. While, on the one hand, the European Union is a Contracting State to the UN Convention on the Rights of Persons with Disabilities and is obliged to take its standards into account in its policies and legislation, on the other hand, very few Member States are Contracting Parties to the Convention on the International Protection of Adults. At EU level, there are currently only recommendations for the regulation of private international law aspects related to mobility of vulnerable adult persons, which also include the adoption of a special regulation that will govern these issues. However, among the existing recommendations, the winning attitude is the one that calls for Member States to ratify the Convention on the International Protection of Adults. Starting with the hypothesis that the European Union does not provide any effective legal framework for the protection of vulnerable adults in cross-border cases, this paper will examine whether there is room for the introduction of enhanced mechanisms for the protection of adults at EU level and make proposals accordingly.*

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***Keywords**: Convention on the International Protection of Adults, Convention on the Rights of Persons with Disabilities, disability, adult, impairment or insufficiency of personal faculties, protective measures*

## 1. INTRODUCTION

More than 80 million people in the European Union (hereinafter: the EU) have some kind of disability, which to a certain extent limits their participation in social and economic life.[1] Disability is universal, and the risk of a certain kind of physical disability due to injury or disease threatens all persons in different proportions and time periods.[2] There is no consensus about a unique and fully appropriate term for a "person with disability".[3] Guided by the definition provided by the World Health Organization, disability is an umbrella term, which, in the context of health experience, implies any restriction or lack of ability to perform an activity in the manner or within the range considered normal for a human being. Disability is a wider term than impairment. While impairment is concerned with individual functions of particular parts of the body, disability refers to the body as a whole, with emphasis placed on the ability to perform the activity.[4] What is unquestionable is the fact that people with disabilities belong to a group of vulnerable persons.[5] Discrimination of persons with disabilities throughout history and their marginalized position in society makes them a particularly vulnerable group in society. Vulnerability implies greater exposure to the risk of harm and human rights violations, given their cognitive, intellectual and physical impairments.[6]

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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. European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, 15.11.2010, p. 3

2 Weisbrock, A., *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the 'Social Model'?*, in: Ippolito, F.; Iglesias Sánchez, S. (eds.), Protecting Vulnerable Groups, Hart Publishing, London, 2015, p. 71

3 See: Marinić, M., *Jesu li osobe s invaliditetom „invalidi"? Pitanje konceptualne naravi, ali i potreba izjednačavanja mogućnosti*, Društvena istraživanja: časopis za opća društvena pitanja, *Vol.* 17, No. 1-2, 2008, pp. 93-94

4 World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps, A manual of classification relating to the consequences of disease*, Published in accordance with resolution WHA29.35 of the Twenty-ninth World Health Assembly, May 1976, [https://apps.who.int/iris/bitstream/handle/10665/41003/9241541261_eng.pdf;jsessionid=67608BFED5E7593D1015133963FDB238?sequence=1] Accessed 15.02.2019

5 Poretti, P., *Vulnerable Person*, in: Bartolini, A.; Cippitani, R.; Colcelli, V. (eds.), Dictionary of Statuses within EU Law, Springer International Publishing, 2019, p. 622

6 Nifosi-Sutton, I., *The Protection of Vulnerable Groups under International Human Rights Law*, Routledge, London, 2017, p. 4

Disability has traditionally been seen only as a purely medical issue, not the issue of human rights protection. The legal framework for the protection of persons with disabilities has long lagged behind the protection of human rights of other vulnerable groups - the protection of women and children. Although attention was paid to persons with disabilities very early within the Council of Europe, i.e., in the European Social Charter,[7] this framework remained legally non-binding. By significantly promoting the human rights of persons with disabilities, the 2006 United Nations Convention on the Rights of Persons with Disabilities (hereinafter: the UN Convention 2006)[8] has been the significant milestone in protection of their rights. Since then there has been a shift in the protection of individual rights of persons with disabilities and the inclusion of the protection of the rights of persons with disabilities in international and regional human rights instruments.[9]

Real challenges for competent authorities, and hence the need for an appropriate international and national legal framework, arise when the issues of the protection of persons with disabilities leave the public law framework as a result of the cross-border movement of natural persons. European countries are faced with the challenge of the growing number of older people. Improved medical technology has increased life expectancy. An increase in life expectancy has resulted in more and more people suffering from age-related diseases such as Alzheimer's disease and dementia.

Strong migration flows within the EU have also affected persons who can be considered vulnerable by their age or disability. There are common situations in which younger people, when searching for a job, leave their country of origin and decide to spend the rest of their lives in the state of their new habitual residence. On the other hand, many people choose to leave their homes after retirement. Such migration at older ages is caused by various reasons; e.g. these people want to avoid paying high taxes, circumvent national succession law, or spend the rest of their lives in a more temperate climate or in a more affordable place.[10] In addition to the aforementioned mobility trends of the elderly, young adults with disabilities

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7 Council of Europe, *European Social Charter*, 18 October 1961, ETS 35

8 The United Nations Convention on the Rights of Persons with Disabilities, Treaty Series 2515 (2006): 3

9 Weisbrock, *op. cit.*, note 2, p. 72

10 Von Hein, J., *Chapter A.4: Adults, protection of*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.) Encyclopedia of Private International Law, Cheltenham: Edward Elgar Publishing, 2017, pp. 298-300

or those who are incapable of making decisions for themselves due to e.g. injury are also in need of protection.[11]

The rules of private international law rules should be responsive to significant demographic and social changes in developed countries, including the examples of cross-border movement of adults.[12] The Convention on the International Protection of Adults (hereinafter: the Hague Convention 2000)[13] was adopted within the framework of the Hague Conference on Private International Law (hereinafter: HCCH), and it regulates the issues of jurisdiction, applicable law, recognition and enforcement, including the cooperation between competent authorities. At EU level, there are no uniform rules of private international law in these situations. Unlike the UN Convention 2006, which was ratified by the European Union as a whole, the Hague Convention 2000 has been ratified by only 10 EU Member States.[14] A lack of uniformity in dealing with cross-border situations leads to legal insecurity and unpredictability. A large number of difficulties arising from cross-border movement of vulnerable adults will be solved if the EU ratifies the Hague Convention 2000. In spite of ratification, some issues may remain ambiguous, but there is room for their regulation within the framework of European private international law.

The paper consists of two parts. In the first part, the standards for the protection of persons with disabilities in the EU will be analyzed and the EU's efforts to adopt a private international law framework for the protection of vulnerable adults will be presented.[15] The second part includes an analysis of the solution offered by the Hague Convention 2000 with an emphasis placed on its scope of application,

[11] Curry-Sumner, I., *Vulnerable Adults in Europe*, EPRS European Parliamentary Research Service, Protection of Vulnerable Adults. European Added Value Assessment. Accompanying the European Parliament's Legislative Initiative Report (Rapporteur: Joëlle Bergeron), Study, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf] Accessed 15.01.2019

[12] See: Weller, M., *Mutual trust: in search of the future of European Union private international law*, Journal of Private International Law, *Vol.* 11, No. 1, 2015, pp. 64-102

[13] HCCH, Convention of 13 January 2000 on the International Protection of Adults, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=71] Accessed 17.01.2019

[14] The Convention has been ratified by Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia, Portugal and the United Kingdom. HCCH, Convention of 13 January 2000 on the International Protection of Adults – Status table, [https://www.hcch.net/en/instruments/conventions/status-table/?cid=71] Accessed 05.03.2019

[15] The legal instruments elaborated within this paper use a different terminology. The UN Convention 2006 uses the term "persons with disabilities" while the Hague Convention 2000 uses only the term "adult". When elaborating the specific legal instrument, the terminology from this instrument will be used in respective chapter. In general part of the paper the term "vulnerable adults" will be used as a term which corporates aforementioned terminology

jurisdiction criterions, law applicable to the mandates in case of incapacity and conditions for the recognition and enforcement.

The hypotheses of the paper are that at EU level there is no legal framework for the effective protection of vulnerable adults in cross-border cases and that the adoption of uniform private international law rules at EU level will contribute to the level of protection of this vulnerable group of people. In addition to presenting the current level of protection, the aim of the paper is to point to legal gaps currently in place and to check if there is a possibility of adopting enhanced adult protection mechanisms at EU level and offer solutions accordingly.

## 2. STANDARDS FOR THE PROTECTION OF ADULTS IN THE EUROPEAN UNION

The existing legal framework on cross-border protection of adults is dispersed and consists of a complex mosaic of diverse instruments which include international, European and national legal sources.[16] This chapter will show various international and EU instruments currently applicable to adult protection situations.

In addition to classification into international and EU instruments, these instruments may also be classified in the light of the nature of public or private international law and with regard to whether these instruments are specifically related to the protection of adults. It is also important to note that certain international agreements that will be mentioned have not necessarily been ratified by all Member States.

### 2.1. UN Convention 2006

The UN Convention 2006 is the first international legally binding instrument setting minimum standards for the protection of the rights of persons with disabilities,[17] and it is also the first human rights convention to which the EU is a contracting party. The EU signed the Convention in March 2007, and it entered into force on 22 January 2011. In accordance with the binding nature of the UN Convention 2006, all European legislation, policies and programs must comply with the obligations established by the Convention. The obligation to implement

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17 MacKay, D., *The United Nations Convention on the Rights of Persons with Disabilities*, Syracuse Journal of International Law and Commerce, *Vol.* 34, 2007, pp. 323-331

the Convention is divided between the EU and the Member States, given the scope of their respective competencies.[18]

The aim of the UN Convention 2006 is to protect and promote the rights and dignity of persons with disabilities.[19] The UN Convention 2006 does not create any new right, but confirms and ratifies the existing ones.[20] Its importance derives from the fact that it imposes obligations on the Contracting States as to how to ensure the full realization of individual rights of persons with disabilities.[21] In order to ensure that the Contracting States act in accordance with the UN Convention 2006 and implement it effectively, they are required to establish a framework to promote, protect and monitor its implementation.[22] As a party, the EU has defined such a framework for issues within its competence. The EU framework complements the national monitoring mechanisms, which are responsible for promoting, protecting and monitoring the implementation of the Convention in EU Member States.

Following the EU Convention Initial Report,[23] in 2015, the Committee on the Rights of Persons with Disabilities adopted its Concluding observations on the implementation of the UN Convention 2006 in the EU. In view of access to justice and the freedom of movement for adults, the Committee recommended the EU to take appropriate action to combat discrimination against persons with disabilities when accessing justice, in such a way as to ensure full process adaptation and funding of training for those working in the field of administration of justice.[24] The Committee expressed its concern about the obstacles faced by persons with disabilities and other persons whose family members are persons

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[18] The UN Convention 2016 is a mixed agreement. Each of the parties involved, i.e. contracting states, should have ratified the Convention. All EU Member States signed and ratified the Convention, while 22 EU countries have also signed and ratified the Optional Protocol. United Nations, Treaty Collection, Status. [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4] Accessed 22.02.2019

[19] Hendricks, A., *UN Convention on the Rights of Persons with Disabilities*, European Journal of Public Health, *Vol.* 14, 2007, p. 276

[20] Korać Graovac, A.; Čulo, A., *Konvencija o pravima osoba s invaliditetom - novi pristup shvaćanju prava osoba s duševnim smetnjama*, Zbornik Pravnog fakulteta u Zagrebu, *Vol.* 61., No. 1, 2011, pp. 65-109

[21] UN Convention 2006, *op. cit.*, note 8, Art. 3

[22] *Ibid.*, Art. 33

[23] United Nation, Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention Initial report of States parties due in 2012 European Union, CRPD/C/EU/1, Distr.: General 3 December 2014, [https://documents-dds-ny.un-.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement] Accessed 17.02.2019

[24] United Nations Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, CRPD/C/EU/CO/1, Distr.: General 2 October 2015, paras 38 and 39. [https://daccess-ods.un.org/TMP/4831370.41330338.html] Accessed 17.02.2019

with disabilities when moving to another Member State, regardless of the length of their stay. It also recommended that urgent action be taken at EU level to ensure that persons with disabilities and their families enjoy the right to freedom of movement at the same level as other persons do.[25]

Although the UN Convention 2006 is a legal instrument of public law, and the rights provided for and obligations imposed on the Contracting States are of substantive legal nature, one should not overlook the dimension of private law.[26] The Hague Convention 2000 has adopted a number of provisions laid down in the UN Convention 2006, in particular the rights to autonomy and independence of persons with disabilities, equality before the law, access to justice, freedom of movement and nationality, health and international cooperation.[27] Although the aim of the UN Convention 2006 is not to harmonize substantive law, these two instruments still interact since the Hague Convention 2000 ensures that the rights acquired by a person under the relevant national law of a Contracting State which are in accordance with the UN Convention 2006, are recognized in the other Contracting State.[28]

### 2.2. Regulation of Private International Law Issues of Adult Protection in the EU

In relation to the protection of adults in the EU from the perspective of private international law, there are currently various international, European and national instruments which apply, to some extent, to cross-border aspects of the protection of vulnerable adults. At the international level, the following three conventions of the HCCH deal with cross-border cases related to the protection of vulnerable adults: the Convention on the Prohibition and Related Protection Measures,[29] the Convention on the Law Applicable to Agency[30] and the Hague Convention 2000.

The EU does not provide for the legal framework on the adults protection. Some of the existing EU legislative can be applied to certain aspects that may arise from

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25 *Ibid.*, paras 48 and 49

26 Curry-Sumner, *op. cit.*, note 11, p. 37

27 HCCH, Outline Hague Protection of Adults Convention, [https://assets.hcch.net/docs/a3920f8f-ee66-470e-943b-cf6865af8226.pdf] Accessed 25.01.2019

28 *Ibid.,* p. 38

29 Unofficial translation of the title. HCCH, Convention du 17 juillet 1905 concernant l'interdiction et les mesures de protection, [https://www.hcch.net/en/instruments/the-old-conventions/1905-deprivation-of-civil-rights-convention] Accessed 27.01.2019

30 HCCH, Convention of 14 March 1978 on the Law Applicable to Agency, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=89] Accessed 27.01.2019

the situation of cross-border movement of adults. These instruments are however not specifically related to the protection of adults, i.e., Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),[31] 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 (recast) (Brussels I Regulation Recast),[32] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (Protection Measures Regulation)[33] and Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation).[34]

The most important instrument for the protection of vulnerable adults in cross-border situations is the Hague Convention 2000, a complementary private international law instrument that contains the rules referring to jurisdiction, applicable law and the international recognition and enforcement of protection measures. It was concluded on 13 January 2000 and it entered into force on 1 January 2009 between France, Germany and the United Kingdom (extend to Scotland only). The Hague Convention 2000 has been ratified by 12 states, of which 10 are EU Member States. Eight Member States have signed the Hague Convention 2000, but have not ratified it yet.[35]

Following the data presented above, there is concern that there are deficiencies in the protection of vulnerable adults in Europe in cross-border situations. In as early as 2008, in its resolution the European Parliament (hereinafter: the Parliament)

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[31] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6

[32] 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 [2012] OJ L351/ 1

[33] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4

[34] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/ 107

[35] The Convention was signed by Belgium, Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland. HCCH, Convention of 13 January 2000 on the International Protection of Adults – Status table [https://www.hcch.net/en/instruments/conventions/status-table/?cid=71] Accessed 05.03.2019

called on all Member States to ratify the Hague Convention 2000.[36] The European Commission (hereinafter: the Commission) is requested by the Resolution to report back to the Parliament and the EU Council on the implementation of the Hague Convention 2000 in the Member States, assess the possibility of the EU accession to the Hague Convention 2000 and submit a legislative proposal aimed at strengthening cooperation and improving recognition and enforcement of protection measures. In its reply, the Commission stated that the possibility of conducting a study on the Hague Convention 2000 with a view to considering other measures involving EU legislation would exist only when it were in force for more than a few years.[37] In the absence of the Commission's report on the implementation of the Hague Convention 2000, the Parliament launched its own new initiative for the protection of adults in 2015. It resulted in a report provided by the European Parliament's Committee on Legal Affairs, which included Added Value Assessment.[38]

In June 2017, the Parliament adopted a new Resolution on the Protection of Vulnerable Adults.[39] In this resolution, the Parliament emphasizes that the differences existing between the applicable law and a large number of competent courts jeopardize the right of vulnerable adults to the freedom of movement and residence in the Member State of their choice, as well as to have adequate protection for their property where such property is located in more than one Member State.[40] The Parliament calls on the Commission again to encourage those Member States which have not yet ratified the Hague Convention 2000 to do so as quickly as possible.[41] It calls on the Commission to submit to the Parliament and the EU Council, before 31 March 2018, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and man-

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[36] European Parliament, European Parliament resolution of 18 December 2008 with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)) [http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-638] Accessed 27.02.2019

[37] European Commission, Follow-up to the 2008 European Parliament resolution with recommendations to the Commission on the legal protection of adults: cross-border implications, SP(2009)988

[38] European Parliament, Protection of Vulnerable Adults European Added Value Assessment Accompanying the European Parliament's Legislative Initiative Report (Rapporteur: Joëlle Bergeron), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf] Accessed 27.02.2019

[39] European Parliament, European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)) [http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0235] Accessed 28.02.2019

[40] *Ibid.*, para G

[41] *Ibid.*, para 1

dates in anticipation of incapacity.[42] In its answer to this Resolution, the Commission states that the potential legislative initiative would be complementary to the Hague framework and that it would bring the desired results only if a sufficient number of Member States acceded to the Hague Convention 2000. It states that it will encourage Member States to accede the Hague Convention 2000, but also warns that consultations showed that the main reasons Member States have for the non-accession to the Hague Convention 2000 are a small number of cases the Convention applies to and the costs that the operation of the Convention may entail.[43]

The analysis of the Parliament's long-standing efforts to make the Commission adopt a legislative initiative for a special instrument aimed at regulating the international protection of adults does not indicate whether and when such an instrument is likely to be adopted. The only activity carried out by the Commission in this respect is to encourage Member States to ratify the Hague Convention 2000, as confirmed at the joint European Commission and HCCH on this topic, which was held in Brussels at the end of 2018.[44] Improvements in relation to the existing Hague Convention 2000 that could be brought by a specific instrument at EU level will be included in the description of the Hague Convention 2000 provisions in the next chapter.

## 3. HAGUE CONVENTION 2000

The Hague Convention 2000 can be linked to the Convention on the Prohibition and Related Protection Measures dating back to 1905. This Convention contained provisions on the applicable law and jurisdiction for personal status, where the nationality was primary connecting factor for identifying the applicable law and the criteria for establishing the jurisdiction. This Convention was ratified by only a few European countries and soon it became obsolete, primarily because of the nationality criterion.[45] After a long break in the regulation of protection measures, the HCCH dedicated themselves to the protection of children. Concepts developed in these conventions[46] have found their place in the Hague Convention

[42] *Ibid*., para 10

[43] European Commission, Answer - Protection of vulnerable adults - E-003844/2017, 30 August 2017

[44] HCCH, Vulnerable Adults – An Important Step Forward, [https://www.hcch.net/en/news-archive/details/?varevent=654] Accessed 25.02.2019

[45] Ruck Keene, A., *The Cross-border Protection of Adults: Hague 35*, in: Frimston, R., Ruck Keene, A., Van Overdijk, C., D Ward, A. (eds.), The International Protection of Adults, Oxford University Press, Oxford, 2015, p. 78

[46] HCCH, Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, [https://www.hcch.net/en/instruments/conventions/full-tex-

2000. For example, the concept of measures directed to the protection of person and property (of a child), the importance of making decisions in the best interests (of a child) as the basis of measures to be adopted by the authorities of the state which is not the state of habitual residence, and finally, the importance of cooperation manifested by setting up Central Authorities.[47]

The Preamble to the Hague Convention 2000 is very short; it consists of only four sentences. The fourth sentence states that "the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations". The concept of "the interests of the adult" is mentioned repeatedly in the text of the Hague Convention 2000. It should be distinguished from the concept of "the best interests of the child"[48] given in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: the Hague Convention 1996).[49] The literature suggests that these are two different concepts and that the aim of this preamble is to ensure that there is a balance between the autonomy of the adult's will and the protection of his or her interests, which is different from the concept of the best interests of the child.[50]

### 3.1. Scope of Application

The Hague Convention 2000 shall apply to situations in which there is an international element, for example, when property of an adult is located in another state. Other terms of application in the geographic context have not been set.[51] The Hague Convention 2000 follows the trends and accordingly, represents *loi*

t/?cid=39] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, [https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf] Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=69] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=70] Accessed 28.02.2019

47 Ruck Keene, *op. cit.*, note 45, p. 79

48 On the best interest of the child see: Župan, M., *The Best Interest of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?*, in: Liefaard, T., Sloth-Nielsen, J. (eds), The United Nations Convention on the Right of the Child. Taking Stock after 25 Years and Looking Ahead, Brill - Nijhoff, Leiden - Boston, 2017, pp. 213-230

49 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=70] Accessed 28.02.2019

50 Ruck Keene, *op. cit.*, note 45., p. 99

51 Von Hein, *op. cit.*, note 10, p. 23

*uniforme*; its rules on the applicable law also apply in cases where they refer to the law of a non-contracting state.

The Hague Convention 2000 applies to persons who have reached the age of 18 years.[52] This limit overlaps with the age limit of the Hague Convention 1996, which is applied to children until they reach the age of 18 years.[53] Such limit should help us avoid difficulties in delimiting the application of the two conventions in relation to the personal field of application. In addition, the Hague Convention 2000 shall also apply to measures in respect of an adult who had not reached the age of 18 years at the time the measures were taken.[54] Thus, the authorities competent under the Hague Convention 1996 that adopt a measure in relation to a child with disability will be able to envisage that these measures would continue to remain effective beyond the child's majority.[55] The effectiveness of these two instruments depends indeed on the ratification of the conventions themselves, and the continuity will only be maintained in those situations in which both states are parties to both conventions.[56] At EU level, this complementarity will only be achieved by all EU Member States ratifying the Hague Convention 2000, as all Member States are contracting parties to the Hague Convention 1996.[57]

The Hague Convention 2000 gives a definition of adults, determining how it applies to the protection of adults who are not in a position to protect their interests by reason of an impairment or insufficiency of their personal faculties. An accompanying Explanatory Report gives the interpretation of the terms "an impairment or insufficiency of one's personal faculties". It is stated that the Hague Convention 2000 does not apply to the protection of adult victims of violence, such as abused women. In such cases, at EU level, the protection can be achieved in accordance with the provisions of the Protection Measures Regulation.[58] Likewise, the Hague Convention 2000 shall not apply to persons with only physical disabilities, which is justified by the fact that a physical disability that is not accompanied by a mental disability does not bring persons into a situation in which they are unable to make

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52 Hague Convention 2000, *op. cit.*, note 13, Art. 2(1)

53 Hague Convention 1996, *op. cit.*, note 49, Art. 2

54 Hague Convention 2000, *op. cit.*, note 13, Art. 2(2)

55 Lagarde, P., Explanatory Report on the 2000 Hague Protection of Adults Convention, [https://www.hcch.net/en/publications-and-studies/details4/?pid=2951&dtid=3] Accessed 25.02.2019, para 15.

56 Curry-Sumner, *op. cit.*, note 11, p. 48

57 With effect from 1 January 2016 in Italy, the Convention on Measures for the Protection of Children is effective in all EU Member States

58 See: See: Dutta, A., *Cross-border protection measures in the European Union*, Journal of Private International Law, *Vol.* 12, No. 1, 2016, pp. 169-184

decisions and protect their interests.[59] On the other hand, such a position can be considered restrictive. Namely, a physical disability itself can justify the adoption of a protection measure if a person agrees that such measures should be taken.[60]

The Hague Convention 2000 provides for a list of measures to be imposed in relation to an adult. The list is not exhaustive. The scope of application of these measure encompasses a wide range of measures and deal in particular with: a) the determination of incapacity and the institution of a protective regime; b) the placing of the adult under the protection of a judicial or administrative authority; c) guardianship, curatorship and analogous institutions; d) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult; e) the placement of the adult in an establishment or other place where protection can be provided; f) the administration, conservation or disposal of the adult's property; g) the authorization of a specific intervention for the protection of the person or property of the adult.[61] The Explanatory Report states that it is possible that some of the measures listed above are not known in some legal systems. However, the provision in the Hague Convention 2000 does not make them available to all Contracting States, but only applicable only if they are provided for by the law applicable by the Convention.[62]

The Hague Convention 2000 also provides for certain issues outside its scope of application. Unlike a list of possible measures, this list is exhaustive. This means that any measure directed at the protection of an adult or his or her property not excluded by the Hague Convention 2000 is covered by its scope of application.[63] Certain issues are excluded from the scope of application of the Hague Convention 2000 because they have already been regulated by other Hague Conventions or because the application of the Hague Convention 2000 thereto would not be appropriate: a) maintenance obligations; b) marriage; c) property regimes in respect of marriage; d) trusts or succession; e) social security; and f) health. Other restrictions concern public law, and in those cases, the aim of the Hague Convention 2000 was not to impose limits on the states in terms of their jurisdiction in matters of key interest: [64] g) measures taken in respect of a person as a result of penal offences; h) asylum and immigration; and i) public safety. If in the context of any of the above questions the issue of adult representation is raised, the Hague

[59] Clive, E., *The New Hague Convention on the Protection of Adults*, Yearbook of Private International Law, *Vol.* 2, 2000, p. 5

[60] Von Hein, *op. cit.*, note 10, p. 24

[61] Hague Convention 2000, *op. cit.*, note 13, Art. 3

[62] Lagarde, *op. cit.*, note 55, para 18

[63] *Ibid.*, para 29

[64] *Ibid.*, para 32

Convention 2000 shall apply.[65] For example, an appointed representative may accept or renounce a succession on behalf of an adult, while the succession proceeding itself will be excluded from the scope of application of this Convention.[66]

### 3.2. Jurisdiction

The Hague Convention 2000 contains a set of rules for determining jurisdiction in situations falling within its scope of application. The judicial authorities of the state of habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.[67] The Contracting State in the territory where these adults are present as a result of their displacement has the jurisdiction for adults who are refugees and persons who, due to disturbances occurring in their countries, are internationally displaced. The same also applies to adults whose habitual residence cannot be established.[68] Concurrent or subsidiary jurisdiction appears in the form of nationality as a jurisdiction criterion.[69]

The Hague Convention 2000 provides for the possibility of a consensual transfer of jurisdiction from a Contracting State of habitual residence or the authorities of the state in whose territory refugees, displaced persons or persons whose habitual residence cannot be established are present to the authorities of certain other Contracting States, where this is in the interest of the adult. Jurisdiction may be transferred upon request from the authorities of either the Contracting State of habitual residence or another Contracting State. The request may relate to all or some aspects of such protection.[70] Finally, the Hague Convention 2000 stipulates that Contracting State where property of the adult is located has jurisdiction to take measures of protection concerning that property.[71]

#### 3.2.1. *Habitual Residence vs. Nationality*

The traditional approach, which prevails in most national jurisdictions, is that the authority of a state of which the adult is a national shall have jurisdiction to take measures for the protection of that person. The application of the law of the state of which the adult is a national, when this adult is habitually resident in another

[65] Hague Convention 2000, *op. cit.*, note 13, Art. 4(2)

[66] Von Hein, *op. cit.*, note 10, p. 24

[67] Hague Convention 2000, *op. cit.*, note 13, Art. 5

[68] *Ibid.*, Art. 6

[69] *Ibid.*, Art. 7

[70] *Ibid.*, Art. 8

[71] *Ibid.*, Art. 9

state, may cause difficulties. This often leads to delays in proceedings, higher costs, difficulties arising from the relationship between substantive and procedural law, and ultimately to a high level of legal insecurity. The Hague Convention 2000 chooses the principle of habitual residence as the primary jurisdiction criterion. This makes it equal to other conventions of the HCCH and European instruments of private international law.[72]

The Hague Convention 2000 stipulates that the authorities of the state of habitual residence of the adult shall have jurisdiction to take measures directed to the protection of the adult's person or property. In case of a change of the adult's habitual residence to another Contracting State, the authorities of the state of the new habitual residence have jurisdiction, without the conditions foreseen for the *perpetuation fori*.[73]

Subsidiary jurisdiction appears in the form of a nationality criterion.[74] It is provided for cases where the authorities of the state of which the adult is a national consider that they are in a better position to assess the interests of the adult. This jurisdiction criterion is quite limited. The authorities of the state of which the adult is a national are obliged to notify the authorities of the state of habitual residence of the adult. Circumstances may be envisaged under which this jurisdiction of the state of which the adult is a national shall not be exercised. These are cases in which the authorities having jurisdiction in accordance with general rules of jurisdiction, the rules of jurisdiction of the authorities of the state where the person is present or the rules of the transfer of jurisdiction, take all measures required by the situation, decide that no measures should be taken or when proceedings are pending before them. The measures taken by the state of which the adult is a national are time-limited, they shall cease to apply as soon as the aforementioned authorities having jurisdiction take a measure or decide that no measure shall be taken. This rule of jurisdiction does not apply to adults who are refugees and those who are internationally displaced due to disturbances occurring in the state of which the adult is a national. The reason for that is obvious. The aim of the Hague Convention 2000 is to avoid that the authorities of the state the adult has been forced to leave make decisions referring to the protection of adults.[75]

Although there is no turmoil in this arrangement, some difficulties may arise when applying the provisions. The first is related to the definition of the term "habitual

[72] Von Hein, *op. cit.*, note 10, p. 22

[73] Hague Convention 2000, *op. cit.*, note 13, Articles 5 and 6

[74] *Ibid*, Art. 7

[75] Lagarde, *op. cit.*, note 55, para 58

residence of an adult".[76] As is common, the Hague Convention 2000 does not define the term, which is a factual term.[77] The obvious need for further clarification of the concept of "habitual residence" is clearly expressed in the cases referring to the protection of children's rights, where in a large number of cases national courts have requested clarification of the term "habitual residence" from the Court of Justice of the European Union (hereinafter: CJEU).[78] It is to be expected that difficulties in practice will be shown in relation to the concept of "habitual residence of an adult", particularly when considering the fact that for an adult adaptation to a family environment can hardly be a relevant fact.[79] The concept of "habitual residence" is attractive because it does not represent a rigid legal concept, but a flexible factual concept that can satisfy every situation.[80] Providing any quantitative or qualitative definition of this concept in any convention would be to cast doubt on the interpretation of this expression in numerous other conventions it is used in.[81] Nevertheless, the lack of a commonly accepted definition of the term can indeed cause legal uncertainty. The concept of "habitual residence of an adult" could certainly be subject to the interpretation of the EU if a special instrument for the international protection of adults were adopted at EU level. This implies the interpretation by the CJEU in relation to the reference for a preliminary ruling, or the taking of a good solution adopted in the Succession Regulation, where in the recital of the Regulation the legislator introduced those indicators which might helpful when determining the habitual residence of the deceased.[82] The solution from the Succession Resolution has resulted with a consensus; it retains the flexibility of the concept, and the indicators given in the recital ensure a uniform interpretation of this concept.[83]

Another difficulty is the fact referring to a small number of states that are contracting parties to the Hague Convention 2000. As currently only 10 EU Member States are applying the Hague Convention 2000, the national private internation-

[76] Kruger, T., *Habitual Residence: The Factors that Courts Conside*r, in: Beaumont, P., Danov M., Trimmings, K., Yüksel, B. (eds.), Cross-Border Litigation in the Europe, Hart Publishing, Oxford and Portland, Oregon, 2017, pp. 741-755

[77] Lagarde, *op. cit.*, note 55, para 49

[78] Case C-523/07 *A* [2009] ECLI:EU:C:2009:225; Case C-497/10 PPU *Mercredi* [2010] ECLI:EU:C:2010:829; Case C-376/14 PPU *C* [2014] ECLI:EU:C:2014:2268; Case C-499/15 *W and V* [2017] ECLI:EU:C:2017:118; Case C-111/17 PPU *OL* [2017] ECLI:EU:C:2017:436; Case C-512/17 *HR* [2018] ECLI:EU:C:2018:513; Case C-393/18 PPU *UD* [2018] ECLI:EU:C:2018:835

[79] Ruck Keene, *op. cit.*, note 45, p. 112

[80] Curry-Sumner, *op. cit.*, note 11, p. 63

[81] Lagarde, *op. cit.*, note 55, para 49

[82] See: Succession Regulation, *op. cit.*, note 33, Rec 23-25

[83] Curry-Sumner, *op. cit.*, note 11, p. 63

al law rules are applied in the remaining 18 Member States. Member States which are Contracting States to the Hague Convention 2000 will primarily establish jurisdiction in relation to habitual residence of adults, whereas national law will be applied in other states, which may be based on different grounds of jurisdiction. As a result, both courts can establish their jurisdiction, which will ultimately lead to conflicting decisions.[84] The accession of the EU to the Hague Convention 2000 would eliminate this problem.

### 3.2.2. *Jurisdiction in Cases of Urgency and Temporary Protection Measures*

The rule of jurisdiction in cases of urgency stipulates that in cases of urgency, the authorities of any Contracting State in whose territory the adult or property belonging to the adult is present have jurisdiction to take any necessary measures of protection.[85] This rule is concurrent and its application is justified only because of the existence of an emergency situation. The Explanatory Report states that a situation of urgency arises where the situation might bring about irreparable harm to the adult or his or her property if remedial action were only sought through primary jurisdiction. It is also stated in the Report that this ground of jurisdiction must not be used as general justification for the jurisdiction of the authorities of the state where the adult is present, especially in medical matters, giving an example of termination of pregnancy of a young incapacitated woman.[86] An acceptable example given in the Report is the situation in which it is necessary to ensure the representation of an adult who is away from his or her habitual residence and who must undergo an urgent surgical operation. These measures are limited to the period of time in which the authorities responsible for acting on other grounds of jurisdiction take measures required by the situation, i.e., in case an adult is habitually resident in a non-Contracting State, this means as soon as measures taken by the authorities of the third state are recognized in the Contracting State in question.[87]

The rule of jurisdiction for taking temporary protection measures is not related to cases of urgency. Exceptional concurrent jurisdiction is conferred on Contracting States where the adult is present to take measures concerning the protection of his or her person. These measures are temporary in nature and their territorial effect is limited. Unlike Article 12 of the Hague Convention 1996, in which jurisdiction is conferred for the purpose of taking measures of provisional character for

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[84] *Ibid.*, p. 62

[85] Hague Convention 2000, *op. cit.* note 13, Art. 10

[86] Lagarde, *op. cit,.* note 53, para 63

[87] Hague Convention 2000, *op. cit.*, note 13, Art. 10(3)

the protection of the person and property of the child, this Hague Convention 2000 limits the scope of jurisdiction only to the protection of the person of the adult, not his or her property. The Explanatory Report indicates that it is obvious that this rule applies to medical treatment. These would be the cases of placement or hospitalization, which by their nature are not urgent.[88] In contrast to urgent protection measures, these measures will cease to have effect whenever it has been established by the primary competent authorities that it is not necessary to take any measure.

The system of urgent and temporary measures does not indicate possible difficulties in the implementation. It contributes to the protection of adults and as such, it would be of benefit to the EU, where a similar concept was partially recognized as beneficial for the protection of the child and his or her property within the meaning of Article 20 of the Brussels II*bis* Regulation.[89] Without the existence of provisions to regulate urgent and temporary protection measures in the international protection of adults, at EU level, Member States will determine the jurisdiction to take urgent and temporary measures pursuant to their national rules. The level of protection of adults in the respective state will certainly depend on whether national law provides for the possibility of adopting such measures on the grounds of presence or whether the jurisdiction to adopt such measures is limited only to nationals of that state.

### 3.3. Applicable Law

#### 3.3.1. *General Rules of Applicable Law*

The Hague Convention 2000 determines that in exercising its jurisdiction the Contracting State applies its law. This rule applies irrespective of the criterion on which jurisdiction is based and, like the Hague Convention 1996, it is justified by the fact that the application of national law makes it easier for the authorities as they apply the law they know best and since ultimately the protection measures themselves shall primarily be enforced in the state that determine them.[90] Exceptionally, in so far as the protection of the person or the property of the adult

[88] Lagarde, *op. cit.*, note 55, para 84

[89] See: Drventić, M., *New Trends in European Family Procedural Law*, in: Duić, D., Petrašević, T. (eds.), Procedural Aspects of EU Law, Sveučilište J. J. Strossmayera u Osijeku, Pravni fakultet Osijek, Osijek, 2017, p. 433. and Župan, M.; Ledić, S.; Drventić, M., *Provisional Measures and Child Abduction Proceedings*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku, *Vol.* 35, No. 1, 2019, pp. 9-32

[90] Župan, M., *Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996.*, in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb, Pravni fakultet Osijek, Osijek, 2012, p. 212

requires, the court may exceptionally apply or take into account the law of another state with which there exists a substantial connection.[91] The purpose of this provision is not to strengthen the connection but to apply the rights of another state in order to protect the interests of a person or his or her property.[92] In addition, the Hague Convention 2000 lays down the law applicable to the implementation of the measure in another Contracting State. Where a measure taken in one Contracting State is implemented in another Contracting State, the conditions of its implementation are governed by the law of that other State.[93]

The rules of this Convention's applicable law shall apply even if the law referred to by them is the law of a non-Contracting State.[94] In addition, the Hague Convention 2000 excludes *renvoi*, stipulating that in terms of the rules of applicable law, the term "law" means the law in force in a State other than its choice of law rules.[95]

### 3.3.2. *Mandate in Case of Incapacity*

The Hague Convention 2000 provides for the situation in which the adult himself or herself organizes in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. An adult does that by conferring powers of representation on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act. This situation is characterized by the fact that the powers of representation cannot begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests. This measure is quite common in certain states, particularly in North America, and it is known in some European states.[96] As part of strengthening the rights of persons with disabilities, the Council of Europe promotes the regulation of a mandate in case of incapacity.[97] By adopting various resolutions and recommendations, the Council of Europe endeavors to transpose

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[91] Hague Convention 2000, *op. cit.* note 13, Art 13(2)

[92] Ruck Keene, *op. cit.*, note 45, p. 125

[93] Hague Convention 2000, *op. cit.* note 13, Art. 14

[94] *Ibid.*, Art. 18

[95] *Ibid.*, Art. 19

[96] E.g. England and Wales, Ireland, Belgium, Denmark, Finland, Germany, Netherlands. See more: *Part III Existing Law in Various Jurisdictions*, in: Frimston, R.; Ruck Keene, A.; Van Overdijk, C.; D Ward, A. (eds.), The International Protection of Adults, Oxford University Press, Oxford, 2015.

[97] Council of Europe, Principles concerning continuing powers of attorney and advance directives for incapacity, Recommendation CM/Rec(2009)11 and explanatory memorandum. [https://rm.coe.int/168070965f] Accessed 18.02.2019

into national law the principles on which legal regulations governing this situation should be based.[98]

The mandate in case of incapacity is completely different from the ordinary mandate which a fully capable adult confers on a person to take care of his or her interests. Such mandate takes effect immediately and in most legal systems ends with the onset of the adult's incapacity or by the determination of his or her incapacity to protect his or her interests. This situation is regulated within the framework of private international law by the Hague Convention of 14 March 1978 on the Law Applicable to Agency.[99]

On the basis of the Hague Convention 2000, the mandate in case of incapacity is governed by the law of the State of the adult's habitual residence at the time of the agreement or the unilateral act.[100] This law is applicable to the existence, extent, modification and extinction of powers of representation. The manner of exercise of such powers of representation is governed by the law of the state these powers are exercised in.[101]

The link between the law of the state the adult is habitually resident in and the existence, extent and extinction of powers conferred by him or her is retained only if the adult has not designated himself or herself another law to govern the aforementioned. An adult may, for this purpose, choose the law of: a) a state of which the adult is a national; b) the state of a former habitual residence of the adult; c) a state in which property of the adult is located, with respect to that property. Such limitation in the choice of the applicable law represents the balance between the principle of personal autonomy and the idea that this situation falls into a category in which not all decisions should be entirely left to persons.[102] However, such arrangement does not prevent the law of a non-Contracting State to be chosen as the applicable law. A positive aspect of this provision is manifested in the fact that nothing prevents a person from designating more applicable laws for the mandate in case of incapacity, which is efficient in cases where a person has property in several states. Finally, if an adult wishes to choose the law of the state which does not recognize the mandate in case of incapacity, such authorization shall be null and void.[103]

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[98] Hrstić, D., *Anticipirano odlučivanje pacijenata*, Zagrebačka pravna revija, *Vol.* 5, 2016, p.12

[99] HCCH, Convention of 14 March 1978 on the Law Applicable to Agency, [https://www.hcch.net/en/instruments/conventions/full-text/?cid=89] Accessed 01.03.2019

[100] Hague Convention 2000, *op. cit.*, note 13, Art 15(1)

[101] *Ibid.*, Art 15(3)

[102] Curry-Sumner, *op. cit.*, note 11, p. 64

[103] Ruck Keene, *op. cit.*, note 45, p. 159

While the fact referring to the right to the choice of applicable law does not entail too many issues related to the application in practice, questions arise from the application of a provision regulating the law applicable to the manner of exercising the powers conferred on the authorized person in case of incapacity, determining the law of the state in which the powers of representation are exercised as the law applicable thereto. This provision results in a situation in which, under the law applicable to the mandate in case of incapacity, the authorized person is entitled to the right to manage the property of a person without any restriction, whereas under the law of the state in which the measure is executed, the authorized person shall have additional authorization for property management. In such a case, the authorized person will need to obtain such authorization in a manner prescribed by the law of the state where execution takes place.[104]

### 3.4. Recognition and Enforcement

The Hague Convention 2000 stipulates that the measures taken by the authorities of a Contracting State shall be recognized by operation of law in all other Contracting States.[105] Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person relying on the measure does not take any step towards enforcement. The party against whom the measure is invoked is the one who must allege a ground for non-recognition provided for by the Hague Convention 2000.[106]

There are five reasons why recognition may be refused: a) if the measure was taken by the authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the Hague Convention 2000; b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested state; c) if recognition is contrary to public policy of the requested state, or conflicts with a provision of the law of that state which is mandatory, whichever law would otherwise be applicable; d) if that measure is incompatible with a later measure taken in a non-Contracting State that would have had jurisdiction on the basis of jurisdiction provided for by the Hague Convention 2000, where this later measure fulfils the requirements for recognition in the requested State; and e) if

[104] Clive, *op. cit.*, note 59, p. 12

[105] Hague Convention 2000, *op. cit.*, note 13, Art. 22(1)

[106] Lagarde, *op. cit.* note 55, para 116

the procedure referring to the placement of the adult in an establishment or other place where protection can be provided has not been complied with.[107]

It is clear from the provision on enforcement that the provision applies only to measures taken by a Contracting State whose recognition is sought in another Contracting State. At present, the application of this provision is geographically limited in the EU, as there are only 10 Member States which are contracting parties to the Hague Convention 2000. The Hague Convention 2000 is virtually non-applicable in respect of mutual recognition and enforcement of measures between Member States. The lack of a legal framework to ensure mutual recognition and enforcement of protection measures in relation to adults, in particular with respect to the recognition of foreign powers of representation, is currently one of the biggest disadvantages of the EU system.[108] The free movement of such measures in the EU will certainly contribute if the EU ratifies the Hague Convention 2000. If Member States are left to ratify the Hague Convention 2000 independently, the procedure will, as in the Hague Convention 1996, take a very long time. The situation would be most effectively solved by a new instrument at EU level. The new instrument is in favor of the fact that, at the EU level, an equivalent to the ground for non-recognition because the measure was not taken by an authority whose jurisdiction was not based on one of the grounds envisaged by the Hague Convention 2000, has been removed from the recent regulations.[109] It is not only that this reason is not included in the list of possible reasons for rejection, but there is the existing EU standard on prohibition of review of jurisdiction of the court of origin.[110] It is clear that such arrangement with respect to the progress of European private international law is outdated and needs to be updated in line with European trends that aim at building mutual trust between Member States.

With regard to the enforcement of measures, the Hague Convention 2000 provides for a procedure for the declaration of enforceability, stating that measures taken in one Contracting State and enforceable there shall, upon request by an interested party, be declared enforceable and registered for the purpose of enforcement in another Member State. In so doing, Contracting States shall apply a simple and rapid procedure, while the declaration of enforceability or registration may be refused only for one of the reasons for which their recognition may be refused.[111] In this case, there is also a question the declaration of enforceability

[107] Hague Convention 2000, *op. cit.*, note 13, Art. 22(2)

[108] Curry-Sumner, *op. cit.*, note 11, p. 66

[109] Brussels II*bis* Regulation, Art. 22 and 23; Maintenance Regulation, Art. 24, Succession Regulation, Art. 40, Brussels I Regulation Recast, Art. 41(1)

[110] Brussels II*bis* Regulation, Art. 24, Brussels I Regulation Recast, Art. 41(3)

[111] Hague Convention 2000, *op. cit.*, note 13, Art. 25

within the framework of European private international law. Shortcomings of this concept have already been recognized at EU level.[112] The need for the declaration of enforceability has become increasingly excluded from European legislation.[113]

## 4. CONCLUSION

Vulnerable adults who are unable to protect their interests need to be specifically protected by a special legal framework. At EU level, there is still no special legal framework for adequate protection of vulnerable adults in cross-border situations. Each Member State has its own legal framework, which provides for different legal instruments for the protection of vulnerable adults. Such an arrangement causes unpredictability when it comes to cross-border cases. Ratification of the Hague Convention 2000 by the EU can be a solution to the existing legal unpredictability in this area. A further step is the adoption of a special legal instrument at EU level, in the form of a regulation, for which the legal basis is found in Article 81 TFEU on judicial cooperation in civil matters. The EU-level regulation is a more effective and comprehensive solution, which has the potential to fill the gaps in the provisions of the Hague Convention 2000. Guided by the principle of mutual trust of Member States, specific provisions contained in the Hague Convention 2000 have reached more modern forms within the framework of the European private international law.

Despite the well-grounded reasons and the existence of the basis within the EU primary legislation, the introduction of private international law rules for the international protection of adults in the EU remains only in the form of recommendations. As early as in 2008, the Parliament adopted a Resolution, which requires the Commission to adopt a legislative proposal that will facilitate the free movement of Europe-wide protection measures relating to vulnerable adults. In its subsequent Initiative and Added Value Assessment, the Parliament justified the reasons for the need to adopt a special regulation, which did not differ greatly from those contained in the existing legal framework for the protection of families and children at EU level. Not even after the second Parliament Resolution of 2017 did the Commission express their will to adopt the proposal. Such stance limits the rights of the vulnerable adults to the freedom of movement. It suggests that

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112 Arenas García R., *Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea*, Yearbook of Private International Law, 2010, p. 362

113 Maintenance Regulation regarding decisions given in a Member State bound by the 2007 Hague Protocol, Art. 17(2); Brussels II*bis* Regulation regarding decisions on the right to access, Art. 41(1), and a decision on the return of a child, Art. 42., Brussels I Regulation Recast, Art. 39, Protection Measures Regulation, Art. 4

EU legislator considers that the mobility of vulnerable adults does not affect the freedom of movement of workers, at least not to the extent to which it is linked to the mobility of families and children. Thus the current state of play of vulnerable adults protection in the EU is contrary to the recommendation of the Committee on the Rights of Persons with Disabilities which warns the EU that the persons with disabilities and their families must enjoy the right to freedom of movement at the same level as other persons do.

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# SELECTIVE DISTRIBUTION OF TRADEMARKED PRODUCTS AND RESTRICTIONS OF ONLINE SALES*

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***ABSTRACT***

*The paper analyses recent decisions delivered by the Court of Justice of the European Union (CJEU) addressing the contemporary challenges facing selective distribution systems. It addresses the legality of restrictions of online sales imposed on distributors. In Coty, a case concerning the selective distribution of luxury products, the CJEU ruled that the restriction of using third-party platforms was compatible with competition law. In order to reach that conclusion, it relied on its trademark jurisprudence. In this regard, several issues emerge: the link between trademark and competition law and the applicability of the ruling on non-luxury products. Coty presents a departure from the CJEU's earlier judgement delivered in Pierre Fabre and different national authorities interpreted it differently. It seems that the debate over these issues is far from over. The purpose of this paper is to contribute to the discussion trying to reconcile diverging decisions. It is principally based on a case-law analysis, providing critical assessment of the decisions under scrutiny (i.e. CJEU's case law and the divergent decisions delivered by different national authorities). The study is supported by an analysis of scientific legal and economic papers concerning selective distribution and e-commerce. The research shows that the outcome of the cases depends largely on the concrete factual circumstances. However, certain*

* The content of this paper does not reflect the official opinion of the European Union. The paper is written on a strictly personal basis and have not been endorsed by any service of the European Commission. The authors are in no way involved in ongoing review of the Vertical Block Exemption Regulation (Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices). Responsibility for the information and views expressed therein lies entirely with the authors. The authors would like to thank the anonymous reviewers for all of their constructive and insightful comments and suggestions.

*points appear to be relevant for all the analysed cases, i.e. the applicability of Coty to non-luxury products and the extent of restrictions that triggers the breach of competition law.*

***Keywords:*** *Selective distribution, competition law, trademark law, exhaustion of trademark rights, luxury products, non-luxury products*

## 1. INTRODUCTION

Generally, there are three distribution strategies: selective, intensive and exclusive. Selective distribution is a system established by a vertical agreement, whose goal is twofold: first, to limit the number of authorised distributors (not to eliminate all competition altogether), and second, to prohibit sales to non-authorised distributors.[1] The authorised distributors are allowed to sell differentiated products in the same market segment, i.e. products that are in inter-brand competition. Thus, selective distribution leaves only final consumers and authorised dealers as possible buyers.

Selective distribution is most appropriate for the sale of branded goods[2] on a large scale. Suppliers supplying luxury, complex or technical products wish to limit the resale of their products to "approved dealers only". They want to sell their products through distribution channels that possess at least a minimum of technical expertise or that are consistent with their branded image. In order to select the distributor, they may use different criteria. Regardless of the selection criteria used, the suppliers' intent is always to prevent approved dealers from selling to non-approved dealers, since the latter could jeopardise their distribution strategy.

The selective distribution system plays a very important role in the way customers come into contact with the goods of the brand in question.[3] That experience is, among others, very important for customers' perception of the products and for the image of the brand.[4] This is why the selective distribution system is seen as an

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1 The notion of selective distribution is defined in the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1. It means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system. Article 1(1)(e) of Regulation 330/2010

2 Guidelines on Vertical Restraints [2010] OJ C 130/1, para 174

3 Vogel, L.; Vogel, J., *Traité de droit* économique : *Tome 2 - Droit de la distribution*, Bruylant, Bruxelles, 2017, pp. 431-438

4 Kato T.; Tsuda K., *A Management Method of the Corporate Brand Image Based on Customers' Perception*, Procedia Computer Science, *Vol.* 126, 2018, pp. 1368-1377; Koll O.; von Wallpach S., *One brand perception? Or many?*, Journal of Product & Brand Management, *Vol.* 18, Number 5, 2009, pp. 338–345

efficient tool to protect the brand image.[5] Firstly, the selection of distributors and the reduction of retail space allow maintaining the luxury image of some products, even when they are highly commercialised. Secondly, the system allows the technical products to be sold by competent sellers providing an after-sale service.

Even though it seems that the operator of the distribution system decides who will sell his products and how, contracts between a manufacturer and distributor are much more complicated. The parties of the contract usually agree on the restraints of price and to whom the retailer may sell the products.[6] The vertical agreement between the operator and the distributor creates a closed relationship between them. It is for that reason that the agreement falls under the strict regulation of competition law.[7]

A selective distribution system may have pro- and anti-competitive effects. It can be economically beneficial, in the sense that it can prevent free-riding, helping creating a brand image for luxury, complex and technical products and thus prompts inter-brand competition.[8] However, that strategy tends to exclude discounters and therefore allows the maintenance of higher prices, which in turn reduces intra-brand competition.[9] The competent competition regulators weigh these effects when deciding whether the vertical agreement is compatible with competition law.[10]

There is a special relationship between trademarks and selective distribution systems.[11] Under certain conditions, the presence of a trademark in a vertical agreement may prevent the application of competition rules.[12] From that perspective, trademarks can be considered as tools for the protection of selective distribution

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[5] Paseczki L; Rózsavölgyi M., *Trademarks and selective distribution: The protection of brand image and identity*, ECTA, 2018, [http://www.ecta.org/uploads/events-documents/article_PL_RM.pdf] Accessed 15.03.2018

[6] Winter R. A., *Pierre Fabre, Coty and Restrictions on Internet Sales: An Economist's Perspective*, Journal of European Competition Law & Practice, *Vol.* 9, No. 3, 2018, pp. 183-187

[7] Case 56/65 Société Technique Minière [1966] EU:C:1966:38; joined cases 56/64 and 58/64 Consten and Grundig v Commission [1966] EU:C:1966:41; case T-99/04 AC Treuhand v Commission [2008] EU:T:2008:256; case C-306/96 Javico [1998] EU:C:1998:173

[8] Bailey D.; John L. E. (eds.), *Bellamy & Child: European Union Law of Competition (8th Edition)*, Oxford University Press, Oxford, 2018, pp. 495-496

[9] Guidelines on Vertical Restraints, para 178

[10] Reisinger M., *Asics vs Coty: Competitive effects of selective distribution systems in light of diverging court decisions*, CPI's Europe Column, 2018, pp. 1-5

[11] For a detailed discussion on the trademark functions in the context of selective distribution systems see Kunda I.; Butorac Malnar V., *Internet Distribution of Luxury Products: Is There a Deluxe Version of EU Competition Law?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, *Vol.* 39, No. 4, Posebni broj, 2018, pp. 1751-1774

[12] Tuytschaever F.; Wijckmans F., *Vertical Agreements in EU Competition Law (3rd Edition)*, Oxford Competition Law, Oxford, 2018, paras 4.15 and 4.16

systems.[13] On the other hand, rights conferred by a trademark are exhausted in relation to goods which have been put on the market in the European Economic Area under the trademark in question, whether by the proprietor itself or with its consent.[14] This allows for the trademarked products to be sold by parallel networks, outside the distribution system put in place by the manufacturer.

The use of algorithms has created new challenges in the field of competition law. New distribution formats emerged. Digital marketplaces (like Amazon or eBay) make it easier for retailers to access customers in more than one Member State. Even though companies compete on parameters such as quality and innovation[15], the use of third party online platforms significantly affects the distribution and pricing strategies of manufacturers and retailers.[16] Many industries successfully tackled the change by engaging in dual and multi-channel distribution. Manufactures started selling goods both through distributors and their own stores, online, brick-and-mortar and/or specialist stores etc.[17] Traditional online sellers started opening brick-and-mortar stores, price comparison websites started to offer direct-purchase options and online retailers started to offer sales opportunities for other retailers.[18] These new distribution formats have been scrutinized by national and EU competition regulators.

This paper addresses several issues regarding restrictions in online sales and the use of third-party platforms in EU law and its implementation on national level. The first part is dedicated to the CJEU's most important decisions with regard to offline selective distribution systems. Special focus is on *Metro* cases[19], *Leclerc* cases[20] and

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13 Vogel; Vogel, *op. cit.*, note 3., pp. 529-533

14 For a general overview of exhaustion of rights conferred by a trademark see Kunda I.; Materljan I., *The EEA "Grey Market" in Trademarked Products: How Many Shades of Grey?*, working paper presented at the INTA Annual Meeting, Trademark Scholarship Symposium 2017, [http://en.croatiamergers.eu/wp-content/uploads/2017/12/Kunda_Materljan-INTA_Working_Paper.pdf] Accessed 15.04.2019

15 Colomo P.I.; De Stefano G., *The Challenge of Digital Markets: First, Let Us Not Forget the Lessons Learnt Over the Years*, Journal of European Competition Law & Practice, *Vol*. 9, Issue 8, 1 2018, pp 485–486

16 Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, 10 May 2017, [http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf] Accessed 15.03.2019

17 Arnold R.; Norman N.; Schmierer D., *Resale Price Maintenance and Dual Distribution*, Distribution and Franchising Committee: ABA Section of Antitrust Law, March 2016, [https://www.cornerstone.com/Publications/Articles/Resale-Maintenance-and-Dual-Distribution] Accessed 15.04.2019

18 Kuhn T.; Rust M., *Who'd have guessed: Coty did not end the debate!*, Lexology, 28 February 2019, [https://www.lexology.com/library/detail.aspx?g=9bd96871-695e-4d2f-9106-cf64a65c955a] Accessed 15.03.2018

19 Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1977] EU:C:1977:167; case 75/84 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1986] EU:C:1986:399

20 Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192

*Copad*[21]. The second part addresses the issues concerning restrictions in online sales developed by the CJEU, in particular in *Pierre Fabre*[22] and *Coty*[23]. The third part scrutinizes two decisions given by two different national competition regulators, i.e. the German Bundeskartellamt and the French Autorité de la concurrence. In relatively similar cases national authorities ruled that the selective distribution system established by the shoe manufacturer Asics (in the first case[24], decision confirmed by the German Bundesgerichtshof[25]) and the chainsaw manufacturer Stihl (in the second case[26]) violates competition law with regard to online sales. By contrast, in the *Coty* case, the CJEU ruled that the selective distribution system operated by a beauty products manufacturer is compatible with competition law. The fourth part analyses the implications of the mentioned decisions. In the two national cases, the national authorities gave more weight to the anticompetitive effects, while the CJEU gave priority to the procompetitive ones. In order to reconcile these diverging decisions, the paper focuses on the points emphasized by the CJEU, i.e. the brand image and the aura of luxury that Coty's products convey and the extent of the prohibition imposed on the distributors. It appears from the analysis that the debate is far from over. The paper concludes with final remarks.

## 2. LEGITIMACY OF SELECTIVE DISTRIBUTION SYSTEMS IN EU LAW

### 2.1. Basic principles and general conditions

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)[27] prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Restrictions of competition

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[21] Case C-59/08 Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL) [2019] EU:C:2009:260

[22] Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649

[23] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941

[24] Bundeskartellamt, Decision n. B2-98/11 of 26 August 2015, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2] Accessed 15.03.2019

[25] Bundesgerichtshof, Beschluss KVZ 41/17 vom 12. Dezember 2017 in der Kartellverwaltungssache, [http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=80673&pos=25&anz=515] Accessed 15.03.2019

[26] Autorité de la concurrence, Décision n° 18-D-23 du 24 octobre 2018 relative à des pratiques mises en œuvre dans le secteur de la distribution de matériel de motoculture, [http://www.autoritedelaconcurrence.fr/pdf/avis/18d23.pdf] Accessed 15.03.2019

[27] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1

“by object” are those that by their very nature have the potential to restrict competition, while restrictions of competition “by effect” are those that have likely anti-competitive effects. In the case of restrictions of competition by effect there is no presumption of anti-competitive effects. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.[28]

In order to determine whether an agreement involves a restriction of competition “by object” (also called “hardcore restriction”), a number of elements must be taken into consideration, e.g. the agreement’s content, its objectives and the economic and legal context of which it forms a part.[29] With respect to agreements between non-competitors (vertical agreements), the category of restrictions by object includes, in particular, the fixing of (minimum) resale prices and restrictions which limit sales into particular territories or to particular customer groups. Vertical agreements which have as their object the restriction of competition are prohibited under Article 101(1) TFEU and no actual anti-competitive effects need to be demonstrated.[30] However, the parties may demonstrate that the conditions set out in Article 101(3) TFEU are satisfied if they want the agreement to be considered compatible with the internal market.

Further on, a restriction “by object” may be compatible with Article 101 TFEU when it is objectively necessary for the existence of an agreement of a particular type or nature, or for the protection of a legitimate goal.[31] In principle, a restriction on a buyer as to where (the territory) or to whom (the customers) he can sell the contract products, actively and/or passively, is a restriction “by object”. Finally, the European Commission provided for a safe harbour by means of Regulation 330/2010. This concerns agreements between undertakings which are considered to have non-appreciable effects on competition, in cases when market shares of

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[28] Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) [2004] OJ C 101/97

[29] European Commission, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, 25 June 2014, [http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf] Accessed 15.03.2019

[30] Bailey; John, *op. cit.*, note 8, p. 497

[31] Guidelines on Vertical Restraints, paras 18, 60, 61 and 62

the undertakings parties to the agreements do not exceed the market share thresholds[32] and when the object of the agreements is not restricting competition.[33]

In regard to selective distribution systems, prohibiting authorized distributors, within the territory where the selective distribution system operates, from selling to distributors who are not members of the selective distribution system is not considered a restriction "by object".[34]

The CJEU established the basic principles for assessing selective distribution systems in the *Metro* cases decided in the 1970s and the 1980s.[35] The *Metro* cases concerned a "cash and carry" outlet which had been refused supplies of SABA electrical products, limited to approved dealers. The selective criteria used by the supplier contained qualitative requirements (i.e. that the dealer was specialised in electrical products, had adequate premises and employed staff, and an obligation for the dealer to provide after sale service), as well as quantitative requirements (i.e. the dealer had to be prepared to enter in a six-month forward supply contract and to maintain specified stock levels).[36]

According to the CJEU, selective distribution systems based solely on objective quantitative criteria do not fall within Article 101(1) TFEU. In fact, in such systems price competition is not generally emphasized either as an exclusive or as a principal factor. The CJEU stated in this regard that "although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded."[37] Selective distribution systems based solely on objective quantitative criteria are thus considered to achieve a result which enhances com-

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32 Article 3 of Regulation 330/2010

33 Article 4 of Regulation 330/2010

34 Article 4(b)(iii) of Regulation 330/2010. See also European Commission, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, 25 June 2014, [http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf] Accessed 15.03.2019

35 Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1977] EU:C:1977:167; case 75/84 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1986] EU:C:1986:399; joined cases 25 and 26/84 Ford - Werke AG and Ford of Europe Inc. v Commission of the European Communities [1985] EU:C:1985:340; case 107/82 Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities [1986] EU:C:1983:293

36 Case 26-76 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1977] EU:C:1977:167, paras 26-36

37 *Ibid.*, para 21

petition and which counterbalances the reduction in competition, particularly as regards price, inherent in such systems.[38]

There is an exception to the abovementioned general rule. The CJEU clarified that although "simple" selective distribution systems are capable of constituting an aspect of competition compatible with Article 101 (1) TFEU, "there may nevertheless be a restriction or elimination of competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands."[39] In other words, a distribution system may fall under Article 101(1) TFEU when the cumulative effect of such systems precludes other methods of distribution from competing in the relevant market.

The CJEU further developed the principles established in the *Metro* cases during the 1980s and the 1990s. Generally, the selective distribution system will not fall within Article 101(1) TFEU if these four conditions are met: 1) resellers are chosen on the basis of objective criteria of a qualitative nature (e.g. the supplier may ask for technically qualified stuff, suitable premises, the ability to display the products and to provide after-sales services etc.), 2) criteria are laid down uniformly for all potential resellers and are not applied in a discriminatory manner, 3) the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use, and 4) the laid down criteria do not go beyond what is necessary to attain this object. These criteria were further repeated by the CJEU in almost every decision concerning selective distribution systems.[40] Thus, if these requirements are fulfilled, the restriction of competition is presumed to be lawful.

Concerning the third condition, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use.[41] Article 101(1) TFEU does not

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38 Case 107/82 Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities [1986] EU:C:1983:293 paras 34 and 37; case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH, Opinion of advocate General Wahl [2017] EU:C:2017:603, para 45

39 Case 75/84 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1986] EU:C:1986:399, para 40

40 See e.g. Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, para 24.

41 Commission's Guidelines on Vertical Restraints [2010] OJ C 130/1

apply only if objective technical (qualitative) requirements are reasonably necessary for the proper sale of that product (in order to preserve its quality and ensure its proper use).[42] It is not easy to determine whether the product justifies the use of a selective distribution system in a particular case.[43] In fact, there are many examples where objective technical requirements were considered to be justified, i.e. in respect to cameras[44], hi-fi products[45] and quality watches[46]. On the other hand, there are examples where the same requirements were not considered to justify the selective distribution system, e.g. law-quality watches[47], tobacco products[48] and products whose quality is regulated by public law.[49]

### 2.2. Luxury products: the *Leclerc cases*

Basic principles concerning the legality of selective distribution systems established for luxurious and prestigious products were developed by the Court of First Instance's *Leclerc* cases in the 1990s.[50] They concerned a selective distribution system for luxury cosmetics, challenged by Galec, a purchasing association responsible for supplying the Leclerc group retail outlets (primarily supermarkets and hypermarkets). In these cases, the systems for distribution of cosmetics products established by Yves Saint Laurent and Givenchy detailed the criteria for the location, aesthetic and functional qualities of the outlets admitted to the network.

The Court of First Instance held that the luxury image of these products was very important to consumers. It considered that it was in the interests of consumers seeking to purchase luxury cosmetics that the luxury image of such products is not tarnished,

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42 Case 107/82 Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities [1986] EU:C:1983:293, para 33; case 31/80 NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK" [1980] EU:C:1980:289, para 16

43 Guidelines on Vertical Restraints, paras 175 and 184-185

44 Commission Decision of 30 Juin 1970 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (IV/24055 - Kodak) (70/332/CEE)

45 Case 210/81 Oswald Schmidt, trading as Demo-Studio Schmidt, v Commission of the European Communities [1983] EU:C:1983:277

46 Case C-376/92 Metro SB-Großmärkte GmbH & Co. KG v Cartier SA [1994] EU:C:1994:5

47 Case 31/85 ETA Fabriques d'Ébauches v SA DK Investment and others [1985] EU:C:1985:494

48 Joined Cases 209 to 215 and 218/78 Heintz van Landewyck SARL and Others v Commission of the European Communities [1980] EU:C:1980:248

49 Case 31/80 NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK" [1980] EU:C:1980:289

50 Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192

as they would otherwise no longer be regarded as luxury products.[51] Therefore, the nature of these products encompassed to a lesser extent the material quality of the product, and to a greater extent their "aura of luxury". That aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, an impairment to that aura of luxury is likely to affect the actual quality of those goods.[52]

It stated that the fact that the products are sold through selective distribution systems which seek to ensure that they are presented in retail outlets in an enhancing manner also contributes to that luxury image and thus to the preservation of one of the main characteristics of the products which consumers seek to purchase. Generalised non-controlled distribution would disable the supplier of ensuring that its products were sold in appropriate conditions, would entail the risk of deterioration in product presentation in retail outlets and thus could harm the "luxury image" that is the very character of the product.[53]

In order to counterbalance the restriction on competition inherent in selective distribution, the systems had to be open to all retailers who could present the products in an appropriate setting. The Court of First Instance stated that the criteria which seek only to ensure that products are presented in an enhancing manner pursue an objective which improves competition by preserving that luxury image and thus counterbalances the restriction of competition inherent in selective distribution systems.[54]

Commentators welcomed the decisions pointing out the need for clarification of the conditions for the assessment of the legality of selective distribution systems.[55] However, an analysis showed that the European Commission did not consistently apply in its decisions the criteria established by the Court of First Instance.[56] It could be

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[51] Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190, paras 119 and 120; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192, paras 113 and 114

[52] Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190, paras 114–123; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192, paras 108–117

[53] Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190, para 120; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192, para 114

[54] Case T-19/92 Groupement d'achat Edouard Leclerc v Commission of the European Communities [1996] EU:T:1996:190, para 119; case T-88/92 Groupement d'achat Édouard Leclerc v Commission of the European Communities [1996] EU:T:1996:192, para 113

[55] Bretagne-Jaeger D., *La distribution sélective des parfums de luxe consacrée à Luxembourg*, Gazette du Palais, No. 159-161, 1997, pp. 11-14

[56] Fort A., *Règles et pratiques communautaires en matière de distribution sélective des produits de luxe dans l'Union européenne*, L'Observateur de Bruxelles, No. 28, 1998. pp. 18-20

argued that the "aura of luxury" is difficult to establish. The *Leclerc* judgements are based on the assumption that the marketing conditions are set in the interest of the consumers. Some commentators criticized such approach stating that the interest of consumers is not an appropriate criterion for assessing the legality of a selective distribution systems since it is highly subjective and cannot provide a reliable basis for the selection of the distribution system appropriate for a certain type of product.[57] The EU authorities did not clearly address the question of diversifications in the treatment of luxury goods. This question is still awaiting an answer.

### 2.3. Trademark exhaustion: the *Copad* case

*Copad*[58] concerned a selective distribution system set up by the fashion branch of Dior company. In order to protect the prestige of its brand the supplier prohibited sales to discount stores, mail order companies and door-to-door sale companies. The selective distribution system was based on a trademark licensing agreement. According to that agreement, the supplier had licensed its trademark for the manufacture and distribution of its luxury products (underwear bearing the Christian Dior trademark) to SIL, a lingerie producer. The dispute arose after SIL had sold lingerie carrying the Dior trademark outside the selective distribution system, i.e. to Copad, a discount store. By selling Dior's trademarked products to Copad, SIL had breached the conditions established in the licencing agreement.[59]

The case is interesting for many reasons, *inter alia*, because Dior's primary concern was not the action against SIL (which was facing economic difficulties), but the enforcement of its trademark rights directly against Copad. Dior claimed that its trademark rights can be applied directly against the third party, and that therefore any further distribution of its trademarked goods is prohibited.

The action was based on the Trademark Directive[60], in particular on its dispositions concerning licencing[61] and exhaustion of the rights conferred by a trademark[62]. According to the said dispositions, the trademark holder may license his

57 Art J. Y.; Van Liedekerke D., *Developments in Ec Competition Law in 1996 – an Overview*, Common Market Law Review, *Vol*. 34, Issue 4, pp. 895–956

58 Case C-59/08 Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL) [2019] EU:C:2009:260

59 *Ibid*., paras 7-11

60 The act applicable to the case was the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L 40/1, now replaced by the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1)

61 Article 25 of Directive 2015/2436

62 Article 15 of Directive 2015/2436

trademark for some or all of the goods for which it is registered. In addition, it has a remedy in case of breach of the license agreement; it can enforce the exclusive right to prevent others from using its trademark in the course of trade.[63] This remedy is only available for specific types of breaches of the license agreement, *inter alia*, if the licensee violates a provision of the licensing agreement relating to the quality of the goods.[64]

The question referred to the CJEU was whether SIL's sale of Dior's trademarked goods outside the selective distribution system to Copad was a type of breach which enables the application of the trademark rights against third parties. The CJEU ruled that the breach in question was not a "simple" breach of licence agreement and that in fact the quality of goods manufactured is brought into question.

The CJEU stated that since luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers from distinguishing them from similar goods.[65] It held that an impairment of that aura of luxury is likely to affect the actual quality of those goods[66] and that the conditions set up by the selective distribution system can, in themselves, preserve the quality and the proper use of such products.[67] It concluded that the breach of licence agreement in question could damage the aura of luxury of the goods so as to affect the quality of the goods.[68]

The application of Dior's trademark rights against the third party, Copad, was made in two steps. First, since that violation constituted one of the violations enumerated in the Trademark Directive[69], the CJEU determined that Dior could invoke its trademark right against its licensee SIL. The second step concerned the establishment of the link between the dispositions establishing the list of "special" breaches of licence agreement and the exhaustion of the rights conferred by a trademark.[70]

According to the exhaustion rule established by the Trademark Directive, once the trademarked goods have been placed on the market, the rights of the trademark owners are considered to be exhausted, provided that the goods have been mar-

63 Article 10 of Directive 2015/2436

64 The short list is contained in Article 25(2) of Directive 2015/2436

65 Case C-59/08 Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL) [2019] EU:C:2009:260, para 24

66 *Ibid.*, para 26

67 *Ibid.*, para 28

68 *Ibid.*, para 30

69 Article 25(2) of Directive 2015/2436

70 I.e. between Article 25(2) and Article 15(1) Directive 2015/2436

keted with the trademark owners' consent. The consent-condition is essential in this case.

The CJEU's argumentation consists in holding that the trademarked goods put on the market by a licensee while breaching the licencing agreement were marketed without the consent of the trademark owner. The trademark owner was assumed not to have exhausted its trademark rights, because the mentioned consent-condition was not fulfilled. Therefore, it could invoke its trademark rights to prohibit a third party outside the selective distribution system to use it in the course of trade.[71]

Concerning the application of trademark rights outside the distribution system, the CJEU's line of argument was not always clear. In fact, in *Peak Holding* it held that contractual restrictions barring exhaustion could only affect the relationship between the parties to the contract.[72] In the contrary, in *Coty Prestige v Simex* it held that contractual restrictions may be effective only if externalized, i.e. visible for third parties.[73]

The approach developed in *Copad* was not applied in *Pierre Faber*, but was applied in *Coty* . Both cases will be examined in the next chapters.

## 3. SELECTIVE DISTRIBUTION SYSTEMS AND ONLINE RESELLERS IN EU LAW

### 3.1. Ban of third-party platforms: the *Pierre Fabre* case

Concerning brick-and-mortar channels of distribution, it is clear from the case law of the CJEU that the supplier may require distributors to maintain a luxury setting for its products.

In *Pierre Fabre*[74], the CJEU was confronted with the question concerning cases in which an authorised distributor wishes to sell the goods both in a brick-and-mortar store and via the internet. The manufacturer of cosmetics and other personal care products operated in the French and European markets through several subsidiaries. Even though the majority of products were not classified as medicines, distribution contracts provided that sales must be made exclusively in a physical space and in the

[71] Case C-59/08 Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL) [2019] EU:C:2009:260, para 51

[72] Case C-16/03 Peak Holding AB v Axolin-Elinor AB (formerly Handelskompaniet Factory Outlet i Löddeköpinge AB) [2004] EU:C:2004:759

[73] Case C-127/09 Coty Prestige Lancaster Group GmbH v Simex Trading AG [2010] EU:C:2010:313

[74] Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649

constant presence of a pharmacist. This provision *de facto* excluded the possibility of selling the products on line. In 2008, the French Competition Authority held that those distribution agreements were contrary to competition law. The decision was challenged before the Cour d'appel de Paris (Paris Appeal Court), which requested a preliminary ruling on whether a general and absolute ban on internet selling amounts to a restriction of competition "by object", and whether such an agreement may benefit from a block[75] or an individual exemption[76].

The Commission's Guidelines on Vertical Restraints state that the internet is a powerful tool to reach customers, better than more traditional sales methods, and that every distributor must be allowed to use it. The use of a website is considered a form of passive selling and the overall sales made over the internet cannot be restricted. However, the supplier may require that the distributor sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick-and-mortar store (physical point of sales).[77]

The CJEU considered online sales to be a "method of marketing", which does not require the physical movement of the customer. Since the contractual clause considerably reduces the ability of an authorised distributor to sell the products to customers outside its contractual territory or area of activity, it is considered as liable to restrict competition in that sector.[78]

Furthermore, the CJEU stated that agreements constituting a selective distribution system are to be considered, in the absence of objective justification, as restrictions "by object".[79] Considering the manufacturer's need to maintain the prestigious image of its products, the CJEU noted that the products in question were not considered luxury products, but "regular" ones. In that respect, it held that the need to maintain prestigious image is not a *per se* legitimate aim for restricting competition and thus a contractual clause pursuing such an aim does fall under Article 101(1) TFEU. It concluded that the disposition in question resulting in a ban on the use of the internet for sales, amounts to a restriction by object.[80]

Concerning the question of applying block exemptions, the CJEU took the selective distribution system out of the scope of the block exemption. In fact, the

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75 I.e. from the Regulation 330/2010

76 I.e. from Article 101(3) TFEU

77 Guidelines on Vertical Restraints, para 52

78 Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:6499, para 38

79 *Ibid.*, para 39

80 *Ibid.*, para 47

exemption is not to apply to vertical agreements the aim of which is to restrict active or passive sales to end users by members of the system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.[81] The CJEU held that the object of a contract clause contained in its selective distribution contracts, prohibiting *de facto* the internet as a method of marketing, is a restriction of passive sales (i.e. the possibility to advertise or promote) to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.[82] It did not accept the argument that a ban on internet sales was analogous to a prohibition on operating out of an unauthorised establishment. According to the CJEU, the term "a place of establishment" refers only to outlets where direct sales take place and not the place from which internet sales services are provided.[83] Therefore, it ruled that the selective distribution system in question does not fall under the block exemptions.

With regard to individual exception, the Court noted that such a ban may benefit from the exception provided for in Article 101(3) if the conditions set out in that provision are met.

The approach taken by the CJEU in *Pierre Faber* was severely criticised. Concerning the legal construction that internet is seen as a "method of marketing" and not as a "an unauthorized place of establishment"[84], some commentators stated that it did not take into consideration the argument that restraints established by vertical agreements can enhance competitiveness within a distributive chain by facilitating better coordination between the participating undertakings, especially leading to a reduction in transaction costs.[85] Others commented that competition law dispositions were applied too extensively.[86]

The use of the internet is cross-border by its nature and therefore likely to incite parallel trading. In this regard, the problem with free-riding is present. In fact, the

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81 The disposition applicable in the case was Article 4(c) of the Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21 (replaced by Article 4(c) of Regulation No 330/2010)

82 Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649, para 54

83 *Ibid.*, para 56

84 *Ibid.*, para 58

85 Romano V. C., *ECJ Ruling on the Prohibition of On-line Sales in Selective Distribution Networks*, Journal of European Competition Law & Practice, *Vol.* 3, Number 4, 2012, p. 346

86 Monti G., *Restraints on Selective Distribution Agreements*, World Competition, *Vol.* 36, no. 4, 2013, pp. 489–512

constant presence of a pharmacist at the sale points involves costs for brick-and-mortar distributors, which are not borne by pure online selling platforms.[87]

### 3.2. Luxury products: the *Coty* case

In December 2017, the CJEU delivered the long awaited *Coty* judgement. Coty is a supplier of luxury cosmetics, which sells its products through a selective distribution system. According to the agreement establishing that system, distributors are allowed to sell the products through the distributor's electronic shop window. However, it prohibits the use of a different business name as well as the visible involvement of a third party undertaking which is not an authorised distributor. The distributor Parfümerie Akzente engaged in the distribution of products through a third-party platform "amazon.de". Coty took legal action and at the appeal instance the Oberlandesgericht Frankfurt am Main (Frankfurt am Main Higher Regional Court) requested a preliminary ruling.

The first two preliminary questions deal with the relationship between selective distribution and Article 101(1) TFEU in general terms: 1) does the selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods comply with that provision and 2) does that provision preclude the contractual clause prohibiting the use of third-party platforms for the online sale of the contract goods. The other two questions concern the application of the exemption provided in Regulation 330/2010.

The difference between *Pierre Fabre* and *Coty* is that the former case concerned an absolute ban on internet sales, which was not the issue in the latter. In *Pierre Fabre* the CJEU had stated that, as regards cosmetics, "the aim of maintaining a prestigious image is not a legitimate aim for restricting competition".[88] In *Coty*, it narrowed the possible interpretations stating that its observations made there must be read and interpreted in the specific context of that case.[89]

The CJEU started its argumentation by repeating that the selective distribution network of luxury products is not prohibited by Article 101(1) TFEU, if the resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, if the characteristics of the product in question necessitate such a network

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87 Romano, *op. cit.*, note 85, p. 347

88 Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649, para 46

89 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, paras 31 and 34

in order to preserve its quality and ensure its proper use and, finally, if the criteria laid down do not go beyond what is necessary to attain that goal.[90]

When it comes to the nature of products, the CJEU relied on the objective justification theory[91] and ruled that their luxury nature *per se* is an objective justification for the establishment of a selective distribution system and for removing it from the application of Article 101(1) TFEU.[92] In order to support its analysis, the CJEU referred to *Copad*. As the aura of luxury distinguishes luxury products from non-luxury ones, an impairment to that aura is likely to affect the actual quality of those goods.[93]

Against that background, the CJEU assessed the ban on use of the third-party platform. It analysed whether the prohibition is proportionate to the objective pursued. In this relation it examined two questions, i.e. whether such a prohibition is appropriate for preserving the luxury image of those goods and whether it goes beyond what is necessary to achieve that objective.[94]

With respect to the first issue, the CJEU held that the absence of a contractual relationship between the supplier and the third-party platform presents an obstacle to ensuring compliance with the quality standards.[95] It stated that the obligation imposed on authorised distributors to sell the contract goods online solely through their own websites provides the supplier with a guarantee that those goods will be exclusively associated with the authorised distributors. Furthermore, it enables the supplier to ensure that the products are sold online in an environment that corresponds to the objective qualitative conditions. Finally, it is the association of luxury products with authorised distributors' websites that contributes to that luxury image among consumers.[96]

Regarding the second issue, the CJEU referred to the Commission's E-commerce Sector Inquiry[97] and to its finding that, even though the third-party platforms are

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[90] *Ibid.*, para 24

[91] Wijckmans F., *Coty Germany GmbH v Parfümerie Akzente GmbH: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms*, Journal of European Competition Law & Practice, *Vol.* 9, No. 6, 2018, pp. 372

[92] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, paras 25-29

[93] *Ibid.*, para 25

[94] *Ibid.*, para 43

[95] *Ibid.*, para 56

[96] *Ibid.*, paras 44 to 53

[97] Report from the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry*, COM(2017) 229 final, 10/5/2017, [http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf] Accessed 15.04.2019

growing in importance, online webshops of the authorised distributors remain the main online distribution channel, to conclude that the prohibition does not go beyond what is necessary to achieve the object of preserving the luxury image of those goods.[98]

Lastly, the CJEU addressed the question whether the prohibition to sell through third-party platforms constitutes a restriction of their customers or a restriction of passive sales to end users, within the meaning of Article 4 (b) and (c) of Regulation 330/2010. In order to answer the question, it analysed whether the contractual clause restricts the customers to whom authorised distributors can sell the luxury goods or whether it restricts authorised distributors' passive sales to end users.[99]

The CJEU clearly departed from *Pierre Fabre*, clarifying that the prohibition in question does not refer to the use of the internet as a means of marketing of the products. It then stated that it is not possible to define or identify a group of third-party platform customers within the group of online purchasers. It added that distributors can use online search engines, and that customers are usually able to find the online offer of authorised distributors by using such engines. The final conclusion was that the prohibition does not amount to a restriction of customers of distributors or a restriction of their passive sales to end users.[100]

*Coty* is seen as an important case in the development of EU competition law.[101] It was welcomed by the commentators who stated that it ended the debate regarding the treatment of the third-party platform ban between the Commission and Member States' competition authorities, which considered that the ban presents an appreciable restriction of competition.[102] Others highlighted the factual circumstances of each case, concluding that the approaches of national authorities were not in contrast with the new developments of EU law.[103]

The following chapters deal with decisions delivered by national authorities.

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98 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, paras 54 and 55

99 *Ibid.*, paras 62 to 64

100 *Ibid.*, paras 65 to 69

101 Winter, *op.cit.,* note 6

102 Wijckmans, *op. cit.*, note 91, p. 374. Waelbroeck D.; Davie Z.; Coty, *Clarifying Competition Law in the Wake of Pierre Fabre*, Journal of European Competition Law & Practice, *Vol.* 9, No. 7, 2018, pp 431-442

103 Reisinger, *op. cit.*, note 10., p. 4; Zelger B., *Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible*, European Competition Journal, *Vol.* 14, No. 2–3, 2018, pp. 445–461

## 4. SELECTIVE DISTRIBUTION SYSTEMS AND THIRD-PARTY PLATFORMS SCRUTINISED BY NATIONAL AUTHORITIES

### 4.1. Ban on using brand names as a keyword and price comparison websites: the *Asics* case

Just a week after the CJEU delivered its judgement in *Coty*, the German Bundesgerichtshof (Federal Supreme Court)[104] confirmed the decisions of the Oberlandesgerichts Düsseldorf (Duesseldorf Higher Regional Court)[105] and the Bundeskartellamt (Competition authority)[106], finding that restricting the access to price comparison websites constitutes an infringement of competition law.[107]

In 2013, the Bundeskartellamt started investigating Asics' German online distribution system of sporting goods (running shoes). In the course of the proceedings, the focus was limited to the prohibition on the use of Asics brand names on third party websites as a key word and to the prohibition on supporting price comparison engines. The authority held that the selective distribution system contained restrictions "by object" under Article 4(c) of Regulation 330/2010. The selective distribution system also contained a ban on the advertising or sale of Asics products via third-party websites. However, this issue was not analysed, since the Bundeskartellamt found that the determination of the first two mentioned restrictions were sufficient.

The German competition authority held that the distribution system used by Asics was not a purely qualitative distribution system, but a combination of a qualitative and quantitative selective distribution system. For this reason, an exemption from the prohibition of Article 101 (1) TFEU was not possible.

Firstly, the prohibition on the use of brand names as a keyword in paid search engine advertising enables authorised distributors to improve the searchability of their online offer for end customers, enabling them to gain new customers

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[104] Bundesgerichtshof Beschluss KVZ 41/17 vom 12. Dezember 2017 in der Kartellverwaltungssache, DE:BGH:2017:121217BKVZ41.17.0, [http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=80673&pos=25&anz=515] Accessed 15.03.2019

[105] Oberlandesgerichts Düsseldorf, Beschluss KVZ 41/17 vom 5. April 2017

[106] Bundeskartellamt Beschluss B2-98/11 vom 26. August 2015 in dem Verwaltungsverfahren, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?__blob=publicationFile&v=3] Accessed 15.03.2019. For a summary in English see Bundeskartellamt, *Case Summary: Unlawful restrictions of online sales of ASICS running shoes*, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2] Accessed 15.03.2019

[107] For a general overview of decisions of German courts see Hoffmann F., Restrictions on Selective Distribution Systems on the Internet, CPI Antitrust Chronicle, October (2), 2014, pp. 1-9

through the internet. A restriction of this kind may be a legitimate limitation of the sales possibilities of selective distributors if the following conditions are fulfilled: the distribution system provides a restriction on offline distributors in a comparable form (principle of equivalence)[108], it constitutes a legitimate quality requirement for the sales or it is justified from the point of view of trademark law considerations[109]. The prohibition on the use of brand names does not fulfil any of these conditions and thus presents a restriction by object.

Secondly, the prohibition on authorised distributors from making active use of price comparison engines to promote sales prevented end customers who particularly value certain criteria (such as the price) to make use of special search engines to help them "filter out" suitable offers. The Bundeskartellamt held that there were no qualitative considerations that could justify the prohibition of support for price comparison engines. In particular, the *per se* prohibition was not justified as a measure of protecting the brand image or of tackling a free-rider problem.

On appeal, the Oberlandesgerichts Düsseldorf upheld the Bundeskartellamt's decision.[110] The competition authority had based in essence its decision only on the complete ban of price comparison websites, finding the ban to be incompatible with competition law. Therefore, the Oberlandesgerichts Düsseldorf limited itself to that finding, and addressed only the matter of price comparison engines. It held that such a prohibition deprives distributors of an opportunity to advertise and sell online effectively, and concluded that the prohibition was not justified by branding considerations or the need for staff to provide customer counselling services. In fact, consumers would not necessarily need advice before purchasing running shoes, and may prefer to look up such information on the internet.[111]

Confirming the first-instance decision, the Bundesgerichtshof stated that a ban on price comparison websites prevented consumers from finding distributors' offers, and was capable of substantially restricting distributors' online sales. Considering the large amount of products offered online, and the considerable number of dis-

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108 Guidelines on Vertical Restraints, para 56

109 In that regard, see joined cases C-236/08 and C-238/08 Google France and Google ECLI:EU:C:2010:159

110 Cole M., *Asics' online sales restrictions confirmed as illegal by Duesseldorf Higher Regional Court*, 8 April 2017, [https://www.covbrands.com/2017/04/08/asics-online-sales-restrictions-confirmed-as-illegal-by-duesseldorf-higher-regional-court/?_ga=2.242657154.1828475972.1553490955-2080505729.155349095] Accessed 15.03.2019

111 In addition, the Duesseldorf Higher Regional Court refused to permit further appeal to the Federal Supreme Court as no fundamental questions of law were raised. It found that there were no reasons to refer the matter to the CJEU for preliminary ruling. The Supreme Court agreed, See Bundesgerichtshof Beschluss KVZ 41/17 vom 12. Dezember 2017 in der Kartellverwaltungssache, DE:BGH:2017:121217BKVZ41.17.0, para 9

tributors, it found price comparison websites important for both consumers and distributors, since they enable consumers to identify which distributors offer the product they selected, and on which conditions. It concluded that a distributor can substantially enhance its chances of sales by connecting with price comparison websites.[112]

The Bundesgerichtshof held that *Pierre Fabre* and *Coty* were not applicable. Firstly, the restriction on the use of price comparison engines did not amount to a total ban on internet sales (which was the case in *Pierre Fabre*), but only limited the use of one online sales channel. Secondly, the distribution system set up by Asics did not concern luxury products (which was the case in *Coty*).[113] It sided with the Bundeskartellamt's conclusion that the established general prohibition of advertising through price comparison websites constituted a restriction "by object".[114]

Some commentators agreed that the stance adopted in *Asics* is not in line with the CJEU's position.[115] Others considered the reasoning of the German authorities to be founded in the concrete circumstances of the case at hand.[116]

### 4.2. Ban of internet sales: the *Stihl* case

The first decision based on the *Coty* judgement was issued in France by the Autorité de la concurrence (competition authority) in the *Stihl* case.[117]

Stihl, a manufacturer of mechanical garden tools (chainsaws, hedge trimmers and lawnmowers), operated through a selective distribution network which required its distributors to hand-deliver the products to their customers and prohibited sales on online marketplaces. Even though the distribution contract did not explicitly prohibit online sales, the conclusion of the competition authority was that the requirement to hand-deliver the products amounted to a *de facto* ban on online sales, since it forced the online purchaser to go in person to the shop to collect the product, and was thus anticompetitive.[118]

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[112] *Ibid.*, paras 23-25

[113] *Ibid.*, para 22

[114] *Ibid.*, para 9

[115] Waelbroeck; Davies, *op. cit.*, note 102, p. 431

[116] Reisinger, *op. cit.*, note 10, p. 4

[117] Autorité de la concurrence, Décision n° 18-D-23 du 24 octobre 2018 relative à des pratiques mises en œuvre dans le secteur de la distribution de matériel de motoculture

[118] Autorité de la concurrence, Décision n° 18-D-23 du 24 octobre 2018 relative à des pratiques mises en œuvre dans le secteur de la distribution de matériel de motoculture, para 37

The Autorité de la concurrence held that the technicality of the products justified the selective distribution system. Concerning internet sales, two different issues emerged: the legitimacy of the ban of online sales and the ban of using third-party platforms.

In regard to the total ban of online sales, the authority did not accept the argumentation put forward by Stihl, i.e. that the hand-delivery requirement only affected the conditions of delivery and not the ability to purchase the product online and that the requirement was necessary to ensure the safe use of its products.[119]

Firstly, it found that the consequences of the distinction between purchase and delivery, which the authority defines "artificial", consist in depriving online sales of their main benefit, i.e. not having to go to the store in person.[120] Secondly, the requirement to hand-deliver the products was disproportionate with regard to its objective of ensuring the safety of its products. Its conclusion was based on the fact that the applicable safety regulation did not impose such condition nor was it practiced by Stihl's competitors.[121]

The authority found that an economic operator can in general go beyond what is provided by the applicable safety regulation and that it is legitimate for it to differentiate itself from its competitors by providing additional service. However, these additional safety requirements for "dangerous" products are not enough for justifying the complete ban of online sales, since authorised distributors should be allowed to sell the products on their own websites.[122]

The ban of using third-party platforms is a different issue. The authority addressed the question whether *Coty*, originally intended for luxury products, could be extended to other types of products. Its answer is positive.

The authority used the argumentation on "dangerous" products to justify the third-party platforms ban. It stated that such a third-party platform ban could be legitimate, since it ensures consumer safety and brand image, on the one hand, and allows Stihl to control that its distributors abide by a number of information obligations, on the other. As in *Coty*, the authority based its reasoning on the existence of a contractual relationship between the supplier and the distributor. Since there was no such contractual relationship between Stihl and third-party platforms, Stihl was not able to exert proper control over the sale of its goods.[123]

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[119] *Ibid.*, para 36

[120] *Ibid.*, paras 164-166

[121] *Ibid.*, para 192

[122] *Ibid.*, para 181

[123] *Ibid.*, paras 283-285

The decision delivered by the Autorité de la concurrence is not final. In fact, Stihl contested the decision before the Cour d'appel de Paris (Paris Court of Appeal) asking for its annulment. In addition, Stihl asked for a stay of the execution order issued by the authority.[124] The president of the Court of Appeal granted the request and pronounced a stay of the execution order.[125]

For the time being, the decision of the French competition authority does not affect Stihl's distribution system. It is to be seen whether it will resist the critics pointed out before the appeal court and become the reference point for future decisions.

## 5. IMPLICATIONS

Decisions delivered after *Coty* by national authorities show that the CJEU's judgement can be interpreted in different ways. On the one hand, *Coty* could be seen as having no relevance for trademarked goods that are not considered luxury goods (as it results from *Asics*). On the other, its application can be extended to non-luxury products (as it results from *Stihl*).

Also, it follows  that complete bans of internet sales are considered to constitute a breach of competition law. Only use of third-party platforms can be restricted. The key aspect justifying the compatibility of third-party platform restriction with competition law is the possibility of finding the distributor on the internet (e.g. through a third party price comparison website).

These issues will be considered in the following chapters.

### 5.1. The nature of the products: luxury and non-luxury

The image of a luxury product is its essential component. Suppliers choose to invest in the image because that is what consumers demand. From an economic point of view, the adoption of a selective distribution system instead of a "mass

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124 Autorité de la concurrence fined Stihl with 7,000,000 euros. In addition, it issued four injunctions, the most important being to amend, within 3 months from the notification of the decision, its selective distribution contracts in order to stipulate in clear terms that the authorized distributors had from then on the possibility to sell all STIHL & Viking's products online, without requiring a "hand-over" to the buyer. Autorité de la concurrence, Décision n° 18-D-23 du 24 octobre 2018 relative à des pratiques mises en œuvre dans le secteur de la distribution de matériel de motoculture, paras 319-320

125 Saez E., *Aftermath of the STIHL case: The first President of the Paris Court of Appeal ordered a stay of execution regarding the four injunctions pronounced by the French Competition authority*, 30 January 2019, [https://www.nomosparis.com/en/aftermath-of-the-stihl-case-the-first-president-of-the-paris-court-of-appeal-ordered-a-stay-of-execution-regarding-the-four-injunctions-pronounced-by-the-french-competition-authority-2/] Accessed 15.03.2019

market" distribution model generates significant costs. Greater expenditure is undertaken at the retail level regarding aspects such as sales assistance, an exclusive showroom, comfort for the shopper and a strong retail brand name. The same goes for high-quality and high-technology products.

In practice, the retailer has a higher margin, and the supplier needs to tolerate it, since it allows the retailer to recover its investment costs. The benefit for the supplier is that the retailers' contribution to the product image adds a component to the final product, as perceived by both the consumer and those who interact with him.[126]

When deciding about the legitimacy of the selective distribution system, two elements reflect the nature of the product: whether the restriction is appropriate to achieve the objective pursued, i.e. to preserve its quality, luxury image or proper use, and whether it goes beyond what is necessary to achieve that objective.

In *Coty*, the CJEU relied on its trademark jurisprudence and found that the assessment of quality of luxury products goes beyond their material characteristics. In fact, the quality of these products can be equated to their "allure and prestigious image which bestows upon them an aura of luxury".[127] The selective distribution system is an effective means to preserve that quality component and therefore a luxury image is a legitimate aim for restricting competition.

The question that was left open after *Coty* is whether that judgement is limited to luxury goods.

At first sight, the answer would be negative. It results from the CJEU's decision in *Pierre Fabre* that the aim of maintaining a prestigious image of a non-luxury product is not a legitimate aim for restricting competition.[128] Comparing the two decisions, it seems that the CJEU differentiates "luxury cosmetics" in *Coty* from regular "cosmetic and personal care products" in *Pierre Fabre*.

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126 For a comprehensive discussion on the issue see Buettner T.; Coscelli A.; Vergé T.,;Winter R. A., *An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers*, European Competition Journal, *Vol.* 5, Issue 1, 2009, pp. 201-226; Kinsella Obe S.; Melin H.; Schropp S., *Comments on the CRA Paper Entitled "An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers"*, European Competition Journal, *Vol.* 5, Issue 1, pp. 227-260; Buettner T.; Coscelli A.; Vergé T.; Winter R. A., *Selective Distribution by Luxury Goods Suppliers: A Response to Kinsella Et Al*, European Competition Journal, *Vol.* 5, Issue 2, 2009, pp. 613-621

127 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, para 25

128 Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649, para 46

As it was mentioned earlier, the basic principles concerning the legitimacy of selective distribution of luxury goods were developed by the Court of First Instance in the 1990s. However, the CJEU did not rely on the *Leclerc* cases to support its analysis.[129] Instead, it relied on *Copad*, a case concerning the exhaustion of trademark rights. Even though the factual context is very similar, it is unclear why the CJEU took into consideration the findings emerging from trademark law and included them into its assessment regarding a selective distribution system in competition law. In fact, the legal issues addressed in the two cases are rather different. *Copad* concerned a breach of licensing agreement, while *Coty* concerned the legality of sale agreements. In *Copad*, the trademark owner claimed that it could directly reach through to a third party outside the selective distribution system under trademark law. It could be stated that both licensing and sales agreements are vertical agreements which restrict the distributors of branded goods.[130] However, it remains a fact that the CJEU did not provide for reasons that explain how issues concerning trademark law and competition law can be reconciled.[131]

It results from *Copad* that there is a direct link between the image of the product and the distribution method. In relation to luxury products, the distribution method becomes a factor of quality. In fact, the "aura of luxury" is created by elaborate and expensive retail services.[132] In *Coty*, the CJEU focused on the fact that there is no contractual relationship between the manufacturer and the third-party platform. Due to the lack of that relationship, the manufacturer cannot perform adequate controls nor take action in cases of any deterioration of its luxury image that may occur if the products are represented inappropriately.

A different look at the two cases could bring to a different result. If the logic expressed in *Copad* is applied in *Coty*, in case of deterioration of the luxury image of its products, Coty could enforce its trademark rights directly against non-authorised third-party online resellers used by authorised distributors. In that case, the restriction on the use of third-party platforms could be put into question.

On the other side, *Copad* is a case decided in an offline environment. It could also be argued that it cannot be wholly applicable in the online environment.[133]

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129 They were mentioned only briefly by the advocate general. Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH, Opinion of advocate General Wahl [2017] EU:C:2017:603, paras 65 and 70

130 Schmidt-Kessen M. J., *Selective Distribution Systems in EU Competition and EU Trademark Law*, Journal of European Competition Law & Practice, *Vol.* 9, No. 5, 2018, p. 313

131 Waelbroeck; Davies, *op. cit.*, note 102, p. 433

132 Schmidt-Kessen, *op. cit.*, note 126, pp. 312-313

133 *Ibid*, p. 314

The CJEU did not provide further guidance on the issue of when a product might be considered to be a luxury product. The mere fact that a product is of high quality and is sold under a registered trademark does not automatically give this product an "aura of luxury". The "aura of luxury" depends on the question of how the products are sold. And it is exactly this "how" that is absent from the CJEU's case law.

When considering the applicability of *Coty* to the distribution of non-luxury products, the *Stihl* case provides an adequate factual background. The object of the selective distribution system is to ensure the quality requirement through before- and after-sale services. Is this objective comparable to the objective of preserving the luxury image?

The Autorité de la concurrence held that it is. And its analysis is rather convincing. In fact, there is a number of services that contribute to the quality of the products, such as information and advice concerning the proper use, video demonstrations available on distributors' websites and  telephone "hotline" services provided by competent personnel. In addition, a survey carried out in the sector of the distribution of garden equipment showed that more than 90% of distributors used only its own online shops for online selling. The authority found these elements essential for the quality of goods and brand identity.[134]

Concerning the applicability of *Coty* to trademarked non-luxury goods, it should be noted that in both *Pierre Fabre* and *Coty* the compatibility of a selective distribution system for luxury goods with Article 101(1) was not directly relevant. In fact, the market share in both cases did not exceed the threshold set out in Article 3 of Regulation 330/2010. The question that emerges is why the referring court in *Coty* even addressed this issue, if it was irrelevant for the dispute.[135]

In this regard, according to the Guidelines on Vertical Restraints, the application of the Regulation 330/2010 does not depend on the nature of the products sold through the selective distribution system.[136] Accordingly, the ban on third-party platforms (if restrictive of competition) should benefit from the block exemption irrespective of the nature of the products involved. The only conditions are that

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[134] Autorité de la concurrence, Décision n° 18-D-23 du 24 octobre 2018 relative à des pratiques mises en œuvre dans le secteur de la distribution de matériel de motoculture, paras 282-288

[135] Waelbroeck; Davies, *op. cit.*, note 102, p. 433

[136] Guidelines on Vertical Restraints, para 176. It could be argued that  distinction between "passive" and "active" sales has no practical relevance in the context of selective distribution. Hoffmann, *op. cit.*, note 107, p. 3

it is necessary for the product in question and that the criteria are implemented objectively and in a non-discriminatory manner.[137]

### 5.2. The extent of the prohibition

When addressing the legality of a selective distribution systems, the starting point adopted by the CJEU is that selective distribution agreements necessarily affect competition in the Internal market.[138] In *Coty*, the luxury nature of the goods is accepted as such an objective justification to remove the selective distribution system out of the scope of Article 101(1) TFEU.[139] *Coty* could be interpreted as there is no Article 4 (b) and (c) of Regulation 330/2010 issue due to the nature of the products. However, this interpretation is not correct.[140]

According to Article 4 (b) and (c) of Regulation 330/2010, the third-party platform ban may be considered a restriction "by object" if it restricts active or passive sales to end users or if it restricts the territory into which, or customers to whom, a distributor may sell contract goods.

In the Commission's Guidelines on Vertical Restraints, the internet as a distribution channel is considered as a form of "passive sale".[141] Passive sale takes place when the distributor responds to unsolicited requests from individual customers. The question that emerges is why it deserves a special treatment.

The free-riding argument presupposes that pure online retailers take advantages of the investment made by traditional bricks-and-mortar distributors on product's image, advertising and consumer drawing power to increase demand for the products. If not prevented, the consequence of that is the underinvestment in activities that consumers value and are willing to pay for. Therefore, suppliers must be able to exclude any retailers that generate negative externalities.[142]

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[137] Eberhardt A., *Why the discriminatory application of criteria in selective distribution systems is block exempted under Regulation 330/2010*, European Competition Journal, *Vol.* 11, Issue 1, 2015, pp. 168-192

[138] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, para 23

[139] *Ibid.*, para 25-29

[140] Wijckmans, *op. cit.,* note 91, p. 374

[141] Guidelines on Vertical Restraints, para 56. The concepts of active and passives sales were developed at a time where internet was not a regular method of communication. A restriction of passive sales referred to a prohibition imposed on a distributor to sell into another distributor's exclusive territory, while active sales concerned the activity of approaching customers allocated to another distributor

[142] Carlton D. W.; Chevalier J. A., *Free-riding and Sales Strategies for the Internet*, The Journal of Industrial Economics, *Vol.* XLIX, No. 4, 2001, pp. 441-461

Online shopping impacts distribution strategies.[143] In order to cope with internet as a new distribution format and to control free-riding, suppliers tend to develop new restrictions on internet retailers. The resolution of the free-ride issue is only possible by setting up quality standards and by choosing distributors which commit to satisfy these standards, i.e. offer the appropriate retail environment and related services to the consumer.

In the context of online sales, the quality standards may refer to the quality of distributors' websites so that products are displayed in a way that avoids any confusion with concurrents' products. In this regard, the supplier may require prior approval of information published on the webpage, the use of logos, colours, banners and formatting, etc. On the other hand, some requirements may be considered disproportionate, e.g. stipulating excessive specifications for the presentation of the product.[144]

The CJEU follows that logic and is ready to exclude internet retailers from the network of "pure-play". In *Pierre Fabre*, the CJEU stated that a contractual clause prohibiting *de facto* the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.[145] This conclusion was softened in *Coty*, where the CJEU assessed the clause at issue by applying the principle of proportionality.[146]

Decisions issued by the German Bundesgerichtshof and the French Autorité de la concurrence are compatible with the CJEU's reasoning. This leads to the conclusion that agreements between producers and retailers, which completely prohibit the retailer from using the internet to sell branded goods (i.e. absolute ban on internet sales), breach competition law, since they are deemed disproportionate. On the other hand, milder online restrictions could be in conformity with competition law. In other words, the distributor has to be allowed to set up its own web page and sell branded products through it. The supplier may require quality standards, but it cannot prevent online selling.

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[143] An economic model of the consumer demand for a luxury good shows that the incentives for manufacturers and consumers not to use the online distribution channel may be aligned. The intervention in the manufacturers' decisions could potentially have an ambiguous effect on consumer utility. Pruzhansky V., *Luxury goods, vertical restraints and internet sales*, European Journal of Law and Economics, *Vol.* 38, Issue 2, 2014, pp. 227-246

[144] Colangelo G.; Torti V., *Selective distribution and online marketplace restrictions under EU competition rules after Coty Prestige*, European Competition Journal, *Vol.* 14, No 1, 2018, pp. 89-90

[145] Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011 EU:C:2011:649, para 54

[146] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] EU:C:2017:941, para 65

The above statement has to be nuanced. In fact, absolute marketplace bans are not hardcore restrictions and thus a case-by-case analysis of the effects is required for both luxury and non-luxury products.[147] The key element is whether there are less restrictive means of protecting the brand image and whether the distributor has other options of selling the products online.[148]

Some commentators remarked that the fact that some luxury goods producers have decided not to use pure-online retailers to distribute their products has not hindered the development of internet distribution. The proof is that almost all exclusive brands can currently be purchased on the internet via the brand owners' own websites or the authorised distributors' sites.[149] However, a problem arises in this context, and it relates to small and medium enterprises which do not have the means to establish and maintain a selling platform of their own. For them, the milder restriction presents a hard burden in terms of market access.[150]

When it comes to third-party platforms, it results from the analysed decisions that the key issue is whether distributors are prevented from advertising the products. Therefore, if the distribution system does not prevent distributors from referencing their websites on third-party platforms (e.g. search engines, comparison websites), it is considered compatible with Article 4 (b) and (c) of the Regulation 330/2010, since it enables customers to access the distributors products through search engines.

Finally, there are authors who openly criticize traditional stances on the free-riding argument in relation to branded goods. In fact, there might be a new form of reverse free-riding, or free-riding off the internet. Pure online retailers also invest in their distribution channel, creating rich product information to allow consumers to make informed purchasing decisions. It could be argued that consumers may take advantage of that distribution format to research and choose a product before purchasing it in a bricks-and-mortar store.[151]

Online distribution channels like Amazon or eBay continue to drive huge sales. Nevertheless, it seems that luxury brands do not envisage using this type of distribution in their future. Until now, they managed to circumvent it. However,

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147 Colangelo, *op. cit.,* note 144, pp. 105-106

148 Witt A. C., *Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods*, European Competition Journal, *Vol.* 12, Nos. 2–3, 2016, pp. 435–461

149 Buettner *et. al., op. cit.*, note 126, p. 226

150 Waelbroeck; Davies, *op. cit.,* note 102, p. 440

151 Accardo G., *Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution Under EU and US Competition Laws*, European Competition Journal, *Vol.* 9, No. 2, 2013, p. 243

many do not see this approach sustainable in the long run.[152] Luxury brands will eventually have to find a way of taking advantage of third-party platforms while protecting the image of their trademark and without jeopardizing their business.

## 6. CONCLUDING REMARKS

*Coty* is an important decision, addressing the contemporary challenges to distribution in EU law. Even though *Pierre Fabre* could be seen as a departure from CJEU's earlier jurisprudence concerning high quality products, *Coty* reaffirms the importance of the nature of luxury goods in the context of selective distribution restraints.

To reaffirm the position of luxury goods, the CJEU based its decision on its trademark jurisprudence. Still, *Coty* leaves some questions open, e.g. what is the relationship between trademark and competition law, what are the criteria for distinguishing different trademarked products, and whether that logic is applicable to non-luxurious goods.

Two national decisions show that *Coty* could be interpreted differently. The respective restrictions in the mentioned national decisions are discussed in the light of the specific underlying facts and circumstances of each case. It follows that the nature of the product for which the selective distribution systems were established is different. Luxury products have appeared to meet the criteria of compatibility with competition rules much more easily than the "regular" ones.

A closer analysis shows that the debate concerning the nature of the product (luxury *versus* non-luxury) is not that relevant in the context of vertical agreements satisfying the exemption criteria provided for in the Regulation 330/2010. What is important is whether the restriction amounts to a territory or sales restriction to end users. It results from the analysed decision that a complete ban of online sales presents a breach of competition law, while more nuanced restrictions are seen as compatible.

The emergence of online platforms is changing distribution models. The analysed decisions show that trademark owners are reluctant to accept that their products are sold through third-party channels, over which they have no control. So far, trademark owners managed to keep the big third-party platforms out of their

[152] Danziger P. N., *Amazon Vs. Coty: Coty May Have Won The Battle, But Amazon Will Still Win The War*, Forbes, 12 December 2017, [https://www.forbes.com/sites/pamdanziger/2017/12/12/amazon-vs-coty-coty-may-have-won-the-battle-but-amazon-will-still-win-the-war/#1cefdd9570e2] Accessed 15.03.2019

business. This is especially true for trademark owners that have luxury brands in their portfolio.

Trademark owners need to keep their own line of distribution open. It is still unsure whether they will finally embrace the possibilities offered by big online platforms (such as eBay or Amazon) and in which manner. Since online distribution formats are constantly evolving, one can argue that in the long run the biggest online platforms will outreach authorised distributors' webshops and eventually conquer the luxury brands market.

However, in the short and medium run, it is the impression of the authors that the CJEU will be more inclined towards the protection of trademarks rights. When it comes to luxury products, the attribute "luxury" does not depend on the material characteristics of the product in question, but on the marketing strategy of the trademark owner. The marketing concept is purely a matter of choice for the undertaking concerned.[153] The selective distribution systems seem to best accommodate the distribution of luxury products.[154] There is a strong link between the "aura of luxury" perceived by the consumers and the amount of funds invested in the marketing strategy. Therefore, it could be concluded that the more the trademark owner invests in its marketing strategy, the easiest is for him to prove the "quality" component of its product and the need to protect it.

The same could be said for technical and high-end products. The reputation of their trademark also depends on the marketing strategy developed by the trademark holder and thus on the funds invested in it. This investment should be protected in the same way.

In the recent case law the CJEU expanded the concepts of "specific subject matter" and "essential function" of trademark providing protection to its advertising and investment functions. In *Google France*, a case dealing with the use of a third-party trademark as a keyword for triggering the display of Google ads, the CJEU stated that the trademark owner is entitled to a protection when that use of the trademark by a third party adversely affects the owner's use of its mark as a factor in sales promotion or as an instrument of commercial strategy.[155] In *Interflora*, a

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153 This position is widely accepted in practice. See e.g. European Union Intellectual Property Office, Fourth Board of Appeal, R 1656/2018-4 Paul Reed Smith Guitars, Limited Partnership, decision of 1 April 2019, para 25

154 Kunda; Butorac Malnar, *op. cit.*, note 11, p. 1771

155 Joined cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)* [2010] EU:C:2010:159

similar case, the CJEU stated that a trademark may also be used by its proprietor to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty. Therefore, an unauthorized use by a third party would present a trademark violation if such use substantially interfered with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty.[156]

The descriptions of the advertising and investment functions of a trademark provided by the CJEU are very broad and could be used in the context of selective distribution and the online environment. Especially since it is not required that the unauthorised use by a third party affects the function of indicating origin.

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# LIABILITY REGIME OF ONLINE PLATFORMS NEW APPROACHES AND PERSPECTIVES*

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***ABSTRACT***

*Collaborative economy creates new business models in different sectors of the economy and produces new impulses for the development and innovations in the traditional areas. However, to answer the new questions arising from this segment of the economy, we must consider the existing legal framework regarding the central subjects of the collaborative economy - online platforms. In this paper we examine one legal aspect of particular relevance in this regard, specifically the liability of online platforms for content that they host. In particular, we consider the existing liability regime of these platforms, new proposals approved by the European Parliament and we conclude this paper with the critical examination of the liability regime in relation to the push for the adoption of voluntary proactive measures on the EU level.*

***Keywords:*** *online platforms, liability, hosting, illegal content online, copyright*

## 1. INTRODUCTION

The Digital Single Market Strategy for Europe defines as one of its objectives the fight against illegal content online. In general, this notion of digital piracy is defined as "*the act of reproducing, using, or distributing information products, in digital formats and/or using digital technologies, without the authorization of their legal owners.*"[1] It is recognized that the most relevant subjects intermediating access

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1 Belleflamme, P.; Peitz, M., *Digital piracy*, Springer New York, 2014

to content online or the "*key gatekeepers of the internet*"[2] are online platforms. As the Commission states, "*the principle, enshrined in the e-Commerce Directive, that Internet intermediary service providers should not be liable for the content that they transmit, store or host, as long as they act in a strictly passive manner has underpinned the development of the Internet in Europe.*"[3] At the same time, if illegal content is identified, the relevant subjects are required to act to remove or disable access to such content. However, the process of removal or of disabling access to illegal content online is not without its flaws – it can be slow, ineffective, lacking transparency and a uniform approach within the European Union.

One of the types of illegal content often made available on the internet without the authorization of the relevant right-holders is content that infringes intellectual property rights, such as copyright. Despite of some efforts on the national level, no uniform approach on how to prevent the upload of protected subject-matter or the process of its subsequent removal or disabling of access to it after its provision online has been established. The absence of a uniform approach as well as the increased relevance of this issue in recent years (as presented by the Commission that included fight against illegal content online in the II. Pillar of its Digital Single Market Strategy for Europe) are reasons why the authors of this paper decided to examine this issue more closely.

To formalize the scope of our work, two research questions are stated:

*a) How proactive measures can be implemented by online platforms?*

*b) What changes brings the new Article 17 of the proposed Directive on copyright in the Digital Single Market?*

This paper is organised into five sections. Section 1 provides a brief definition of the term 'online platforms'. Section 2 examines the existing liability regime of online platforms, specifically focusing on the interpretation of one of the liability exemptions - hosting. The following Section 3 outlines the activities of the Commission in this area in recent years. Section 4 discusses the adoption of proactive voluntary measures by online platforms. The last Section analyses Article 17 of the Copyright proposal and the relevant changes it proposes.

[2] Communication from the Commission on the Mid-Term Review of the implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All. COM (2017) 228 final

[3] Communication from the Commission. A Digital Single Market Strategy for Europe. COM/2015/0192 final

## 2. ONLINE PLATFORMS

To explain what online platforms are and to provide their definition is not an easy task. Definitions of online platforms that exist in an academic literature differ in various aspects. A uniform definition of online platforms currently does not exist, as there is no consensus among professionals or legislators, as to what such definition should include.

One of the more general definitions describes online platforms as "*all online spaces where users engage in commercial and non-commercial interaction with each other.*"[4] As a stipulation of a single definition is not suitable or necessary, the European Commission refers in its works to a general enumeration of *the most common characteristics of online platforms:*

a) *capacity to facilitate, and extract value, from direct interactions or transactions between users*; Platforms may provide access to goods, services or information resulting in the digital value creation, "*notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies.*"[5]

b) *ability to collect, use and process a large amount of personal as well as non-personal data* in order to optimize, *inter alia*, the service and experience of each user.

c) *capacity to build networks,* where any additional user will enhance the experience of all of the existing users (the so-called 'network effect');

d) *ability to create and shape new markets* and to regulate or control the access to them;

This challenges the existing traditional markets and drives innovation, growth and competition in the digital economy. Particularly significant is the fact that platforms enable small and medium-sized enterprises to participate on markets they would not otherwise be able to reach in the traditional business setting and enable the creation of "*new forms of participation or conducting business based on collecting, processing, and editing large amount of data.*"[6]

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4 Gillespie, T., *The Politics of 'Platforms'*, New Media & Society, 2010, *Vol.* 12, No. 3, ISSN: 1461-4448, pp. 347-364

5 Communication from the Commission. Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe. *COM(2016) 0288 final.* p. 3

6 *Ibid.*, p. 2

*a) reliance on information and communications technologies.*[7]

Facilitating and supporting the creation of online platforms *is an economic and strategic imperative for Europe* in the context of the Digital Single Market formation. Currently the EU represents only 4% of the total market capitalisation of the largest online platforms, as the vast majority of them originate in the US and Asia.[8] To change this course, the Commission has determined various steps to be taken in order to assist in and encourage the development of a platform-based economy in the EU. Firstly, it is necessary to *eliminate the legal uncertainty* resulting from the existence of different rules governing platforms in individual Member States in relevant areas. Despite of the fact that full harmonisation is not possible or even desired, it is necessary with regard to certain issues, for instance in the area of the personal data protection (currently regulated by the newly adopted General Data Protection Regulation). However, as the Commission states, if the adoption of a new legislation is necessary, it should "*only address clearly identified problems relating to a specific type or activity of online platforms in line with better regulation principles*"[9] – the so-called 'problem-driven approach'. Furthermore, it is necessary to ensure the online platforms' conformity with the existing EU rules, e. g. with regard to the competition, consumer protection, and protection of freedoms of internal market. Finally, "*principles-based self-regulatory measures, including industry tools for ensuring application of legal requirements and appropriate monitoring mechanisms*"[10] play a certain role. To summarize, the Commission has introduced the following principles necessary to consider, when responding to issues associated with online platforms:

*a) "a level playing field for comparable digital services;*

*b) responsible behaviour of online platforms to protect core values;*

*c) transparency and fairness for maintaining user trust and safeguarding innovation;*

*d) open and non-discriminatory markets in data-driven economy.*"[11]

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7 Commission Staff Working Document Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market. *SWD/2016/0172 final.* p. 2

8 Communication from the Commission. Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe. *COM(2016) 0288 final,* p. 3

9 *Ibid.*, p. 5

10 *Ibid.*

11 *Ibid.*

## 3. THE LIABILITY REGIME OF ONLINE PLATFORMS

The legal framework regarding the liability of online platforms is contained in the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereinafter only as "ECD"). ECD aims to create a legal framework, within which the free movement of information society services between individual Member States is ensured through the elimination of existing barriers.

The liability regime stipulated in ECD pertains to the so-called *intermediary service providers* defined as *any subjects (natural or legal persons) providing an information society service*. The definition of *information society service* is contained in another legislative act characterising it as "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service.*"[12]

ECD distinguishes *three different liability regimes* concerning specific activities of service providers - *mere conduit, caching and hosting*, each of them stipulating specific conditions for the application of the liability exemption aiming to restrict situations, in which intermediary service providers may be held liable pursuant to the applicable national law. The liability exemptions are established in a horizontal manner covering civil, criminal and administrative liability regarding all types of illegal activities initiated by third parties online, including copyright and trademark piracy, unfair commercial practices, misleading advertising, etc.[13] As this paper focuses on the issue of illegal content online, one of the above mentioned exemptions is of particular importance in this regard and therefore will be closely examined.

### 3.1. Hosting exemption and its interpretation by the CJEU

*Hosting* relates to the provision of information society service consisting *of the storage of information provided by a recipient of the service.* In this case, the service provider shall not be liable for the information stored at the request of the recipient of the service, if these conditions are fulfilled:

[12] Article 1 (b) of the Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules in Information Society services (codification) *OJ L 241, 17.9.2015,* p. 1–15

[13] Verbiest, T.; Spindler, G.; Riccio, G. M., *Study on the liability of internet intermediaries*, Available at SSRN 2575069, 2007. p. 4

a) "*the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*

b) *the provider upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*"[14]

Various implementation issues resulted from the application of the liability exemption stipulated in Article 14 (1) ECD. The Court of Justice (hereinafter only as "CJEU") has provided its interpretation of the service provider's liability in various cases. In the case C-324/09 L'Oréal and Others, specifically with regard to the operator of an online marketplace (eBay), the CJEU analysed the question, whether the service provided by the operator of an online marketplace is covered by Article 14 (1) ECD, and, if so, under which circumstances it may be concluded that the operator of an online marketplace has 'awareness' within the meaning of Article 14 (1) ECD. Another relevant interpretation is contained in the joined cases C-236/08 to C-238/08 Google France and Google, where the CJEU examined, whether an internet referencing service, that provides storage of information supplied by the advertiser, is exempted from the liability and therefore cannot be held liable prior to it being informed of the unlawful conduct of the advertiser. Conclusions of the CJEU in the above mentioned cases can be summarized into conditions that need to be fulfilled in order for the liability exemption stipulated in Article 14 (1) ECD to be applicable.

First of all, *provision of an information society service within the meaning of ECD.* In both cases the CJEU has concluded, that services provided feature all of the elements of the information society service definition. It must be noted that in most cases, an examination on a case-by-case basis will be necessary to determine whether activities of a certain provider can be considered as 'the provision of information society service'. To illustrate, the CJEU stated that a service consisting of facilitating relations between sellers and buyers of goods is, in principal, considered a service for the purposes of ECD.[15]

Second of all, *storage of information*. In both of the above mentioned cases it was confirmed by the CJEU that the relevant service providers stored information provided to them. As stated in the case C-324/09, eBay's activities include, *inter*

[14] Article 14 (1) of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) *OJ L 178, 17.7.2000,* p. 1-16

[15] See also the interpretation of the term 'information society service' provided in: Harrington, J., *Information society services: information society services: what are they and how relevant is the definition?*, Computer Law & Security Review, *Vol.* 17, No. 3, 2001, p.174-181

*alia,* the storage of data supplied by its customers and sellers, and "*the storage operation is carried out by eBay each time that a customer opens a selling account with it and provides it with data concerning its offers for sale.*"[16] Similarly, in the joined cases C-236/08 to C-238/08, the referencing service provider "*transmits information from the recipient of that service, namely the advertiser, over a communications network accessible to internet users and stores, (…), certain data, such as the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser's site.*"[17] However, it must be noted, that the mere storage of information is not considered sufficient for concluding that a certain service falls within the scope of Article 14 (1) ECD. The CJEU therefore requires a more detailed examination: "*that provision must, in fact, be interpreted in the light not only of its wording but also of the context in which it occurs, and the objectives pursued by the rules of which it is part.*"[18]

Third of all, the internet service provider's conduct is limited to that of an *intermediary provider within the meaning of ECD.*

Another condition is that *a service provider provides a service neutrally, by a merely technical, automatic and passive processing* of the data provided by its customers, and *does not play an active role of such kind as to give it knowledge of, or control over, those data.*[19] Certain activities of the service provider, such as a storage of offers for sale on its servers, setting the terms of its service, remuneration for such service and provision of general information to its customers, are not sufficient for denying the service provider the liability exemption. However, if the service provider's activities also include the provision of assistance, for instance by optimizing the presentation of the offers for sale in question, or by promoting those offers, than the service provider can no longer be considered as neutral, but as one playing an active role of such a kind that gives it knowledge of, or control over, the data relating to those offers for sale. To illustrate, if a service provider, after processing the data provided to it by its advertisers, determines how and in what order will their ads be displayed, it has control over such data and therefore will no longer benefit from the liability exemption.

Furthermore, *the absence of actual knowledge or awareness*. Another condition is that the service provider has not had 'actual knowledge' of illegal activity or information, and, as regards claims for damages, has not been aware of facts or circumstances from which the illegal activity or information is apparent. The condition

[16] Case C-324/09 L'Oréal and Others [2011], ECLI:EU:C:2011:474, p. 110

[17] Joined cases C-236/08 to C-238/08 Google France and Google [2010],ECLI:EU:C:2010:159, p. 111

[18] Case C-324/09 L'Oréal and Others [2011], ECLI:EU:C:2011:474, p. 111

[19] Joined cases C-236/08 to C-238/08 Google France and Google [2010],ECLI:EU:C:2010:159, p. 114

continues in stipulating, that if the service provider obtains such knowledge or awareness, it is obligated to *act expeditiously to remove, or disable access to, the information.* The CJEU therefore states, that the service provider will not be entitled to the exemption liability, if it is aware of facts or circumstances "*on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14 (1).*"[20] The obligation of the service provider covers every situation, in which it becomes aware, in one way or another, of such facts or circumstances, whether as a result of an investigation undertaken on its own initiative or through a notification by a third party (e. g. trusted flaggers, rightholders, etc.).

It must also be mentioned that the subject of the above examined cases was not the infringement of copyright, but the infringement of trademarks. Due to this and despite of the interpretation provided by the CJEU, various issues still remain unsettled. Examination on a case by case basis with regard to the specific circumstances of each case is therefore necessary. This creates problems and legal uncertainty for the individual service providers with regard to how to continue their operations, when it may not be clear, whether the liability exemption in question applies to them or not.

## 4. RECENT ACTIVITIES OF THE COMMISSION

The liability exemptions stipulated in ECD have significantly influenced the development of online platforms and their activities in Europe. As the Commission stated, "*it is not always easy to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the exemptions from liability.*"[21] The Commission recognizes the need to address certain issues resulting from the online platform's operations, one of which is the fact that the amount of digital content available on the internet grows extensively and includes *inter alia* illegal content. The detection and the subsequent removal of illegal content presents an urgent challenge that needs to be addressed. Due to this, the fight against illegal content online has been included in the II. pillar of the Digital Single Market Strategy as one of the key issues requiring closer examination. The Commission stated two principles to be applied when addressing online platforms in this matter:

[20] Case C-324/09 L'Oréal and Others [2011], ECLI:EU:C:2011:474, p. 120

[21] Communication from the Commission. A Digital Single Market Strategy for Europe *COM/2015/0192 final,* p. 12

a) *maintaining a balanced and predictable liability regime for online platforms* and

b) *pursuing a sectoral, problem-driven approach* in tackling illegal content online.

These principles are applied in the Commission's Communication on Tackling Illegal Content Online[22] and the recently adopted Commission Recommendation on measures to effectively tackle illegal content online[23] (hereinafter only as "Recommendations").

## 5. PUSH FOR THE ADOPTION OF VOLUNTARY MEASURES BY ONLINE PLATFORMS

One of the new approaches regarding the fight against illegal content online that can be identified in recent years is the Commission's 'push' for the adoption of voluntary proactive measures by platforms in their own capacity. The objective of this recommendation is to gain knowledge or awareness of potentially illegal content to which platforms provide access to.

To eliminate possible concerns in this regard, the Commission expressly specified that "*taking such voluntary proactive measures does not automatically lead to the online platform losing the benefit of the liability exemption.*"[24] This follows the CJEU's interpretation of Article 14 ECD that clarified, that the mere fact that the providers' activities are diverse and not only focused on the intermediation (e. g. including determining its terms of service, obtaining remuneration for such services, provision of general information to its customers etc.),[25] does not have a direct effect of denying it the liability exemption, as it "*does not necessarily mean that it plays an active role in respect of the individual content items it stores.*"[26] Therefore, these concerns should not preclude the application of the necessary proactive measures by the relevant providers, as they have a relevance to them, e. g. to enforce their terms of service. As the Commission has noted, "*many large platforms are now making use of some form of matching algorithms, based on a range of technologies,*

[22] Communication from the Commission. Tackling Illegal Content Online Towards an enhanced responsibility of online platforms *COM (2017) 555 final*

[23] Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online *(C(2018) 1177 final)*

[24] Communication from the Commission. Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms. *COM(2017) 555 final,* p. 10

[25] See: Case C-324/09 L'Oréal and Others [2011], ECLI:EU:C:2011:474, p. 115-116

[26] Communication from the Commission. Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms. *COM(2017) 555 final,* p. 11

*from simple metadata filtering, to hashing and fingerprinting content*"[27] aimed at the automated content recognition.

The Commission encourages providers "*to take, where appropriate, proportionate and specific proactive measures in respect of illegal content. Such proactive measures could involve the use of automated means for the detection of illegal content only where appropriate and proportionate and subject to effective and appropriate safeguards.*"[28]

An important term in this respect is the term '*proactive measure*'. In general, it is a measure adopted to solve a problem *before* it occurs. Proactive model consists of four elements:[29]

a) *responsibility* - proactive measures shift the responsibility away from the individual claimant to the provider, which is in a position to take action to eliminate unlawful conduct;

b) *participation* - given the potential 'top-down' nature of proactive measures, it is important to involve all stakeholders, such as providers, copyright holders, potential victims etc. in the process;

c) *monitoring* - unlike a proactive model, which is concerned with a self-contained incident, proactive measures are programmatic and on-going. A process of monitoring and review is therefore essential to assess whether a proactive measure is effective;

d) *enforcement and compliance* - a key challenge for proactive measures, therefore, is to devise appropriate means of enforcement. In this respect, principles founded on the concept of equity are important. Arbitration courts considering this principle may be a possible solution.[30]

An important aspect to consider is the time of the adoption of these measures. From the above-mentioned technical perspective, proactive measures are measures adopted before the incident (e. g. the infringement of copyright) occurs. The question therefore is, when the proactive measures shall be applied - before the upload of such a content or after it is made available to the public. To illustrate, considering one of the measures used in practice by providers - the measure of the 'fingerprint creation' (the creation of a database with 'fingerprints' or samples of the

27 *Ibid.*, p. 12

28 Article 18 Commission Recommendation of 1. March 2018 on measures to effectively tackle illegal content online. C(2018) *1177 final*, p. 12

29 Fredman, S., *Making Equality Effective: The role of proactive measures*, 2009

30 Suchoža, J.; Hučková, R., *Reflections on Arbitration Proceedings*, in: The Relationship between Constitutional Values, Human Rights and Arbitration, New York: JurisNet, LLC, 2011, pp. 161-180

protected content against which the uploaded content is compared to), the upload of the content and the provision of a 'fingerprint' is necessary. It follows that proactive measures should be carried out immediately after the item is in the provider's sphere, at the latest, before it can be used (e.g. to share with the public).

Different factors have to be considered to determine, whether the adoption of certain measures is *appropriate*, e. g. if the content's illegality has already been established, if the contextualization with regard to a certain type of content is not essential, the nature, scale and purpose of the envisaged measures, the type of content, the content's notification by law enforcement agencies, if action had already been taken, etc.[31] Moreover, it is necessary to establish specific safeguards to ensure that:

a) providers act in a diligent and proportionate manner in respect of content stored by them, in particular when processing notices and counter-notices and when deciding on the possible removal or disabling of access to allegedly illegal content, and

b) decisions concerning such content, in particular regarding the removal or disabling access to it, are accurate and well founded. The latter can be ensured through human oversight and verifications that may be needed in certain cases to determine the illegality of content at issue. Therefore, different safeguards should be established not only by applicable law (e. g. regarding privacy and personal data protection), but also by providers themselves as additional safeguards aiming to avoid e. g. the removal of legal content.

One example of a possible and currently used proactive measure is the *Content ID,*[32] which is based on a digital fingerprinting[33] system developed by Google to protect copyright holders.[34] Its purpose is to identify and manage the content on the

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[31] Article 18 Commission Recommendation of 1. March 2018 on measures to effectively tackle illegal content online. (2018) 1177 final p. 12. Preamble (25)

[32] *YouTube Content ID Service*. 2018, [https://developers.google.com/apps-script/advanced/youtube-content-id] Accessed 27.03.2019

[33] According to Broder, fingerprints are short tags for larger objects. An example of a large object is a video file. As comparing two large files would take a relatively long time, it is preferable to compare shorter strings (tags) that clearly represent them. See also: Broder, A. Z. *Some applications of Rabin's fingerprinting method*, in: Sequences II. Springer, New York, NY, 1993, p. 143-152

[34] This system is only available to the right holders holding exclusive rights to the copyrighted content, on a certain territory (if they do not hold a worldwide license) and after evaluation of their actual need for this tool. In certain cases different tools may be more suitable for rightholders, such as copyright notification web form or Content Verification Programme

Google's platform YouTube.[35] The first necessary step is that the rightholders provide YouTube with audio or visual reference files identifying their works, which are then included in a database that creates a specific 'fingerprint' from those files. The Content ID system then scans videos on YouTube against these fingerprints. If a match is found, the rightholders have three options – to block the video from being viewed, to monetize it by running ads against it (in some cases revenues are shared with the uploader) or to track the viewer data for detailed analytics (e. g. in which countries is the video popular). As YouTube states, the second option of monetizing the video is the most popular among rightholders, who then do not have to rely on the notice and take-down procedure also available in the case of copyright infringement.

Another similar measure is the system used by SoundCloud.[36] Like YouTube, SoundCloud has already implemented its own system for identifying copyright-protected content based on the acoustic fingerprinting.[37] Difference between these measures is in the primary input provided by copyright holders (e.g. audio signal, raw data), which is entered to the fingerprinting algorithm.

Creating a fingerprint and comparing it to a local service database is the first step in the copyright protection. However, it is not without its flaws. The disadvantage of local fingerprinting databases is that they do not contain fingerprints of all of the copyright-protected content. It is likely that the content uploaded will be considered as legitimate since its fingerprint is not yet contained in the database. The possible solution may present the use of the global copyright context database such as the ZEFR's rights management service[38] called *RightsID*. This system is widely used by global content companies (e.g. Universal, Paramount, MTV, Facebook). In addition to various machine learning methods, ZEFR also uses human review, which reduces the possibility of a wrong decision, but also increases the time needed for the necessary comparison.

## 6. CHANGES PROPOSED IN THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

The newly formulated Article 17 of the Directive on copyright in the Digital Single Market (hereinafter only as "Directive") proposes a new approach to the li-

[35] See also: Letai, P., *Is YouTube a copyright infringer? The liability of Internet hosting providers under Spanish Law*, The Liability of Internet Hosting Providers Under Spanish Law, February 3, 2012

[36] *Soundcloud*. 2019, [https://soundcloud.com/] Accessed 27.03.2019

[37] An acoustic fingerprinting is a type of fingerprinting algorithm, which output is generated from an audio signal and can be used to identify an audio sample in an audio database. For more details, see Wang, A. *et al.*, *An Industrial Strength Audio Search Algorithm*, in: Ismir, 2003, p. 7-13

[38] *Zefr´s right management*. 2019, [https://zefr.com/about-us/rights-management] Accessed 27.03.2019

ability of online platforms. In this section, we provide a short overview of the most relevant changes it contains and their brief examination. It must be noted, that this Directive is not applicable *inter alia* to sharing platforms. Despite of this, it establishes a new and challenging approach to the examined subject and therefore will be briefly analysed.

### 6.1. Scope of the Directive

Article 1 (1) of the Directive defines its scope as stipulating rules on the further harmonisation of EU law "*applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content.*"[39]

The second Chapter of the Directive focuses on certain uses of protected content by online services, specifically the use of protected content by online content-sharing service providers. These providers enable third parties (their users) to upload content which is then stored on their servers. In this case, the Article 14 ECD should be applicable, if the stipulated conditions are met. The problem arises, however, when firstly, the uploaded content is protected content (under copyright or other intellectual property rights), secondly, when providers give access to such content to other subjects, therefore communicating it or making it available to the public, and lastly, when no prior authorisation from the relevant rightholders has been granted. In this regard, "*legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts, and need to obtain authorisation from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union law.*"[40]

To eliminate this legal uncertainty, the proposed Directive stipulates new obligations for online content-sharing service providers (hereinafter only as "providers") which provide services that "*play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.*"[41] This Directive therefore regulates services, "*the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion*

[39] Article 1 (1) of the proposed Directive on copyright in the Digital Single Market

[40] *Ibid.*, Recital 61

[41] *Ibid.*, Recital 62

*within it. Such services should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.*"[42] Other services that do not meet the above stated conditions are outside the scope of this Directive.

### 6.2. Act of communication to the public

The 'act of communication' was defined by the CJEU as "*any transmission of the protected works, irrespective of the technical means of process used* [where] *every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized.*"[43] Moreover, as is apparent from the wording of Article 3 (1) of the InfoSoc Directive[44], it is sufficient that a work is made available to the public, irrespective of whether it is actually accessed or not.

Various examples fulfilling the requirements of the 'act of communication' concept have been provided by the CJEU in its decisions, such as the provision of clickable links on a website leading to protected works published without any restrictions on another website,[45] or the making available and managing of an online sharing platform, on which copyright protected works are made available through the use of the BitTorrent protocol.[46]

One of the relevant factors considered in these cases was the indispensable role of a user and the deliberate nature of its intervention. According to the settled case law, the user makes an act of communication when "*it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work.*"[47]

In the latter case the CJEU examined the question of whether the concept of 'communication to the public' includes the making available and management of an online sharing platform which, by means of indexing metadata relating to copyright protected works, enables the platform's users to locate these works and

[42] *Ibid.*, Recital 62

[43] Judgement of the Court of 19 November 2015, C-325/14 SBS Belgium, ECLI:EU:C:2015:764, pp. 16, 17

[44] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related right in the information society. *OJ L 167, 22.6.2001,* p. 10–19

[45] See Judgement of the Court of 26 April 2017, C-527/15 Stiching Brein, ECLI:EU:C:2017:456

[46] See Judgement of the Court of 14 June 2017, C-610/15 Stiching Brein, ECLI:EU:C:2017:300, p. 37

[47] *Ibid.*, p. 35

to share them in the context of a peer-to-peer network.[48] The liability of these websites' operators have been examined by the CJEU in the case C-610/15 Stiching Brein. The CJEU stated that "*as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an 'act of communication'.*"[49] The Court considered following factors as relevant to the establishment of a communication of a work:

a) the platform provided access to copyright protected works to its users without the authorisation of the relevant rightholders;

b) these works could be accessed by the platform's users at any time or place;

c) despite of the fact that such works have not been provided by the platform itself, but by its users, this would not be possible without the existence of such a platform, or at the very least sharing of such works would prove to be more complex;

d) the platform by indexing torrent files allowed its users to locate these works, using for example its search engine;

e) the platform also indexed the works shared under different categories (relevance, genre, popularity) and obsolete of faulty torrent files have been deleted by the platform and some content have been actively filtered, which rebuts the assumption that the platform only provided physical facilities for enabling or making a communication.

After examining all of these factors the Court's conclusion was that "*the making available and management of an online sharing platform (…) must be considered to be an act of communication for the purposes of Article 3 (1) of Directive 2001/29.*"[50]

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48 In general, a peer-to-peer network (P2P) is described as a network, in which two or more computers communicate with each other without the need of a central server to enable such communication (decentralized system). Various protocols make use of the peer-to-peer network, one of which is the BitTorrent protocol used to share files between its users (peers). The basic feature of the BitTorrent protocol is that it does not create a central server, from which files would be downloaded, but it divides a file into segments which are then downloaded by its users (leechers) from other users' computers in a network enabling such download (seeders).When the user wants to download a file, he/she must first download the relevant torrent file and open it with a specific software, namely the 'BitTorrent Client'. Various websites are created to enable the download of such torrents, predominantly relating to copyright protected works without any authorization from the relevant rightholders

49 Judgement of the Court of 14 June 2017, C-610/15 Stiching Brein, ECLI:EU:C:2017:300, p. 34

50 *Ibid.*, p. 39

These cases demonstrate the need for a broad interpretation of the term 'act of communication' to ensure the fulfilment of the InfoSoc Directive's objective, which is to establish a high level of protection of the relevant copyright-holders. However, another requirement must be examined before granting such protection, namely that a work has been communicated to a public.

### 6.3. Act of making available to the public

The term 'public' is defined in the CJEU's case law as referring to "*an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons.*"[51] If a work is communicated only to a specific group of individuals, or a certain *de minimis* threshold is not reached, it is not communicated to the public. According to the settled case law, to be categorized as a 'communication to the public', "*a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorized the initial communication to the public.*"[52]

To illustrate, the Court in the case C-610/15 Stiching Brein examined, whether an online sharing platform, on which protected works have been made available to its users through the use of torrents, communicated these works to the public. The Court considered as relevant the number of the platform's users (its operators claiming to have several dozens of millions of 'peers'), and stated that "*in this respect, the communication at issue (…) covers, at the very least, all of the platform's users,*"[53] which can access such works at any time and place, therefore aiming at an indeterminate number of potential recipients. Moreover, it was necessary to determine whether such communication was aimed at a 'new public'. This was confirmed, as the Court held that the platform's operators could not be unaware that the platform in question provided access to works without the authorization from the relevant rightholders, as they expressly stated their purpose to enable the platform's users' to access such works and encouraged them to make copies of those works.

This interpretation of the author's right to prohibit communication of his/her work to the public has been considered as creating an "*extremely expansive right,*"[54] without legal certainty as to which conduct will fulfil the conditions of this right's

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[51] Judgement of the Court of 7 December 2006, C-306/05 SGAE, ECLI:EU:C:2006:764, pp. 37, 38

[52] Judgement of the Court of 26 April 2017, C-527/15 Stiching Brein, ECLI:EU:C:2017:300, p. 33

[53] Judgement of the Court of 14 June 2017, C-610/15 Stiching Brein, ECLI:EU:C:2017:300, p. 42

[54] Groom, J., *The Pirate Bay: CJEU rules that operating a torrent file indexing site is a communication to the public.* Journal of Intellectual Property Law & Practice, *Vol.* 12, No. 12, 2017, p. 965-968

two components, as both of the previously examined cases focusing on very specific issues show. Therefore a right balance will have to be found between ensuring the high protection of copyright holders and other concerned parties, particularly with regard to businesses (freedom to conduct a business) and individual users (freedom of expression and information).

### 6.4. The new concept in the Directive

The Directive establishes a new understanding of the terms examined in the chapters above. Specifically, Article 17 (1) stipulates an obligation of Member States to "*provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.*" In such a case, the provider in question is required to obtain the necessary authorisation from the rightholders, e. g. a licensing agreement, to communicate or to make available to the public the protected content.

An important rule is contained in Article 17 (3), which stipulates that when service providers perform an act of communication or of making available to the public under the conditions laid down in this Directive, "*the limitation of liability established in Article 14 (1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.*" This provision effectively determines the relationship between this Directive and the eCommerce Directive, excluding the applicability of the hosting exemption as regards the provision of services which are within the scope of this Directive. This supports the latest approaches of the legislator to the liability of online platforms, where the objectives are to maintain a balanced and predictable liability regime and to pursue a sectoral, problem-driven approach in tackling illegal content online. The legislator, therefore, effectively limits the scope of the eCommerce Directive, specifically excluding the provision of access to copyright-protected or other protected subject matter from the hosting exemption, and therefore creates a specific liability regime for cases in which no authorisation has been granted by the relevant rightholders.

This approach *inter alia* answers one of the issues related to the applicability of the hosting exemption, namely the fairly extensive scope of the protection it provides. In this regard, providers are in general not liable for any content that they store until they learn of its illegality. This was contested in the case of platforms that predominantly store copyright-protected content without the consent of the rightholders and profit from this service. In this regard, the Recital 62 specifically states that "*in order to ensure a high level of copyright protection, the liability exemp-*

*tion mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy.*"[55] This includes e. g. platforms operating on a peer-to-peer basis enabling their users to download the content in question through the use of torrents.

Other changes as regards the liability of a provider can be identified in the Directive, but due to the scope of this paper we will only briefly present these changes. The Directive considers as necessary *the cooperation between the providers and the rightholders*, established through the provision of information between these subjects regarding the process of removal or of disabling of access to illegal content, e. g. through the notification system. Moreover, it is required that *a general monitoring obligation is not imposed*, as this would contradict Article 15 ECD. Furthermore, *the prevention of over-removal of non-infringing content and therefore the protection of freedom of information* must be ensured. It is therefore necessary to *strike a balance between competing fundamental rights*, including but not limited to the right to the personal data protection, freedom to receive and impart information included in the freedom of expression, freedom to conduct business, right to the protection of intellectual property etc.

**Related works**

Colangelo and Maggiolino consider the EU initiatives to resolve the reported value gap between the rightholders and online platforms, critically assessing the Commission's Proposal for a directive on copyright within the digital single market, specifically focusing on its consistency with the CJEU's interpretation of the term 'communication to the public' and with the liability exemptions established by the eCommerce Directive, as well as arguing the lack of empirical evidence supporting the need for such legislation.[56] Frosio provides a criticism of the EU's new approaches as regards the existing safe harbours established in the eCommerce Directive in numerous papers, also arguing the lack of empirical evidence supporting such recourse.[57] The former Article 13 of the proposed Directive on copyright is further discussed by Romero-Moreno, assessing the compatibility of content recognition and filtering technology with the rights and freedoms of the

55 Recital 62 of the proposed Directive on copyright in the Digital Single Market

56 See: Colangelo, G.; Maggiolino, M., *ISPs' copyright liability in the EU digital single market strategy*. International Journal of Law and Information Technology, *Vol.* 26, No. 2, 2018, p. 142-159

57 See: Frosio, G. F., *Reforming intermediary liability in the platform economy: a European digital single market strategy*. Nw. UL Rev. Online, 2017

concerned parties.[58] The afore-mentioned Article 13 and its shortcomings has also been discussed by Senftleben et al.[59]

## CONCLUSION

The existence of online platforms is considered as an economic and strategic imperative for Europe. Due to this, their establishment and functioning has been promoted *inter alia* by the creation of the specific liability regime which enables platforms to provide their information society services without automatically becoming liable if and when protected subject-matter is made available through their services, considering the amount of content continuously uploaded on the internet by their users that cannot be effectively and in a timely manner controlled at the time of its provision. However, to ensure the protection of fundamental rights within the digital environment, the EU requires from online platforms responsible behavior aimed to protect its core values, one of which is the protection of intellectual property.

The adoption of voluntary proactive measures by the individual online platforms is an example that illustrates how the Commission tries to react to the new challenges as regards the provision of protected subject-matter online, specifically it illustrates the "push" for the creation of self-regulative instruments by the online platforms themselves to ensure the protection of intellectual property rights. These mechanisms assist the online platforms which can than swiftly react when illegal content is identified and eliminate the need to take court action by the relevant rightholders, which spares both the time and costs of such litigation.

Moreover, the recently adopted proposal for the Directive on copyright in the Digital Single Market fundamentally challenges the existing liability regime as established in the eCommerce directive by effectively limiting its scope with the exclusion of the provision of a specific type of services from the applicable hosting exemption. The real application of this Directive in practice and issues related to it remain to be seen, however, it will definitely present a challenge not only for the subjects on which new obligations will be imposed, but also to the national law and courts required to interpret this new legislation.

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[58] See: Romero-Moreno, F., *Notice and staydown and social media: amending Article 13 of the Proposed Directive on Copyright*, International Review of Law, Computers & Technology, 2019, p. 187-210

[59] See: Senftleben, M. *et al.*, *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*. European Intellectual Property Review, 2018, p. 149-163

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# THE PUBLIC POLICY (*ORDRE PUBLIC*) RULE OF THE EU SUCCESSION REGULATION AND THE HUNGARIAN INHERITANCE LAW

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***ABSTRACT***

*The EU Succession Regulation declares in Article 35 that "[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum". This paper aims at analysing on the one hand the public policy (ordre public) rule of the EU Succession Regulation and on the other hand the Hungarian inheritance law with regard to the application of Article 35.*

***Keywords****: EU Succession Regulation, applicable law, public policy, Hungarian inheritance law, preliminary question*

## 1. INTRODUCTION

Courts are sometimes confronted with concepts and rules of foreign law which are considered to violate the fundamental principles of the forum. It occurs when the application of foreign law (the content of its provision) may be contrary to the public policy of the forum. Or, when a decision given in a State wanted to be recognised in another State, and such recognition would be manifestly contrary to the public policy of the State in which recognition is sought.

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[**] The work and research made by filling out the questionnaire 'Governing Inheritance Statutes after the Entry into Force of EU Succession Regulation – GoInEU' of the EU Justice Programme 2014-2020 coordinated by the University of Florence – in which among others Eötvös Loránd Tudományegyetem of Hungary is also participating – was utilized to the presentation held at the conference in Osijek and to this paper, as well

This paper aims at analysing the public policy (*ordre public*) rule of the EU Succession Regulation[1] and the Hungarian inheritance law. As in case the applicable law is a foreign law, then in certain circumstances the question shall be answered whether the rule of the foreign law (a given foreign law solution) could be considered as contrary to the Hungarian public policy. The analysis focuses on the rules and national traditions of the Hungarian inheritance law.

## 2. THE DETERMINATION OF THE APPLICABLE LAW UNDER THE EU SUCCESSION REGULATION

The EU Succession Regulation is universal in its nature because Article 20 lays down that any law specified by the regulation shall be applied whether or not it is the law of a Member State.

To the question of public policy, it is materiel to sum up the main rules on the determination of the applicable law under the EU Succession Regulation. In the absence of choice, according to Article 21, the habitual residence (in lieu of nationality) is the relevant connecting factor. So, the law applicable to succession as a whole is the law of the country where the deceased was habitually resident at the time of death. As Recital 23 of the Preamble states, the place of habitual residence represents a genuine link between the succession and a State, and declares that the habitual residence thus determined should reveal a close and stable connection with the State concerned. Therefore, Recital 23 of the Preamble addresses the followings to the authorities: „the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence". However, Recital 24 of the Preamble admits that habitual residence may be difficult to prove, and can rais problems to the extent that it allows some room for manipulation. The escape clause in Article 21 (2)[2] facilitates the finding of the 'proper law' by giving relevance to the law of the State with which the deceased was more closely connected. Recital 25 of the Preamble explains that in

1 The Regulation No 650/2012 of the European Parliament and of the Council (4 July 2012) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter referred to as the EU Succession Regulation)

2 „Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – courts are entitled to arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased. However, as 25 Recital of the Preamble stresses out, the „manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex".

As it follows from Article 22, citizens are entitled to choose the law applicable to their succession. Article 22 (1) limits this choice to the law of a State of their nationality[3]. As Recital 38 of the Preamble stresses out this limitation ensures a connection between the deceased and the law chosen and aims to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share. Article 22 (2) rules furthermore that the choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition.

It is Recital 27 of the Preamble that refers the followings „the rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law". However, in certain cases, the rules of the Regulation may lead to a situation where the court having jurisdiction to rule on succession will be applying foreign law. In this case, the public policy mechanisms would come into play if the condition of its application are met.

## 3. THE PUBLIC POLICY (*ORDRE PUBLIC*) RULE OF THE EU SUCCESSION REGULATION

The EU Succession Regulation declares in Article 35 that "[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum". Besides it, Article 39 rules that a decision given in a Member State shall be recognised in the other Member States without any special procedure being required, except there is a ground of non-recognition (Article 40). According to Article 40 a) such ground is "if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought". The

[3] „A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death."

same rule applies as ground of non-recognition in case of acceptance of authentic instruments (Article 59), enforceability of authentic instruments (Article 60), enforceability of court settlements (Article 61).

It shall be emphasized that the adopted wording of Article 35 is fully accord with the public policy rule of the Rome I Regulation[4] (Article 21) and the Rome II Regulation[5] (Article 26). The public policy rule in the Proposal of the EU Succession Regulation[6] as the Max Planck Institute for Comparative and International Private Law (hereinafter referred to as the Max Planck Institute) highlighted was based on Article 18 of the Hague Succession Convention[7]. However, the Max Planck Institute expressed the need to adopt the wording of Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation and reasoned it with the importance of developing consistent rules for general questions of private international law such as public policy.[8]

The wording of Article 35[9] of the EU Succession Regulation makes it clear that the public policy rule can be invoked only after the applicable law had been determined and courts are entitled to deny the application of foreign law only if its application would be manifestly incompatible with the public policy of the forum. Based on the wording of Article 35, that is the expression of "manifestly"

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (hereinafter referred to as Rome I Regulation)

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (hereinafter referred to as Rome II Regulation)

6 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final of 14.10.2009 (hereinafter referred to as the Proposal of the EU Succession Regulation)

7 Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons is not yet in force. (hereinafter referred to of the Hague Succession Convention)

8 *Max Planck Institute for Comparative and International Private Law. Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Comment to Article 27*. Rabels Zeitschrift, Bd. 74, No. 3, 2010, p. 663

9 The Proposal of the EU Succession Regulation ruled in Article 22 about the special succession regimes. However, the Max Planck Institute suggested that this rule should be modelled on Article 9 of the Rome I Regulation rather than on Article 15 of the Hague Succession Convention and should be named as overriding mandatory provisions. Finally, Article 22 had been set aside from the Proposal and the adopted version of the EU Succession Regulation does not contain any rule on overriding mandatory provisions

and the Recital 58 of the Preamble[10], the narrow interpretation of the text should be supported.[11] In addition, it is regularly highlighted that the public policy rule shall be applicable only if the case has enough connection to the forum State (Inlandsbezug).[12]

The Max Planck Institute argues that as the Preamble refers to the Charter of Fundamental Rights of the European Union, such an interpretation[13] is suggested according to which Article 35 is not limited to the mere policies of the forum State, but also encompasses the public policy of the European Union as an integral part of the forum's policies.[14] So, while deciding about the incompatibility of the foreign law with the law of the forum, the values of European legal tradition, and thus the case law of the Court of Justice of the European Union should be taken into consideration by the courts. Therefore, Article 35 shall be interpreted with the guidance of Recital 81 of the Preamble which says that this Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, and it must be applied by the courts of the Member States in observance of the rights and principles contained in the Charter of Fundamental Rights. A reference to the Charter of Fundamental Rights also appears in Recital 58 of the Preamble. Recital 58 emphasizes that "the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination." Article 21 of the Charter

10 See especially the first sentence of Recital 58: "Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned."

11 As it is suggested in the literature of the Rome I Regulation and the Rome II Regulation, see e.g.: Thorn, K., *Art 21 Rom I-VO*, in: Rauscher, T. (ed.), Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR Kommentar, Sellier, München, 2011, p. 586, Renner, M., *Rome I Article 21,* in :Calliess, G. P. (ed.), Rome Regulations. Commentary, 2nd. ed., Wolters Kluwer, Alphen aan den Rijn, 2015, p. 396, 407

12 This is usually mentioned by the commentary literature, see e.g.: Jakob, D.; Picht, P.: *Art. 26 Rom II-VO,* in: Rauscher, T. (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR Kommentar*. Sellier, München, 2011, pp. 1015-1016, Thorn, *op. cit.,* note 11, p. 587

13 It should be noted that as opposed to the Preamble of EU Succession Regulation, the Preamble of the Rome I Regulation and the Rome II Regulation do not refer to the Charter of Fundamental Right

14 Max Planck… Comment to Article 27., *op. cit.* note 8, p. 663. See also: Renner, *op. cit.* note 11, p. 399, Burián, L., *Európai kollíziós jog: Korszak-* és *paradigmaváltás a nemzetközi magánjogban?* Magyar Jog, Bd. 59, No. 11, 2012, p. 700

of Fundamental Rights is the so-called non-discrimination rule. Article 21 (1) regulates that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". Section 2 says that "within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited". Thus, as it is general in the legal systems, that the capacity to inherit is derived from the legal capacity of a person, the non-discrimination rule shall be considered as a core principle when applying the public policy rule.

Finally, it is relevant to mention that the public policy rule of the Proposal of the European Succession Regulation (Article 27) had a second paragraph: "In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum". While formulating its opinion about the reserved share of the estate (or other indefeasible rights to the estate), the Max Planck Institute highlighted that there is a danger that the choice of law rules of the Regulation could be circumvented by courts having excessive recourse to exceptions based on public policy[15] in order to protect the principles of the forum State about mandatory succession rights. The Max Planck Institute also stressed out that only a few Member States considered their national provisions on forced share as an integral part of their respective public policy and also pointed out that the succession laws of many legal systems provide for some kind of compensation of individuals in need. In these situations, it is rather unlikely according to the Max Planck Insitute that a violation of the public policy of the forum would occur, given that the result obtained by the applicable law often does not substantially differ from that of the forum.[16] The mentioned second paragraph of the public policy rule had been set aside during the adoption of the EU Succession Regulation which can be considered as a reasonable change had to be done. In my view, the formulation of Article 35 still makes it possible to rely on the public policy of the forum in such situations when the applicable law does not provide on whatever legal basis any share from the estate for those individuals who are considered to be entitled to some protection.

15 The Max Planck Institute also referred to the „overriding mandatory provisions" as the Proposal of the European Succession Regulation had a separate rule about special succession regimes in Article 22

16 Max Planck… Comment to Article 27., *op. cit.* note 8. pp. 663-664

## 4. PUBLIC POLICY QUESTIONS FROM THE POINT OF THE HUNGARIAN INHERITANCE LAW

The basis of inheritance law is very much connected to the family law and the property law of a legal order. Therefore, it shall be presumed that public policy also has an important role to protect their values. Based on the rules of the Act V of 2013 on the Civil Code of Hungary (hereinafter referred as "the Hungarian Civil Code") some examples will be discussed hereinafter.

### 4.1. Succession, the right of inheritance

The Hungarian Civil Code guarantees the substantive basis of the right of inheritance by some general rules on succession. These rules are particularly relevant from the point of public policy matters, especially if it is about the violation of the non-discrimination principle. The right to inherit is ultimately based on legal capacity, specifically on section XV of the Fundamental Law of Hungary (25 April 2011) and § 2 (1) of the Hungarian Civil Code, as these latter rules that the legal capacity of each natural persons is equal.

The right to inherit shall not lapse according to § 7:2 of the Hungarian Civil Code. This means that inheritance law claims as property law claims shall not elapse. However, it should be noted that under Hungarian law the reserved (compulsory) share falls under the realm of the law of obligations, thus the period of limitation for claims for reserved share shall be five years (§ 7:76).

In addition, § 7:3 of the Hungarian Civil Code rules that the disposition of one's property after death may take place by testamentary disposition or by intestate succession. Next to the will, the Hungarian inheritance law accept two other forms of testamentary disposition that are the agreements as to succession[17] and the testamentary gift[18]. The fact that in a foreign legal system there are different legal basis to inherit, is not enough in itself to call upon for public policy. But e.g.

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[17] **§ 7:48** [Agreements as to succession]
(1) An agreement as to succession means an agreement where the testator names the other party to the agreement his/her heir in exchange for maintenance, annuity or care to be provided to the testator him/herself or to a third person specified in the agreement for his entire estate or a specific part thereof, or in respect of certain property, and the other party undertakes the commitment to provide said maintenance, annuity or care

[18] **§ 7:53** [Testamentary gift]
(1) If a gift has been given under the condition that the donee outlives the donor, the regulations governing gifts shall apply to the contract with the exception that the formal requirements to be applied shall be the same as those for agreements as to succession
(2) A testamentary gift shall be deemed valid only for a bequest that would qualify as a specific legacy in a will

if the the foreign law does not allow the disposition of the property at all, or allow but in a discriminatory way, then public policy could come into action.

Here, it also should be noted that in every legal system there are rules which regulate those circumstances based on which a person shall be debarred from succession. One of these is unworthiness. The sole case, that there are different grounds for unworthiness in a foreign legal system, is not sufficient to call upon for public policy. But if the special rule on unworthiness is based on such ground which is discriminatory, then the rule of public policy can help to protect the law of the forum. The same can be said if a foreign law has different rules on the acquisition of inheritance, the legal status of heirs, the estate debts and their satisfaction.

### 4.2. Succession by will

The freedom of testamentary disposition is regulated in § 7:10 of the Hungarian Civil Code. It means that the testator shall be entitled to freely dispose of their property, or a part thereof, at time of death by a will. Therefore, as already mentioned above, if someone is debarred from to dispose of their property, then necessarily public policy will come into play. Under Hungarian law, wills shall be drafted in person (§ 7:11). This seems to be a second example for a core principle of the Hungarian inheritance law, and is able to generate a debate whether it shall be considered to be part of the Hungarian public policy.

The Hungarian Civil Code contains strict rules on the formal validity requirements for holographic wills[19] and on attesting a holographic will[20]. The same is

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[19] § 7:17 [Formal validity requirements for holographic wills]
(1) A holographic will shall be considered valid from a formal point of view if the date when it was drafted is clearly indicated, and:
a) if it is entirely written and signed by the testator in his own handwriting;
b) if written by other persons, it is signed by the testator in the contemporaneous presence of two witnesses or, if it was signed previously, the testator declares the signature to be his own before two witnesses in their contemporaneous presence, and if the will is also signed in both cases by the witnesses, indicating their capacity as such; or
c) if written by the testator himself or by other persons, it is signed by the testator, and deposited personally with a notary public either as an open document or a sealed document, specifically marked as a will.
(2) A holographic will written by the testator in his own handwriting, consisting of several separate pages shall be deemed valid if each page is numbered in sequence.
(3) A holographic will consisting of several separate pages, if written by a person other than the testator, shall be deemed valid if each page is numbered in sequence and signed by the testator and by both witnesses.

[20] § 7:18 [Attesting a holographic will]
(1) A holographic will may not be witnessed by:
a) any person who is unable to verify the testator's identity;

true when a devise is made to a subscribing witness or another participating person[21]. However, the mere fact, that some of these rules are different in a foreign law, it does not raise in itself public policy questions. The rules on joint will or the joint will of spouses[22] are difficult to value. Such will can be either valid or invalid under national laws. And if it is invalid, spouses are not entitled to execute their will in the same document. It necessarily can only be viewed as a limit of their freedom to testamentary disposition, however, characteristically does not seem to hit the level of public policy. Last but not least, the sole case that there are different grounds for the invalidity and the annulment of a will is not a reason to call for public policy.

### 4.3. Intestate succession

It is a core question in the inheritance law of a legal system that who can be qualified as a legal heir, who is entitled to inherit from the estate. So, the sole case that that there are different types of legal heirs, or different order how they inherit, or different conditions to inherit, or different reasons for debarment, is not enough

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b) a minor or incompetent adult, or by any person whose legal capacity has been partially limited in respect of serving as a witness;
c) any person who is illiterate.
(2) The witness' knowledge of the contents of a will and his awareness that he has participated in the drafting of a will are not conditions of the validity of a holographic will.

21 § 7:19 [Devise made to a subscribing witness or another participating person]
(1) Any devise made in favour of a subscribing witness of a holographic will or another participating person or one of their relatives shall be invalid, unless this section of the will is handwritten and signed by the testator himself.
(2) A devise made in favour of a subscribing witness or one of his relatives shall not be null and void if two witnesses other than the subscribing witness himself have participated in drafting the will.
(3) The person who drafted, edited or wrote the will, and any person whose activity carries the potential to influence the contents of the will shall be
(4) Where a devise made in favour of a legal person, or any member, executive officer, representative or supervisory board member, or any employee of such legal person may not participate as a witness. Participation by such person in drafting the will shall render the devise made in favor of that legal person invalid.

22 See the rules on joint will in § 7:23 of the Hungarian Civil Code:
(1) The wills of two or more persons executed in the same document in any form shall be invalid.
(2) The written will of spouses made during their marriage and executed in the same document shall be considered valid if:
a) it is entirely written and signed by one of the testators in his own handwriting, and the other testator declares in the same document in a signed statement executed in his own handwriting that the document also contains his last will and testament;
b) if written by other persons, it is signed by the testators in the contemporaneous presence of the other testator and the witnesses, or both testators declare separately in the contemporaneous presence of the other testator and the witnesses that the signature on the document is their own; or
c) the spouses made a notarial will

to call upon for public policy. So, the mere fact that a legal rule or an institution is either unknown in the law of the forum or on the contrary is not present in the foreign law, courts shall not think of applying the public policy rule automatically. But, if these differences are based on such ground which contradicts the non-discrimination principle, then public policy will necessarily come into play, e.g. the disinheritance of the child born extramarital or the inheritance share of the male and the female children are different.

As far as the succession law status of a child is concerned, in case he/she is not adopted, his/her status can be based only on blood relationship under Hungarian law. The legal effects of a relationship based on lineage is the same, independently whether the child was born in a marriage or extramarital. Such an interpretation that the inheritance rights of these children would not be equal to the children born in a marriage, would be contrary not only to § 7:55 (2) of the Hungarian Civil Code, but also to section XV of the Fundamental Law of Hungary and § 2 (1) of the Hungarian Civil Code, as these latter rules that the legal capacity of each natural persons is equal. Thus, the discrimination of the said children would be contrary to the Hungarian public policy. It should be noted that Hungary is part of the Convention on the Rights of the Child (1989) which rules are based on the underlying principle of the best interests of the child. As already explained above, under Hungarian law, the legal capacity of each natural persons is equal. Thus, if the intestate succession rules discriminate a heir based on their sex (e.g. share of a male son is twice than his sister's one), it would be considered as contrary to the Hungarian public policy.

As far as the succession law status of a partner is concerned, the followings can be highlighted. On the ground of the mere fact, that the inheritance share of a spouse is very limited, it cannot be decided whether it is contrary to the Hungarian public policy or not. For example, under the former Hungarian Civil Code of 1959 the testator' spouse was entitled to the beneficiary ownership (usufruct) all of those assets she/he did not inherit [§ 615 (1)]. In case of the same-sex registered partnership, it can be said that Hungarian law gives the same legal status for a same-sex registered partner as for a spouse from a succession law point of view (both in case of intestate succession and succession by testamentary disposition).[23] Thus, the said succession law status of the same-sex registered partner shall be part of the Hungarian public policy. In case of the same-sex cohabitation, as it is the situation in case of the opposite-sex cohabitation, it can be said that under Hungarian law the cohabitant is not an heir (intestate succession rules do not relate to them), but

[23] See further Fuglinszky, Á., *Hungarian law and practice of civil partnerships with special regard to same-sex couples*, Cuadernos de Derecho Transnacional. *Vol.* 9, No. 2, 2017, pp. 278-313

they can be named as an heir in the will by the testator.[24] Thus, e.g. if a foreign legal order would give any intestate succession effect to a de facto cohabitant relationship (either opposite-sex or same-sex), the mentioned foreign rules could not be considered as contrasting with the Hungarian public policy. Namely, the mere fact that according to a foreign legal system different person can be qualified as a legal heir e.g. on the ground what is recognized as family relationship, than Hungarian law allows, is not a reason to call upon for public policy. On the contrary, the different notion of family shall be respected. Here, the reference shall be made to the case of Schalk and Kopf v. Austria[25] and of Pajić v. Croatia[26], where for the purposes of Article 8[27] of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights referred to and reiterated ”its established case-law in respect of different-sex couples, namely that the notion of »family« under this provision is not confined to marriage-based relationships and may encompass other de facto »family« ties where the parties are living together out of wedlock”.

### 4. 4. The traditional legal institutions of the Hungarian inheritance law

The Hungarian inheritance law retained traditional elements from the 19th and the 20th century to the present days. These elements are especially the spouse's life estate, the reserved (compulsory) share of inheritance and the lineal succession. As with the entry into force of the Hungarian Civil Code on 15th March 2014, the spouse's life estate as a general intestate succession status ceased to be exist[28], hereinafter only the reserved (compulsory) share of inheritance and the lineal succession will be discussed.

#### 4.4.1. *The reserved share of inheritance*

The reserved share of inheritance is an imperative minimum share of the closest relatives and the spouse (or the partner whose legal status is the same or similar

[24] See further: Szeibert, O: *Marriage and Cohabitation in the New Hungarian Civil Code—Answering the New Challenges*, in: Menyhárd, A.; Veress, E. (eds.), New Civil Codes in Hungary and Romania. Springer International Publishing, Cham (Germany), 2017, pp. 173-191

[25] Schalk and Kopf v. Austria (Application no. 30141/04) 24 June 2010, p [91]

[26] Pajić v. Croatia (Application no. 68453/13) 23 February 2016, p [63]

[27] Paragraph 1 of Article 8 rules that “everyone has the right to respect for his private and family life, his home and his correspondence.”

[28] See § 7:58 for the spouse's share from the estate contemporaneously with a descendant, where paragraph (1) rules that “the testator's spouse shall be entitled contemporaneously with the legal heir to: a) life estate on the family dwelling used together with the testator, including furnishings and appliances, and b) one share of a child from the remainder of the estate.”

to that of the spouse) of the testator chargeable to his/her estate. Legal systems do regulate the reserved share of inheritance either as a proprietary right or as claim based on the law of obligations. As far as the former is concerned, the heir entitled to reserved share shall have the legal status like all other heirs and this hinders the testator to dispose of those parts of his/her estate which is divided und upheld imperatively by the law for the heir entitled to reserved share. In case of the latter, even if the right of the heir entitled to reserved share is infringed by a testamentary disposition or donations given inter vivos, the last will of the testator cannot be avoided and contested, but the heir entitled to reserved share shall be authorized to sue the legal heirs and ask for his/her reserved share of inheritance in the form of a money claim.[29] The mere fact, that under Hungarian law the reserved share of inheritance falls under the realm of the law of obligations, do not entitle the courts to rely upon the public policy rule if the foreign law regulate the reserved share of inheritance as a proprietary right.

Under Hungarian law, according to the Hungarian Civil Code, the descendants, the spouse (or the same-sex registered partner) and the parents of a testator shall be entitled to a reserved share of inheritance if such person is a legal heir of the testator or would be one in the absence of a testamentary disposition at the time of the opening of the succession (§ 7:75). However, if any of the heir entitled to reserved share is validly disinherited by the testator in his/her testamentary disposition, the reserved share will be also denied from him/her (§ 7:77). Disinheritance shall be valid if the testamentary disposition expressly indicates any of the grounds which are listed in § 7:78 (1)[30] and any of the grounds established proved

29 Csöndes, M.; Klasiček, D: *The legal nature of the forced share of inheritance under Croatian and Hungarian law* in: Drinóczi, T.; Ercsey, Zs.; Zupan, M.; Vinkovic, M. (eds*.),* Contemporary legal challenges: EU - Hungary – Croatia, University of Pécs Faculty of Law, Pécs–Osijek, 2012, pp. 457-458. See also Klasiček, D., *Nužno nasljedno prvo kao ograničenje slobode oporučnog raspolaganja* [Imperative Inheritance – Limitation of Freedom of Testatio], doktorska disertacija, Pravni fakultet, Zagreb, 2011

30 § 7:78 [Grounds for disinheritance]
(1) Disinheritance can take place if a person entitled to a compulsory share:
a) is undeserving of inheritance from the testator;
b) has committed a serious crime to the injury of the testator;
c) has attempted to take the life of the testator's spouse, domestic partner or his next of kin or has committed another serious crime to their injury;
d) has seriously violated his legal obligation to support the testator;
e) lives by immoral standards;
f) has been sentenced to an executable term of imprisonment, and has not yet served his term;
g) has failed to offer aid or assistance as it may be expected by the testator at a time of need.
(2) The testator may disinherit a descendant of legal age for reasons of gross ingratitude the descendant has displayed toward the testator.
(3) A parent may be disinherited by the testator for wrongful conduct which would also serve grounds for the termination of parental custody rights.
(4) A testator may disinherit his/her spouse because of a conduct seriously violating conjugal rights.

to be true. Thus, the conclusion is the same, different rules on the reserved share of inheritance under foreign law do not entitle the courts to rely upon the public policy rule.

Recourse to the nature of the reserved share of inheritance, the Constitutional Court of Hungary declared in its decision 1383/B/1990 that the reserved share is not part of the inheritance law protected under Article 14[31] of the Constitution of the Republic of Hungary, thus the reserved share of inheritance is not protected constitutionally. Article XIII (1) of the Fundamental Law of Hungary of 2011 – as the former Consitution – declares everyone's right to succession. Since the entry into force of the Fundamental Law of Hungary (01. 01. 2012) the Constitutional Court of Hungary has not been decided about the constitutional interpretation of the right of inheritance in Article XIII (1) in connection with the reserved share of inheritance. However, an opposite approach and interpretation does not seem probable as the Constitutional Court of Hungary in its decision 22/2012. (V. 11.)[32] declared that it will continue to use and refer to all of its decisions made under the Constitution provided that the relevant provisions of the Fundamental Law are essentially the same as those in the previous Constitution and also declared that a deviation from the previous practice requires express justification. Nevertheless, it shall be emphasized that even though the reserved share of inheritance is not protected constitutionally, it does not mean that public policy questions cannot arise in connection therewith, as not the constitutional provisions are the only and ultimate sources for the definition and content of the public policy.

For the application of the public policy rule, the followings shall be emphasized. The Max Planck Institute also suggested the reliance on the public policy rule for such situation where the testator, for example, modifies the connecting factor for the sole purpose of circumventing the provisions on forced heirship of the State to which the case is predominantly connected (fraus legis). Beside that on the basis of the Max Planck Institute implications the public policy rule may also come into effect "whenever the exclusion of the reserved portion or of other indefeasible rights to the estate does not constitute the «sole ground» but is rather intermingled with other elements which creates a fundamental contradiction with the public

(5) Any person who is debarred from succession for reason of disinheritance shall not be entitled to administer the inheritance of the person replacing him. The provisions pertaining to the termination of the parents' asset management right shall apply mutatis mutandis to the administration of such assets

31 Article 14 of the Act XX of 1949 on the Constitution of the Republic of Hungary ruled that "The Constitution guarantees the right of inheritance."

32 Dec. 22/2012 (V. 11.) AB on the interpretation of paras (2) and (4) of Article E) of the Fundamental Law of Hungary, paragraph [40]

policy of the forum state, e.g. when combined with a discriminatory purpose". The example given to it was the following: if the testator intended to exclude certain persons because of their gender or religion by choosing a foreign law that prevents this group of heirs from participating in the estate.[33]

### 4.4.2. The lineal succession

During the codification of the Hungarian Civil Code the lineal succession were not intended to abolish, and what is more, its main rules from the former Hungarian Civil Code of 1959 were preserved. This is a special form of intestate succession. Assets falling under the rules of linear succession are an independent sub-category of the estate. The lineal succession essentially means that certain properties are returned to the deceased's family if the deceased leaves no children or other descendants, instead of going to the spouse (or the same-sex registered partner).[34] Namely, if the legal heir is not a descendant of the decedent, any property that has come down to the decedent from an ancestor by inheritance or gift shall be subject to lineal succession [§ 7:67 (1) of the Hungarian Civil Code]. To underline, the linear succession ensures that any assets belonging to the family of the deceased are returned to their family and the spouses shall be entitled to life estate on the lineal property.[35] According to § 7:70 (2) the provisions on lineal succession shall not apply to any property that no longer exists at the time of the testator's death, however, they shall apply to any substitute property or a property purchased from the proceeds received for such property.

Though, lineal succession was just briefly presented, it is without doubts that as a special form of intestate succession it serves a special policy. That is to hold the property on those parental site from where it has come down to the decedent by inheritance or gift and do not allow its devolution on the basis of the general intestate succession rules to the other parental site or the spouse (or the same-sex registered partner).[36] Nevertheless, these rules cannot be considered to be part of the Hungarian public policy.

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[33] The Max Planck Institute made these comments in connection to the not adopted second paragraph of Article 27, however its essence is valid to the present rule of Article 22, as well. See Max Planck… Comment to Article 27., *op. cit.* note 8. p. 664

[34] See also § 7:67 (2) on lineal property: "Property inherited or received as a gift from a sibling or his descendant shall also be subject to lineal succession if the property had been inherited or received as a gift by the sibling or his/her descendant from his/her and the decedent's common ancestor."

[35] Molnár, H., *The Position of the Surviving Spouse in the Hungarian Law of Succession*. ELTE Law Journal, Bd 2., No. 2, 2014, pp.96-97. Available at [http://eltelawjournal.hu/wp-content/uploads/2015/12/7_Hella_Molnar.pdf] Accessed 15.04.2019.

[36] To the policy of the lineal succession see: Vékás, L., Öröklési *jog (Inheritance law)*, 7th. ed., Eötvös József Könyvkiadó, Budapest, 2013. pp. 115-117, Fabó, T., Ági öröklés *(Lineal succession)*, in: Oszto-

## 5. SUMMARY

In this paper it was presented that the question whether a rule of a foreign law could be considered as contrary to the Hungarian public policy can only be answered in the knowledge of the concrete provisions. That is how a judgment can be given about public policy issues.

While deciding about such difficult questions courts are often confronted with another complicated matter. It is well-known that succession law effects are basically based on family law relationship. However, sometimes, first, the existance and the validity of this family law relationship started to be called into question. E.g. as far as the legal status of the spouse is concerned, the question could be whether the marriage was validly concluded or as far as the legal status of the child is concerned, the question could be whether his/her status is based either on blood relationship or on adoption. In private international law it is the so-called preliminary question (*Vorfrage*). If the preliminary question is solved dependently, then the law designated by the conflict of laws rules on succession will determine not only the substantive law questions of the succession, but also the substantive law questions of those legal relationship which give the basis the succession law effects. However, if the preliminary question is solved independently, then the law designated by the conflict of laws rules of the forum will determine the substantive law questions of those legal relationship which give the basis the succession law effects.[37] To note, the Act XXVIII of 2017 on private international law does not contain any concrete rule about the preliminary question, therefore it is for the judge to decide whether to solve the preliminary question dependently or independently. If it is solved independently, then public policy questions could become more intensive in the question asked.

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# REFORM STEPS IN INHERITANCE LAW REGULATION IN THE PRE-DRAFT OF SERBIAN CIVIL CODE - HAS THE COMMISSION FOR CODIFICATION DONE A GOOD JOB?*

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***ABSTRACT***

*It's been almost twelve years since the Commission for drafting the Civil Code of the Republic of Serbia was established, but the society and the scientific community in Serbia have not yet met the new Civil Code. It came only to the Pre-Draft, on which a public hearing was opened in mid-2015. Some reform steps have been taken in all areas of civil law, and certainly in the area of inheritance. However, the impression is that the legal doctrine neither is satisfied with the scope of the reform in the field of succession, especially because in this civil law area legal interventions were least made, as well as with some proposed solutions. Given the fact that the regulation of inheritance law is mostly similar in countries on the territory of the former Yugoslavia, because it has the same foundation - The Federal Inheritance Act of 1955, we believe that the scientific community in these countries should be notified with the ideas of Serbian codifier, in order to be potentially considered in the case of amendment of inheritance acts. Therefore, in this paper we will point out new solutions proposed by the Commission for codification and briefly analyze some of the proposals that deserve special attention. But, we will not stop there, full stop won't be put there. We will try to answer the question: whether the codifier stopped halfway, i.e. whether it at all reached the halfway point that should be crossed at this moment - the moment when the work on such monumental legal edifice as the Civil Code has been finalizing? This is particularly important if we take into account recent reform steps in the sphere of inheritance law in contemporary comparative legislatures, especially in the EU member states. Therefore, this paper will have strong critical dimension, in terms of some of the proposed solutions, as well as in regard of failures of the Commission for drafting the Civil Code.*

***Keywords:*** *Civil Code, inheritance law, legal reform*

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## 1. INTRODUCTION

Civil Code is a very significant monument of legal architecture of one country and represents a significant feature of national identity. Its adoption is considered as indisputable imperative for a society[1] because it is the act of the high authority that establishes a coherent system of civil law, which contributes to the stability of civil law relations. In the Republic of Serbia, the Commission for Drafting the Civil Code was established in 2006. After almost nine years, the Commission published a preliminary draft of the Civil Code.[2] Ministry of justice opened a public debate about Pre-Draft in June 2015, which is scheduled to last a year. But, at the beginning of 2019, the debate is still in progress. The Pre-Draft consists of 2,838 articles, with nearly 500 alternative proposals.

In preparing the Book on law of succession, the Commission started from the actual Inheritance Act of 1995, which its creators "modestly" called as reform Act. Also, in legal doctrine, there are opinions that in practice it proved to be a good Act,[3] although undoubtedly has significant drawbacks. The Commission intended to improve the existing regulation on the basis of the current changes in the legal life, comparative experience, and law application in court practice. However, the impression is that numerous opened issues, which the Commission itself defined,[4] are still open.

In this paper, we will analyze some major novelties in the field of law of succession issued by the Pre-Draft of the Civil Code, and try to answer the question whether the proposed novelties are in line with contemporary trends in comparative inheritance law. Moreover, we will point to some significant issues that remain outside the sphere of interest of the Commission, and which, in our opinion, should be regulated, or existing legal solutions modified.

1 Morait, B., *Gradjanski zakonik ka društveni imperativ*, Pravni život, No. 10, 2016, p. 341

2 Commission for Drafting the Civil Code of the Republic of Serbia was formed in November 2006. The Commission published a preliminary draft of the Civil Code (Draft text prepared for the public debate, with alternative proposals - Pre-Draft), at the end of May 2015. Full text of Pre-Draft available at: https://www.mpravde.gov.rs/files/NACRT.pdf. Accessed 15 November 2018

3 Salma, J., *O prvom potpunom normativnom Nacrtu Građanskog zakonika Republike Srbije*, Pravni život, No. 10, 2016, p. 376

4 See: Slijepčević, R., *Izrada Građanskog zakonika Srbije*. Available at*: [projuris.org/docx/R_Slijepcevic_Izrada_Gradjanskog_zakonika.doc] Accessed 15.11.2018*

## 2. NEW PROPOSED SOLUTIONS IN PRE-DRAFT OF THE CIVIL CODE

### 2.1. Introduction of contract of inheritance in Serbian law

In the laws that regulate it,[5] the contract of inheritance is the strongest legal ground to inherit, because contractual heirs have priority in succession in relation to testamentary and legal heirs.[6] In Serbian law, as in many European laws, including Croatian, this contract is null and void.[7] This solution was strongly criticized by significant representatives of Serbian civil law doctrine, who emphasized the importance of this legal instrument to regulate inheritance law consequences of the death of one person, and pointed to a number of its advantages in relation to the contract on support for life, which it was substituted by in Serbian/ex Yugoslav law.[8]

This stimulated the Commission for Drafting the Civil Code to provide, as an alternative to the existing solution, the possibility for the contract of inheritance to be regulated in Serbian law *de lege ferenda*. In four articles (art. 2776-2779), the codifier prescribed among which parties this contract could be concluded, conditions for its validity, the form and the subject of the contract. The Commission proposed that this contract can be concluded only between spouses,[9] but they

[5] See: sec. 1941 des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 *S. 738,* BGBl. I S. 54; sec 1249 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018; art. 481 and art. 494 of Swiss Civil Code (Zivilgesetzbuch), 1907, status as of 1 January 2018; art. 126 of Inheritance Act of the Federation of Bosnia and Herzegovina, Official Gazette No. 14/2014

[6] It is believed that this is due to one-sided irrevocability of the contract of inheritance - this contract bounds contracting testator until his death. Antić, O., *Ugovor o nasleđivanju i drugi zabranjeni nasled-nopravni ugovori u našem pravu*, Anali Pravnog fakulteta u Beogradu, No. 5, 1986, p. 512

[7] Art. 179 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015. See also: art. 102 of Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019; art. 103 of Inheritance Act of the Republic of Slovenia, Official Gazette No. 15/1976, 23/1978, 13/1994, 40/1994, 117/2000, 67/2001, 83/2001, 31/2013, 63/2016; art. 121 of the Inheritance Act of the Republic of Montenegro, Official Gazette No. 74/2008; art. 7 of the Inheritance Act of the Republic of North Macedonia, Official Gazette No. 47/1996, 18/2001

[8] Stojanović, N., *Zašto je ugovor o nasleđivanju zabranjen u našem pravu*, Pravni život, No. 10, 2003, p. 163; Đurđević, D., *Uvođenje ugovora o nasleđivanju u srpsko pravo*, Anali Pravnog fakulteta u Beogradu, No. 2, 2009, p. 188 and onwards. Comparative legal theory points to the advantages of this contract. Bonomi, A., *Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members*, in: Anderson, M.; Arroyo Amayuelas, E. (eds.), The Law of Succession: Testamentary Freedom, European Perspectives, Europa Law Publishing, Barcelona, 2011, p. 34

[9] See: alternate art. 2776, par. 1 of the Pre-Draft. The introduction of the contract of inheritance would have resulted in the abolition of the possibility for the spouses to conclude the contract on support for life (see art. 2794 of the Pre-Draft - alternative proposal). The disputable question is whether to restrict the conclusion of this contract only between spouses or to allow its conclusion to a wider circle of sub-

may dispose of the inheritance under this contract also in favor of the children of one or the other spouse, their joint children, adopted children or other descendants.[10]

The primary idea of the legislator is that all the descendants who would be called to inherit contractors have to give their consent, in order for the contract to be valid. The descendant may give consent afterward, but if he/she dies before the decedent, does not want to inherit or is unworthy to inherit, and has no descendants - the contract will produce the full legal effect even without his/her consent.[11] As an alternative to all this, the codifier foresaw the possibility that for the validity of the contract the consent of the decedent's descendants is not required.

The consequences of opting for one of these two solutions will have to reflect in the field of compulsory inheritance. Such a conclusion, however, does not follow from the solutions proposed in the Civil Code Pre-Draft. Art. 2778 of the Pre-Draft stipulates that the property that is the subject of the contract is not the part of the legacy, and that compulsory heirs can't settle their compulsory portion from that property. We believe that such a solution would be justified only if the validity of the contract sought the consent of all the descendants who are called to inherit.

In our opinion, for the validity of this contract should not be required the consent of the descendants of the contracting parties.[12] If contractual dispositions violate a compulsory portion of compulsory successors, they would be able to demand its settlement. The value of property assets disposed of by the contract of inheritance should be calculated in the so-called assessed value of the succession.[13] Testamentary and contractual heirs, as well as legatees, would owe the settlement of the

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jects, although in comparative law there is an obvious tendency to allow the conclusion of the contract only to a narrow circle of persons (spouses, non-marital partners, possibly fiancés). In the Preface of Civil Code relating to inheritance, the Commission explained this solution by the effort to eliminate the numerous disputes in practice occurring after the death of one spouse - the contracting party of the contract on support for life. See: Prednacrt Građanskog zakonika, *O nasleđivanju*, Book IV, Beograd, 2011, p. 19

10 See: art. 2776, par. 2 of the Pre-Draft

11 Art. 2777 of the Pre-Draft. This solution is similar to conditions that Inheritance Act prescribes for the validity of contract on assignment and division of property inter vivos

12 Same: Stanković, M., *Ugovorno nasleđivanje između supružnika*, doctoral thesis, Beograd, 2015, p. 452

13 The opinion that property rights disposed of by the contract of inheritance have to be taken into account when calculating the assessed value of the succession (in case of compulsory portion violation), is dominant in Serbian civil law theory. See: Marković, L., *Nasledno pravo*, Beograd, 1930, p. 315; Stojanović, *op. cit*, note 8, p. 177. The same solution has the Inheritance Act of the Federation of Bosnia and Herzegovina, Official Gazette No. 14/2014 (art. 129). Opposite opinion: Antić, O., *op. cit*, note 6, p. 512

forced portion, in proportion to the value of the legacy they received, unless the testator especially privileged some of them.

The Pre-Draft of the Civil Code does not stipulate anything about what the consequences would be in case of annulment of the marriage or divorce between the contracting parties.[14] It seems that in the spirit of this legal institute is that if the marriage was not terminated by the death of a spouse, the former spouse should not have the right to inherit the contractual decedent. In case of the termination of a marriage by divorce or annulment, the contractual dispositions should lose their effect *ex lege*.

### 2.2. Broadening the fiction of *nasciturus*

The primary condition required for a person to inherit the decedent is that was alive at the time of decedent's death or, in case of *nasciturus*, that it was conceived at the time of *delatio hereditatis*.[15] But, many modern laws have adopted the fiction from Roman law about *nasciturus*, under which conceived but an unborn child was considered as it was born, if it was in his best interest. However, the dilemma is whether to recognize the right to the posthumously conceived children to inherit their relatives.

Decades ago medicine gave an affirmative answer to the question whether a dead man/woman can become a parent.[16] By combining the methods of cryopreservation of reproductive cells and embryos, [17] and other methods of assisted reproduc-

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[14] In contemporary comparative law we can find different solutions. In German law, the disposal of property rights is ineffective, unless if is to be assumed that the testator would have made it even if the marriage or engagement was disolved (sec. 2077 and sec. 2279, par. 2 des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 *S. 738,* BGBl. I S. 54). Austrian law has a similar provision, but the spouse who is not to blame for the dissolution of marriage has the right to inherit under the contract, no matter what the marriage no longer exists (sec. 1265 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018). In French law, the contract does not become ineffective ipso iure, but contractual testator may unilaterally revoke the contract (art. 1088 and art. 1395 de le Code civil des Français, 1804, dernière modification au 25 mars 2019)

[15] The same solution: art. 3, par 1 and 2 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

[16] In legal doctrine, for a child who is conceived and born after the death of his parents, the term "posthumous child" has been using. Kindregan, Jr, C. P., *Dead Dads: Thawing an Heir from the Freezer*, William Mitchell Law Review, *Vol.* 35, Issue 2, 2009, p. 434

[17] Frozen gametes and embryos can be stored for hundreds of years. Well known is the case when the child was conceived using sperm that had been frozen for 21 years. Greenfield, J., *Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities, Minnesota Journal* of *Law, Science & Technology, Vol. 8, Issue 1, 2007, p. 281*

tion, the child can be conceived even after the death of one, in exceptional cases (when there is a frozen embryo) and both parents.[18]

Fertilization postmortem may be carried out by using frozen gametes of one or both partners, only if an intentional parent gave certified consent in written form for his/her reproductive cells to be used after the death (we believe that one can give consent in the last will, too).[19] The most common cases are when using the sperm cells of a deceased man to fertilize the woman, but it is possible to use woman's frozen egg cells after her death for fertilization - then it requires the participation of a surrogate mother.

The Commission, which drafts the Civil Code, is in a great dilemma of whether to regulate the birth for another person (surrogate motherhood). As one of the alternatives, the Pre-Draft of the Civil Code offered a solution that only in the case of full surrogacy, for fertilization of a surrogate mother can be used genetic material of the intended parent who died, within a year of his death, if he gave written consent for posthumous use of his reproductive material.[20] If this solution is adopted, the legal parents of the child would be considered the intended parents, and not the surrogate mother.[21]

Starting from the above, the Commission decided that the fiction of *nasciturus* should be broadened. In Art. 2597, par. 2 of the Pre-Draft the Commission stipulates that the decedent's child who is not born at the time of his death can inherit him if it is born alive. That guarantees that posthumously conceived child can inherit his biological parents, because there is no longer a condition in the law that it must be conceived before the moment of decedent's death.[22]

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[18] Vidić, J., *Posthumna oplodnja i njena naslednopravna dejstva*, Zbornik radova Pravnog fakulteta u Novom Sadu, No. 3, 2011, p. 554

[19] Posthumous fertilization is also possible when there is no previously frozen reproductive material, if in the short period after the death, one takes fertilized cells from the deceased (see: case *Stephen v. Comm'r of Soc. Sec.*, 2005). More: Dorogazi, J., *Gillet-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, Washington University Law Review, *Vol.* 83, Issue 5, 2005, p. 1598, ft. 6

[20] See: art. 2277 of the Pre-Draft - alternative proposal

[21] See: art. 2272 of the Pre-Draft

[22] We think that because of legal certainty and the protection of the interests of other heirs time limits for using reproductive material of a deceased person for conception should be stipulated. More: Krstić, N., *Naslednopravna dejstva post mortem reprodukcije*, Pravni sistem i zaštita od diskriminacije, zbornik radova sa konferencije u Kosovskoj Mitrovici, 2015, p. 267 - 268

### 2.3. New reasons for unworthiness of inheritance

Contemporary laws stipulate the reasons for unworthiness of inheritance in cases where a potential successor make unlawfully conducts towards the decedent. Determining the conditions for unworthiness needs to be approached with the necessary measure for precaution, because this is the most serious inheritance-law sanction for the heirs. The reasons for unworthiness to inherit are set as *numerus clausus* so there is no place for any analogy and expansion of reasons beyond the legally defined framework.[23]

In art. 4, par. 1, Serbian Inheritance Act provides the reasons for unworthiness of inheritance that are almost identical to the reasons prescribed in Croatian Inheritance Act.[24] However, the codifier considered that some new reasons for unworthiness should be stipulated. Thus, according to the proposed solution, unworthy to inherit will be the successor who intentionally committed a criminal offense against the testator that took him in the state of permanent incapacity for making a will. Also, unworthy is going to be the heir who prevented or attempted to prevent the realization of the order of inheritance, which the decedent ordered or tried to order, or with whom he counted.[25] A unique position in the legal literature is that the first proposed reason is justified, but in regard to the second reason, there are doubts whether it should be stipulated.[26]

In addition to this, as another alternative solution, in art. 2598, par. 1, point 7 of the Pre-Draft of the Civil Code the codifier proposes two alternatively prescribed reasons of unworthiness. The first is when an heir intentionally commit a serious criminal offense, and to the death of the decedent does not return to the country (ratio is in sanctioning the perpetrators of serious crimes who have fled abroad to avoid criminal sanction). The second alternative for unworthiness to inherit is when the successor by committing criminal offense with intent gain a more favorable position to inherit. We think that only the second proposed reason is acceptable.

[23] Đurđević, D., *Institucije naslednog prava*, Beograd, 2015, pp. 68 - 69

[24] Art. 125 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019

[25] See: art. 2598, par. 1, point 3 and 5 of the Pre-Draft

[26] More: Stojanović, N., *Prednacrt Građanskog zakonika Republike Srbije i nasleđivanje*, Zbornik radova Pravnog fakulteta u Nišu, tematski broj "Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru", No. 62, 2012, p. 193

### 2.4. The date as the condition for validity of a holographic will

A holographic will is one of nine forms of the last will in Serbian law. Conditions for its validity are minimal: 1. that is handwritten by the testator, and 2. that he signed the will.[27] This will is valid even if testator missed to put on it the date when the will was made, because the Inheritance Act doesn't stipulate such condition.[28]

The Pre-Draft, as one of the possibilities, provides that for the validity of the holographic will is necessary to indicate the date of its making.[29] Legal doctrine outlines many arguments that indicating the date on the holographic testament should be mandatory: 1. the date indication is helpful in determining whether the testator had testamentary capacity at the time of writing the testament; 2. in the case of multiple testaments the date determines which testament shall take effect, and to what extent; 3. finally, placing the date demarcate the last will of the testator from the testament draft.[30]

Although these arguments stand, it seems that prescribing that indicating the date is mandatory would lead to an excessive and often unnecessary formalization of a holographic will. This type of testament is private, usually made by legal laymen, without witnesses or help by legal experts. Therefore, it would often happen that the testator fails to indicate a date on his will. As a result, the testament would be voidable and may be annuled by the court, so the last will would not be respected. In addition, the importance of dating the holographic testament is significant in very few cases: when there are multiple testaments or when there is a suspicion that the testator has lost an active testamentary capacity. If indicating the date would be stipulated, it will open the question of whether the date could be written only by testator's hand, or is it possible to be printed.[31]

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[27] Art. 84, par. 1 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015.ZON-a. More about writing and signing holographic will: Đurđević, D., *Sloboda testiranja i formalizam olografskog testamenta*, Pravni život, No. 11, 2009, p. 851 and onward; Ćeranić, D., *Svojeručni testament*, Anali Pravnog fakulteta u Zenici, No. 5, 2010, p. 40 and onward

[28] Dating the will is not mandatory, but it is desirable (art. 84, par. 2 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015). Croatian law has a similar provision, with the difference that Croatian legislator prescribed that not only dating the will is desirable, but also putting on the will the place where making it (art. 30, par. 2 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019)

[29] See alternative for par. 2 of the art. 2678 of the Pre-Draft. Same solution: art. 970 de le Code civil des Français, 1804, dernière modification au 25 mars 2019; art. 505, par. 1 of Swiss Civil Code (Zivilgesetzbuch), 1907, status as of 1 January 2018; art. 602, par. 3 di Codice Civile Italiano, Gazzetta Ufficiale, 79/42, con le ultime edizione di 75/17.

[30] Marković, *op. cit.* note 13, pp. 196 - 198; Antić, O., Balinovac, Z., *Komentar Zakona o nasledjivanju*, Beograd, 1996, p. 323; Stojanović, N., *Nasledno pravo*, Niš, 2011, p. 213

[31] More: Kašćelan, B., *Svojeručno zaveštanje u italijanskom pravu*, Godišnjak Pravnog fakulteta u Istočnom Sarajevu, No. 1, 2010, p. 148

We think that Serbian codifier should take the example from the German Bürgerlichen Gesetzbuches (sec. 2247, par. 5). German legislator does not insist on dating the holographic will (sec. 2247, par. 2 of the Code only states that the testator may indicate the place where and the date when he made the testament, but that's not obligatory), and stipulates that it is going to be valid if there is no suspicion in its validity. However, if there is doubt of its validity, and only then, undated testament shall be deemed as legally invalid. In the case of multiple testaments, undated will be considered earlier made up of dated, and therefore revoked by the later.[32]

### 2.5. New general rule of testament interpretation

Serbian Inheritance Act stipulates two general rules of testament interpretation: first, testament must be interpreting in a way that finds real intention of the testator, and second, that testament must be interpreting in a manner favorable to the legal (intestate) heirs or persons burdened with something in the testament.[33]

Inheritance-law theory pointed out that these two general rules of interpretation sometimes will not be enough, which would lead that the testament, due to ambiguities or contradictions, does not produce effects. Because of that, between two existing general interpretation rules, the third one should be "inserted" - it is so-called favorable interpretation (construction). This interpretation rule applies when the last will has more than one meaning, and when at least one of the possible meanings results in its invalidity. Then, it is used in order to eliminate the meanings of the testator's words which would cause his will to be null and void, or not to have intended effects.[34] The favorable interpretation means that in any case the will should be interpreted in a way to have legal effect, or at least one or more testamentary provisions to produce effect, especially when there is a *non-liquet* situation (*favor testamenti* principle).

The Commission adopted this view and amended the first existing interpretation rule In Inheritance Act by prescribing that testamentary provisions should be interpreted according to the real intention of the testator "and in the sense with which they may have a legal effect."[35] No changes were made in the second

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32 Đurđević, *op. cit.* note 27, pp. 861 - 862

33 Art. 135 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

34 Đurđević, D., *Blagonaklono i dopunjujuće tumačenje testamenta*, Pravni kapacitet Srbije za evropske integracije, Beograd, *Vol.* 4, 2009, pp. 126 - 127

35 Art. 2730, par. 1 of the Pre-Draft

interpretation rule, although in most modern laws, including Croatian,[36] dominates the solution that the ambiguous provisions should be interpreting in favor of testamentary heirs.[37]

### 2.6. Violation of testamentary form as a reason for nullity of the testament

In Serbian law, testaments are voidable when they fail to comply with the formalities prescribed by law.[38] The same solution contains Pre-Draft in art. 2764. Only the persons with direct legal interest can claim the will to be voidable,[39] and they must file their claim within one year from the moment they became aware of the will, but no longer than ten years from the official reading of the will.[40] These time frames are preclusive and the court observes them *ex officio*.[41]

However, codifier made a significant step towards tightening the legal consequences of testamentary form violation and stipulated that the testament would be considered null and void if completely deviates from the form prescribed by law.[42] The impression is that this solution will cause confusion in practice and that for the courts will not be easy to determine when a will "completely deviates from the form", and when there are "minor" violations of form. The application of this regulation would especially complicate the fact that in Serbian law there are nine forms of wills, whose validity laid down on substantially different conditions and form requirements. Therefore, it seems that the codifier should opt for an identical sanction when there is a violation of the form. We are supporters of the existing solution because after the expiry of the deadlines for testament annulment - it

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[36] Art. 50, par. 2 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019

[37] About the reasons which led the Serbian legislature to opt for this solution, see in detail: Antić; Balinovac, *op. cit.* note 30, pp. 404 - 405

[38] Art. 168 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

[39] Art. 165 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

[40] Art. 170 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

[41] Svorcan, S., *Komentar Zakona o nasledjivanju, sa sudskom praksom*, Kragujevac, 2004, p. 364; Stojanović, *op. cit.* note 30, p. 301; Đurđević, *op. cit.* note 23, p. 206. The judicature took the same stance. See: Judgment of the Supreme Court, Rev. 4953/95, from November 15th 1995 (cited from: Krsmanović, T., *Upućivanje na parnicu u ostavinskom postupku*, Bilten sudske prakse Vrhovnog suda Srbije, No. 2-3, 1997, p. 270); Decision of the Supreme Court, Rev. 970/06, from November 8th 2007 (cited from: Vuković, S., Stanojčić, G., *Aktuelna sudska praksa iz građansko-materijalnog prava*, Beograd, 2011, p. 344)

[42] Art. 2753 of the Pre-Draft

would be reinforced and testator's last will would be respected. We think that the nullity due to testamentary form violation is too excessive sanction.[43]

### 2.7. Liability for the decedent's debts in case of renunciation of inheritance in favor of coheir

Renunciation of inheritance in favor of coheir has the character of the positive hereditary statement: the successor accepts the heritage and then gives his inherited portion (i.e. offer) to one or more coheirs. If coheir accepts offered hereditary part, on the relationship between them apply the rules as for gifts.[44]

As the successor, who gave a statement on the renouncement of inheritance in favor of coheir, accepted heritage, he is considered the universal successor. Consequently, he is also liable for the decedent's debts up to the amount of his hereditary portion.[45] This solution may be regarded as unfair because the heir didn't get anything from the succession estate, and certainly did not have in mind that he will be liable for the decedent's debts. Accepting this argument, the Commission provided in Pre-Draft that in case of renunciation of inheritance in favor of coheir, the receiver is liable for the decedent's debts unless something else is agreed.[46]

New proposed solution gives the assignor of the hereditary part a more favorable and fair position (if hereditary part transferred without compensation). On the other hand, although the legal significance of this regulatory change is big, its practical value is much smaller, because in most cases in probate rulings the courts didn't state the property assignor as heir, but only the heir to whom hereditary share ceded, and only he was liable for the debts of the decedent.

## 3. SOME RELEVANT ISSUES THAT THE COMMISSION FOR DRAFTING THE CIVIL CODE DID NOT CONSIDER

In the previous part of this paper, we presented the most important novelties that the Commission for Drafting the Civil Code included in the Pre-Draft. Some of

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[43] The effects of the declarative court decision proclaiming the will null and void are such as if the will had never existed. There is no time frame for declaring a will null and void and every interested person may invoke the reasons for its nullity (art. 161 *in fine* of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015)

[44] Art. 216 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

[45] Although it is not explicitly prescribed, the attitudes about this issue in legal doctrine are undivided. Kreč, M.; Pavić, Dj., *Komentar Zakona o nasljedjivanju*, Zagreb, 1964, p. 449; Antić; Balinovac, *op. cit.* note 30, p. 563; Stojanović, *op. cit.* note 30, p. 344

[46] Art. 2822, par. 2 of the Pre-Draft

them represent a qualitative improvement in the regulation of succession-law relations. However, in our opinion, even more important is the question of whether the Commission has done enough, i.e. whether the codifier failed to regulate some very important issues that were pointed by legal doctrine, and jurisprudence as well.

The document entitled "*Drafting the Civil Code*", which came from the pen of Secretary of the Commission Ratomir Slijepčević, presented the list of open issues in the area of inheritance that deserve profound consideration. Those issues the Commission has defined itself somewhere at the beginning of drafting the Code.[47] It's enough to compare the circle of these issues with what has been done, and one can clearly see that for almost half of them the Commission did not offer a single normative novelty. They did not even propose alternatives to existing solutions from the Inheritance Act, so obviously these questions will remain open after the adoption of Codification. More importantly, some significant issues of inheritance law, which theory suggests for years, not even entered into the catalog of these open questions, and certainly have not been the subject of consideration by the Commission. Above all, it seems that the codifier in the area of succession law did not follow the trends and reform steps in contemporary comparative legislation. We will look at just a few, in our opinion, the most important.

### 3.1. Heterosexual cohabitants and same-sex partners as intestate heirs

In comparative law, there is a visible trend of strengthening the position of non-marital partners as intestate heirs, primarily from the registered same-sex partnerships, but as well from the heterosexual partnerships in some laws. Partners from registered same-sex partnerships have the right to inherit partner as an intestate heir in Sweden, Denmark, Finland, Germany, Czech Republic, Austria, Hungary. Some countries guarantee succession rights both to the partners from heterosexual and registered same-sex partnerships (Croatia, Slovenia, Netherlands, Belgium).[48] Finally, some laws recognize mutual inheritance rights only to the heterosexual cohabiting partners (Greece and the Federation of Bosnia and Herzegovina). Heterosexual cohabiting partners, as well as same-sex partners have no right to inherit intestate one another in Serbian law, regardless how long they lived together and regardless of whether they had common offspring. The "argument" that in the various forums can be heard in favor of this solution is that the form is crucial in

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47 See: Slijepčević, *op. cit.* note 5

48 See in more details: Vidić Trninić, J., *Vanbračni partner kao zakonski naslednik u savremenim pravima Evrope*, Zbornik radova Pravnog fakulteta u Nišu, No. 68, 2014, p. 408 and onward; Micković, D.; Ristov, A., *Reformata na naslednoto pravo vo Republika Makedonija*, Skopje, 2016, pp. 80 - 84

inheritance law, and there is an absence of a form at cohabitation. On the other hand, same-sex partnerships are not being regulated at all in Serbian law, and these partners do not have any legal rights.

It is obvious that the Serbian law remains conservative and does not have enough liberal capacity. Inheritance law, like all other branches of law, must strive forward. Therefore, we believe that in line with a dynamic and evolutionary approach which we represent, the same inheritance rights with spouses should be recognized for heterosexual cohabiting partners (as intestate and compulsory heirs). As for same-sex partners, we presented our thoughts ten years ago, in one of our first articles.[49] Although the discussion about this in Serbia will take a while, we are convinced that the partners from registered same-sex partnerships, when the law of registered partnerships is adopted, will have the right to inherit deceased partner. This, especially because these partnerships can produce legal effects only if they are registered, and then the "formal requirements" will be met.

### 3.2. The circle of compulsory heirs

Each country, starting with the doctrinal positions, views on the importance of family and the supposed solidity of family relationships, and following contemporary social trends, defines subjects and conditions under which they are entitled to get a certain part of the inheritance after the death of the decedent. The imperative nature of legal rules regulating the area of compulsory succession ensures the protection of property rights and interests of the decedent's close family members from excessive gratuitous dispositions *mortis causa* and/or *inter vivos*, by which they have been unjustly evaded from succession. Compulsory heirs are guaranteed the right to request their compulsory portion of the succession estate irrespective of the decedent's expressed will on the distribution of the succession assets.

The circle of compulsory heirs varies greatly from country to country.[50] It can be seen that in this field in recent years and decades there have been significant

[49] Krstić, N., *Nasleđivanje partnera iz istopolnih partnerskih zajednica u savremenom pravu*, in: Petrušić, N. (ed.), Pristup pravosuđu - instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije, tematski zbornik radova, Niš, *Vol.* 4, 2008, pp. 275 - 277

[50] In the Netherlands, the right to compulsory portion is recognized only to descendants of the decedent (art. 4:63, par. 2 and art. 4:64, par. 2 of Dutch Civil Code (Burgerlijk Wetboek, Boek 4, Geldend van 19-09-2018 t/m heden)). In French law compulsory heirs are all the descendants and the spouse (art. 913, art. 913-1 and art. 914-1 de le Code civil des Français, 1804, dernière modification au 25 mars 2019). In Austria (sec. 762 and 763 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018) and Italy (art. 536 di Codice Civile Italiano, Gazzetta Ufficiale, 79/42, con le ultime edizione di 75/17) a wider range of forced heirs is prescribed: except the descendants and the spouse, the ancestors of the decedent also have the right to forced share. In German (sec. 2303, par. 2

changes, ambivalent by its character, in accordance with current social thoughts. Main trends in European laws are: restriction of the circle of relatives entitled to compulsory portion, improvement of legal position of the spouses and cohabitants and diminution of amount of forced share.[51]

In Serbian law, there is the widest range of relatives-compulsory heirs in Europe. All decedent's descendants, ascendants and brothers and sisters as well, are entitled to claim a compulsory share, if they are called to inherit (besides them, the right to claim a compulsory share have decedent's spouse, adoptee and his descendants and adopter).[52]

This solution is opposite to the tendency, that exists in comparative law, of narrowing the circle of compulsory heirs and in particular the abolition of the right to a compulsory portion of the decedent's ancestors and other relatives (except descendants). In comparative legal theory, the dominant view is that testator should be guaranteed a wider freedom to dispose of his property rights at his discretion and therefore narrow circle of heirs should be entitled to claim compulsory portion.[53] Having regard to the fact that the importance of kinship has been reducing when constructing the rules of inheritance, and with the aim of favoring freedom of testamentary disposition, it is our opinion that we should reduce the circle of relatives that may be compulsory heirs. Except for descendants, this right should be guaranteed only for the parents, not for the further ancestors or siblings.[54]

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des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 *S. 738,* BGBl. I S. 54; art. 10, par. 6 des Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz L-PartG) and Swiss law (art. 471 of Swiss Civil Code (Zivilgesetzbuch), 1907, status as of 1 January 2018), beside offspring and the spouse, this right is recognized to the parents and the homosexual partner from registered partnership

51 Fontanellas Morell, J. M., *La professio iuris sucesoria*, Madrid, 2010, p. 287

52 See: art. 39 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015. The reason for this solution the legislator found in respecting the principle of reciprocity: if the grandchildren may have the right to a compulsory portion on their grandparents' succession estate - the grandparent should be recognized the same right on the succession estate of their grandchildren. Antić; Balinovac, *op. cit.* note 30, pp. 123 - 124

53 In this context, in inheritance-law theory, calls to abolish the institute of compulsory portion, or at least modify it, are increasingly stronger. On these endeavours, see in more detail: Cámara Lapuente, S., *Freedom of Testation, Legal Inheritance Rights and Public Order under Spanish Law*, in: Anderson, M.; Arroyo Amayuelas, E. (eds.), The Law of Succession: Testamentary Freedom, European Perspectives, Europa Law Publishing, Barcelona, 2011, pp. 283 - 289. In North Macedonia, the Commission for Drafting the Civil Code has the view that only decedent's children should be compulsory heirs, but only if they are permanently unable to work and without the necessary means for life. About the reasons that justify this solution: Micković, D.; Ristov, A., *The Reforms of the Inheritance Law in the Process of Codification of the Macedonian Civil Law*, Harmonius, 2016, pp. 160 - 161

54 As one option, it might be considered that siblings and ancestors, for a certain period of time after the death of the testator (e. g. within a year), should be entitled to the support from the succession estate,

### 3.3. Testamentary forms

There is small number of legislations that stipulate as many testamentary forms as it is the case with Serbian law. Serbian Inheritance Act envisages nine forms of wills, and therefore it gives the opportunity for the one who wants to make a will, to do it in the way and in the form that suites its' needs the most, or that match the circumstances in which the testator is. That's the good side of this regulation.

However, the question is whether the existence of some testamentary forms in Inheritance Act is justified, especially if one takes into account that some of them in Serbian legal life (almost) never have been made, and they virtually represent a dead letter. That's the case with testament on the boat and military testament. Also, the question is whether we should have both judicial and notary testament, because the rules for making these two forms are almost similar. Furthermore, one can discuss that some forms of wills are outdated, so it can be considered if their deregulation is opportune, or at least a modification of the foundations on which they should be based in the future. The Commission for Drafting the Civil Code was of the opinion that nothing should be changed.

On the other hand, the inevitable question is whether it is justified to stipulate in Serbian law some new testamentary forms that existed in comparative law for a long time (e. g. the mystical testament).[55] Finally, one can debate is it really always necessary for the law to insist on strict compliance of the form when making a will, and whether there are situations when the formalities should be mitigated, in order to give the opportunity for the testator to make a will buy audio or video recording in particularly justified circumstances, such as exceptional circumstances (in Serbian law the testator is allowed to make nuncupative will in exceptional circumstances). These new testamentary forms are going to be regulated *de lege ferenda*, no doubts about that. Why not be regulated now, in the new Civil Code? Why not to allow the possibility for making a will by phone, camera, even on the internet (e.g. on social networks or by e-mail)? Smart devices are an indispensable part of our lives, we use them constantly. We should be able to record our last will on these devices - it can be considered more authentic than when one writes the will on the paper. Of course, defining the rules, form demands would be a challenge for every legislator, but for the start - making video or audio wills should be allowed at least in exceptional circumstances.

in order to ensure their subsistence minimum. This right would be granted only to those relatives that the decedent was obliged to maintain by law if maintenance ended due to his death

55 About the significance of the mystical testament and the way how to be regulated in Serbian law, in detail: Arsenijević, B., *Tajno zaveštanje u pojedinim evropskim pravnim sistemima*, Zbornik radova Pravnog fakulteta u Nišu, No. 78, 2018, p. 408 and onward

## 4. CONCLUDING REMARKS

The Commission for drafting the Civil Code of the Republic of Serbia has been working on this Act for more than thirteen years. Entire lawyers public eagerly expects the adoption of the Code. But, the big question is whether the Code is going to satisfy public expectations.

In the sphere of succession law, the Commission imported into the Pre-Draft of the Code most of provisions from Serbian Inheritance Act, which served as a solid foundation. Bearing in mind that the inheritance law develops, the Commission proposed some new solutions that constitute a qualitative improvement in relation to existing solutions. The most important are: introduction the contract of inheritance, as the strongest legal ground to inherit; broadening the fiction of *nasciturus*, in order to recognize to the posthumously conceived child the right to inherit; prescribing new reasons for unworthiness to inherit; prescribing new general rule for testament interpretation *in favorem testamenti*; prescribing new rule for liability for the decedent's debts in case of renunciation of inheritance in favor of coheir, etc.

On the other hand, the impression is that some very important issues were not in the focus of the Commission. We believe that the Commission left a lot of open questions that should be carefully considered by the codifier. In this paper, we accented some of them. Our opinion is that heterosexual cohabitants and partners from registered same-sex partnerships should have a mutual right to inherit one another intestate. In order to give more freedom of testamentary disposition to the testator, we think that Serbian codifier should reduce the circle of relatives that may be compulsory heirs - except for descendants, this right should be guaranteed only for the parents. Finally, special attention should be dedicated to the reform of testamentary forms. Some forms of the last will do not exist in legal life for decades, and therefore the question is whether it is justified to continue to be regulated in the Code. Instead of them, some new forms should be regulated (e.g. mystical testament). Also, the legislator should follow the digital revolution and rapid changes in the modern world, which reflects in the legislation. Recording the last will on the smart devices is the future of testamentary succession and we believe that Serbian codifier should make efforts to provide conditions for the validity of this new form of the last will.

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# CERTAIN ASPECTS OF EU, AUSTRIAN AND HUNGARIAN LAW IN CONNECTION WITH INHERITANCE OF BUSINESS SHARES*

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***ABSTRACT***

*The paper has three sections. First of all, the legal bases of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession are discussed, because this regulation shall be directly applicable in the Member States of European Union in accordance with the Treaties. There are several issues that fall outside the scope of the regulation, for example questions governed by the law of companies, such as clauses in the memorandum of association of companies, which determine what will happen to the shares upon the death of the members. From the point of view of Hungarian law, it is a matter of company law to talk about the inheritability of business shares in each type of companies.*

*The second part of the paper is about general rules in company law regarding inheritance of business shares and in the third part family firms are discussed. Writing about these is common in Austrian legal literature; in connection with these, succession in family firms is a significant topic. In Hungarian legal literature the term family firm is rarely found, but the usage and content of term "family firm" cannot be neglected because of their role in economy.*

***Keywords**: inheritance law, company law, business shares, Succession Regulation, family firms*

## 1. INTRODUCTION

This paper has three sections, those are similar to concentric circles: in the first part, we discuss the legal bases of Regulation (EU) No 650/2012[1] as a general

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1 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter Regulation, Succession Regulation)

legal surrounding obligatory in the EU; after this two legal systems are examined in neighbouring countries in Central and Eastern Europe with different stages of development in the second and third segments by not only presenting but also comparing them.

The Succession Regulation shall be directly applicable in the Member States of European Union in accordance with the Treaties. There are several issues that fall outside the scope of the regulation, for example questions governed by the law of companies, such as clauses in the memorandum of association and articles of association of companies, which determine what will happen to the shares upon the death of the members.

The second part of the paper is about general rules in company law regarding inheritance of business shares. Different kinds of clauses in case of succession can be applied in the articles of associations in Austria, it is important to examine whether these can be used in Hungary.

In the third part we will discuss family firms as the smallest in our concentric circles. Writing about these is common in Austrian legal literature; in connection with then, succession in family firms is a significant topic. In Hungary it is not a widely-used expression regarding legal literature, but the usage and content of term "family firm" cannot be neglected because of their role in economy.

## 2. THE SUCCESSION REGULATION

"Inheritance law is not so necessary field of law from the aspect of unification of Europe without a doubt. Another field of law has this role, for example business law. Because of this, inheritance law was not a political issue for the legislator organs of the European Union. The economical and – if it is possible – the legal unity can only be realized in case, the differences between fields of law affected by economical concrescence disappear. One of these fields of law is inheritance law."[2] The demand in connection with regulation of this field of law is not unsubstantiated: "the number of inheritance cases, which have cross-border feature in member states of member states of European Union, is estimated to 450 000 per annum, and their combined value amounts to 120 billion euro."[3] Based on the impact as-

[2] Ludwig, I., *Az öröklési kollíziós jog európai összehasonlító vizsgálata,* Közjegyzők Közlönye, *Vol.* 8, Issue 7-8, 2004, p. 3

[3] Mádl F.; Vékás L., *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga,* 8th edition, ELTE Eötvös Kiadó, Budapest, 2015, p. 400; Burandt, W.; Rojahn, D. (eds.) *Erbrecht*, 2nd edition, Verlag C. H. Beck oHG, München, 2014, p. 1431

sessment report assembled to the draft of the Succession Regulation about "10% of inheritance cases in the European Union have international feature".[4]

The direct force[5] which prevails in the view of the Regulation means that this Regulation did not have to be implemented to harmonise with Hungarian legal system, *a contrario*, the national law must follow it. The Act V of 2013 on Civil Code[6] has been created after accepting the Regulation; some procedural rules to issue the European Certificate of Succession are enacted into the Act XXXVIII of 2010 on probate actions.[7]

The Regulation is in force,[8] most of its rules are to be applied from 17 August 2015, thus it must be applied concerning deaths on and following this day. Apart from the previous ones, several articles came into force earlier, for example several registries.

The applicable law by Article 20 of Succession Regulation is universal, in other words any law specified by this Regulation shall be applied whether or not it is the law of a member state. "This kind of resolution can be criticised, before all because applying a law beyond the Union is not justified by neither the aspects of internal market nor practical arguments."[9] This thought is basically true, but the legislators wanted to create such conflict of law legislation rules so that law of that member state should be applied with which the testator has the (possibly) closest relation. The choice of law would be not so free, if the testator would be allowed to choose only between the laws of the Member States of European Union. It could be considerable that in case of choice of law the testator may choose law of such state, with which his/her heirs do not fare ill as if the applicable law by the Regulation would be followed. This method can be seen in the earlier Rome Regulations and in the Hague convention.[10]

4 COMMISSION STAFF WORKING DOCUMENT Accompanying the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Inheritance, Impact Assessment, SEC(2009) 410 final, Brussels, 14. 10. 2009. [http://ec.europa.eu/civiljustice/news/docs/succession_impact_assessment_en.pdf] Accessed 16.04.2019. See also: Gothárdi E., *Az általános joghatóság szabályozása az Európai Unió öröklési rendeletében*, Magyar Jog, *Vol*. 62, Issue 9, 2015, pp. 522-523

5 Blutman, L., *Az Európai Unió joga a gyakorlatban*, 2nd edition, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2013, p. 338

6 [http://njt.hu/cgi_bin/njt_doc.cgi?docid=159096.357520] Accessed 16.04.2019

7 Act XXXVIII of 2010 Sections 102/B and 102/C. [http://njt.hu/cgi_bin/njt_doc.cgi?docid=131478.361244] Accessed 16.04.2019

8 This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. (Article 84 Subsection 1) See also Article 84 Subsection 2

9 Mádl; Vékás, *op. cit.* note 2, p. 405

10 REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I); REGULA-

Unless otherwise provided for in the Regulation, the law applicable to the succession as a whole shall be the law of the state in which the deceased had his habitual residence[11] at the time of death. Where, by way of exception, it is clear from all the circumstances of the case (for example because of work) that, at the time of death, the deceased was evidently more closely connected with a state other than the state whose law would be applicable as it was mentioned before, the law applicable to the succession shall be the law of that other state.[12]

"The Regulation accepts the theory of unity of heritage, in other words the legal fate of the estate is subsumed under law of one state"[13] for reasons of legal certainty and in order to avoid the fragmentation of the succession, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third state.[14] This kind of regulation could be found also in the Hague convention[15] The other theory created by the science of international private law is the so-called theory of division of heritage, where the applicable law is different in case of real estate (as a rule, the applicable law is the law of the location, *lex loci*) and in case of personal properties (the applicable law is the personal law of the deceased at the time of death, *lex personae*).[16]

The factors to determine the personal right of a legal person – principle of registration and principle of seat[17] - are in connection with the issue above. These principles also determine the bases of inheritability of business shares; in other words the possibility to form the terms of the memorandum of association and the relevant cogent provisions, too. The unification of these principles would be a great benefit for the whole European Union; although there is only a slight chance to achieve this, due to the differences in opinions on which principle to follow.

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TION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation („Rome III"); The Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. See also: Bergquist, U.; Damascelli, D.; Frimston, R.; Lagarde, P.; Reinhartz, B.; Odersky, F., *EU-Erbrechtsverordnung Kommentar*, Verlag Dr. Otto Schmidt KG, Köln, 2015, pp. 128-129

[11] In connection with habitual residence see further: *ibid.* pp. 34-35., pp. 68-70; Odersky, F., *Die Europäische Erbrechtsverordnung in der Gestaltungspraxis*, notar, *Vol.* 6, Issue 1, 2013, pp. 4-5

[12] Article 21, see also Sections 23 to 25 of the Preamble

[13] Mádl; Vékás, *op. cit.* note 2, p. 404. Szőcs, T., *Az európai öröklési rendelet mint új kihívás*, Közjegyzők Közlönye, *Vol.* 20, Issue 2, 2016, p. 34

[14] Section 37 of the Preamble

[15] See also: Bergquist *et. al., op. cit.* note 9, p. 33

[16] Nagy, Cs. I., *Nemzetközi magánjog*, 2nd edition, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012, p. 147

[17] *Ibid.* pp. 62-65. Mádl, Vékás, *op. cit.* note 2, pp. 216-224

The law determined pursuant to the law applied by the Regulation or the chosen law shall govern the succession as a whole, but the Regulation gives us a specific list also. In this part it mentions that the applicable law shall govern in particular among others the causes, time and place of the opening of the succession, disinheritance and disqualification by conduct, liability for the debts under the succession.[18]

One of the main questions of inheritance law after determination of beneficiaries[19] is that how the rights and obligations are transferred to the successors. The Hungarian version of Regulation uses the word "átszállás" in this context. It has to be admitted that this is the correct translation of the expressions in the German and English version (der Übergang, transfer). This word was used in inheritance law in connection with inheritance of business shares in limited liability companies in Act IV of 2006, the previous Hungarian act on business associations. In this meaning the following definition was true without any restriction: the transfer of business share is a change in status, subject change of members not based on a legal transaction.[20] Act IV of 2006 used this terminus technicus in connection with natural persons and legal persons,[21] Act V of 2013 on Civil Code uses it only in case of transformation, merger and demerger of legal persons and subject change in business shares based on legal act.[22]

### a. The definition of succession in Succession Regulation

The Regulation uses autonomic terminology,[23] based on the previous decisions of the European Court[24] – and there is a definition for succession:[25] the succession is no other, than succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer

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18 Article 23, see also Section 42 of the Preamble

19 Section 47 of the Preamble

20 Papp T. (ed.), *Társasági jog*, Lectum Kiadó, Szeged, 2011, pp. 412-413

21 Act IV of 2006 § 128

22 Act V of 2013 § 3:170

23 Gombos, K., *A jog érvényesülésének térsége az Európai Unióban*, Wolters Kluwer Kft., Budapest, 2014, p. 81

24 Case C-513/03 Héritiers de M. E. A. van Hilten–van der Heijden vs. Inspecteur van de Belastingdienst [2006] ECLI:EU:C:2006:131, par. 41.; Case C-256/06 Theodor Jäger vs. Finanzamt Kusel-Landstuhl [2008] ECLI:EU:C:2008:20, par. 25.; Case C-11/07 Hans Eckelkamp & Co. vs. Belgische Staat (2008) ECLI:EU:C:2008:489, par. 39.; Case C-25/10 Missionswerk Werner Heukelbach eV vs. État belge [2011] ECLI:EU:C:2011:65, par. 16.; Case C-132/10 Olivier Halley & Co. vs. Belgische Staat [2011] ECLI:EU:C:2011:586, par. 19.; Case C-31/11 Marianne Scheunemann vs. Finanzamt Bremerhaven [2011] ECLI:EU:C:2012:481, par. 22

25 Article 3 Subsection 1 a)

through intestate succession. We can find similar components in the preamble, placing it into the Regulation it became full value legal norm. According to the Section 47 of the Preamble the law applicable to the succession should determine who the beneficiaries are in any given succession, these are determined, so it covers heirs and legatees and persons entitled to a reserved share. Obviously it was the purpose of the legislative body to cover all the hereditary relationship, so this category must be understood under the scope of the Regulation.

The Case *Marianne Scheunemann vs. Finanzamt Bremerhaven*[26] is in connection with inheritance tax exemption, and it has a close relationship to company law. The reference has been made in proceedings between Mrs Scheunemann and Finanzamt Bremerhaven (Bremerhaven Tax Office; 'the Finanzamt') concerning the notice relating to the calculation of inheritance tax on an estate which includes a shareholding in a capital company established in a third country. By its question, the referring court asks in essence whether the Treaty provisions on the free movement of capital are to be interpreted as precluding legislation of a Member State which, for the purposes of the calculation of inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country, while conferring those advantages in the event of the inheritance of such a shareholding when the registered office of the company is in a Member State. Under German law, the tax-free amount and the reduced-rate valuation shall apply to shares in a capital company where the capital company has its registered office or principal place of business in Germany at the time when the tax is incurred and the testator or donor had a direct holding in the nominal capital of that company amounting to more than one quarter thereof. According to the German Government, one of the aims of the tax advantages provided for under the national provisions at issue in the main proceedings is to encourage persons inheriting substantial shareholdings in a company to become involved in its management so as to be able ultimately to ensure the survival of the undertaking and save jobs. As regards the facts in the case before the referring court, it is established that the testator had a 100% holding in the capital of the company concerned and, accordingly, it cannot be denied that he was able to exert a definite influence over its decisions and to determine its activities, although this case is different because of the Canadian seat of the company. Legislation of a Member State, which, for the purposes of the calculation of inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country, while conferring those advantages in the event of the inheritance of such a shareholding when the regis-

[26] Case C-31/11 Marianne Scheunemann vs. Finanzamt Bremerhaven [2011] ECLI:EU:C:2012:481, par. 22

tered office of the company is in a Member State, primarily affects the exercise of the freedom of establishment, since that holding enables the shareholder to exert a definite influence over the decisions of that company and to determine its activities. Those Treaty provisions are not intended to apply to a situation concerning a shareholding held in a company which has its registered office in a third country. We can agree with the opinion of the Court because the seat of the company is not in a Member State of the European Union, so none of the freedoms is violated, if such restrictive rules (in this case rules of not giving a tax exemption) are valid and these do not affect third state.

Apart from the definition of succession the Regulation does not determine the definition of legacy, but that opinion is acceptable so this shortage will not cause any problem during application of the Regulation.[27]

**b. The connection between company law and the Regulation**

Questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memorandum of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members,[28] is excluded from the scope of this Regulation. This exception means the Hungarian legislative body does not have to do anything to adjust the laws to this Regulation in subject of company law, the actual national regulation is proper. This topic is also excluded from the scope of the Regulation from the point of view of Hungarian law, because to decide the possibility of inheritance of business shares in every type of companies, whether there are any limitations, is not an inheritance law, but a company law matter.[29]

Because of the above mentioned, to decide if a legal matter is to be governed by company law or inheritance law, the law of competent court in succession with cross-border implications will decide, and Article 30 of Succession Regulation must be applied: Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that state, they are applicable irrespective of the law applicable to the succession.[30]

27 Bergquist *et. al., op. cit.* note 9, p. 64

28 Article 1 Subsection 2 h)

29 Mádl; Vékás, *op. cit.* note 2, p. 404

30 Section 54 of the Preamble. Bergquist *et. al., op. cit.* note 9, p. 53

## 3. General rules in company law regarding inheritance of business shares

In Hungarian law at general partnerships and limited partnerships the heir of the deceased person can join to these partnerships based on the agreement with the other living members. This shows the partnership feature of these companies, because for the members, who are still in the partnership, it is not irrelevant who enters into the company in the place of the deceased, the membership is bound to persons.[31] The heir who becomes member must not fulfil contribution, only in case the company and the heir agreed in that way.[32] Not only the declaration of the heir is needed as soon as possible, but the unanimous consent of the other members.[33] If these are not fulfilled it is possible that a two-personnel general partnership or a limited partnership which has only one acting partner and one limited partner is terminated, due to the fact that the legitimate functioning cannot be restored six months after the death of a member with entering other person into the company.[34]

In case of limited liability companies, it also depends on the will of the heirs whether they would like to continue the activity of their predecessor, in the event of a member's death, the heir may request the managing director to be entered in the register of members upon providing proof of inheritance.[35][36] The identity of the heir is also needed to be proven unambiguously. For the unification of this question the European Certificate of Succession was created, although the use of this Certificate shall not be mandatory,[37] it is practical. A European Certificate of Succession may be requested - with the exception set out below - after the grant of probate of full effect, the temporary grant of probate declared fully enforceable, or the ruling on the conclusion of the probate proceedings where the court adjudicates all claims affected by the temporary grant of probate becomes final. The executor of the will provided for in Regulation and the administrator of the estate - including the guardian ad litem provided for business shares and claim - may apply for the issue of a European Certificate of Succession before the specified time in order to demonstrate the powers referred to in Article 63(2)*c)* of the Regulation.[38] "A whole chapter of the Regulation (articles 62 to 73) has been dedicated

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31 Kisfaludi A., Szabó M., (eds.) *A gazdasági társaságok nagy kézikönyve*, Complex Kiadó, Budapest, 2008, p. 759

32 Act V of 2013 § 3:149., § 3:155

33 Papp, *op. cit.* note 19, p. 386

34 Act V of 2013 § 3:152., § 3:158

35 Kisfaludi, Szabó *op. cit.* note 29, p. 944

36 Act V of 2013 § 3:170

37 Article 62 Subsection 2

38 Act XXXVIII of 2010 § 102/B. Subsections 1 and 2

exclusively to the Certificate. Thus, the European Certificate of Succession might be called a third pillar of the Succession Regulation – besides the rules on the applicable law and on jurisdiction, recognition and enforcement."[39] The form of the application and the Certificate is in the 4th and 5th annex of Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014,[40] this regulation executes the Succession Regulation.

The Certificate[41] was created in order to facilitate the proving of the heirs', legatees', executors' of the will or administrators' of the estate rights and status in another Member State, for instance in a Member State in which succession property is located, in case of a succession with cross-border implications within the Union, to settle the case speedily, smoothly and efficiently. In order to respect the principle of subsidiarity, the Certificate should not prevail over internal documents which may exist for similar purposes in the Member States.[42] It should not be an enforceable title in its own right but should be considered as a document of evidentiary effect. Furthermore, it should be presumed authentically certify facts which have been established under the law applicable to the succession or under any other law applicable to specific facts, such as the substantive validity of dispositions of property upon death.[43]

The managing director may refuse to register the heir or the successor if the persons authorized in the memorandum of association provide a statement on the acquisition of the business share according to the conditions laid down in the memorandum of association within a preclusive period of 30 days from the date of the heir's or successor's application for registration taking effect, and the market value of the business share is paid by such persons to the heir or successor. Any clause of the memorandum of association to provide a longer term than 30 therefore days shall be null and void.[44]

The shares incorporate membership rights in private limited companies; these are securities with a really special hereditary, company, security legal relationship. In

[39] Hertel, Ch. *European Certificate of Succession – content, issue and effects.* ERA Forum. Journal of the Academy of European Law, *Vol.* 15, Issue 3, 2014, p. 394

[40] COMMISSION IMPLEMENTING REGULATION (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

[41] For further analysis of the Certificate see *ibid* pp. 397-406

[42] Section 67 of the Preamble

[43] See also Section 71 of the Preamble

[44] Act V of 2013 § 3:170. Subsection 2

connection with these, the problem mentioned before does not arise in case their transferability is not restricted.

Company law is also excluded from the scope of other conflicting legislation regulations, such as Rome-I Regulation. The inheritance of business shares, origin of claim for redemption will be regulated in the memorandum of associations; along with the issues of continuing business activity and becoming a member of the company. The conflict of laws rules of each state will regulate the judgment of memorandum of associations.[45]

According to Tamás Gyekiczky: „it is unclear, whether the cases in which the memorandum of associations have accurately detailed provisions in connection with the inheritance of the members' business shares belong to the scope of the regulation or only those cases are excluded from the scope where the member's death results to succession in the company regulated by the memorandum of association and company law. The Regulation supports the second interpretation; this is confirmed by definition of inheritance."[46] Our point of view by the interpretation of the text is that the scope of the Regulation is also excluded if the memorandum of association has detailed provisions for case of one member's death. As per the Regulation: such clauses in the memorandum of association are also excluded from the scope of the Regulation, which determine what will happen to the shares upon the death of the members.[47] This determination could be understood as inheritance, too. Although the definition for succession in the Regulation would like to cover all kind of devolution of rights and duties, however company law prevails over the rules of inheritance law, the Regulation took this into consideration and this way it excluded business shares from the scope.

Nowadays it could easily happen that one company has members from another country. If these members are natural persons, in case of their death the Regulation shall be applied. With respect to the fact that company law is excluded from the scope, the devolution is based on the memorandum of association and on the law, and the applicable law by the Regulation determines who the heir is, in other words, who is allowed to become a member in the company by right of inheritance, unless the memorandum of association provides otherwise.

In Austrian company law general partnerships are dissolved in the event of death of a member. This is because the law has the starting point if a member dies, who is liable for debts which are not covered with the assets of the company, the other

45 Burandt; Rojahn *op. cit.* note2, p. 1434

46 Gyekiczky T., *Az európai „öröklési" rendeletről,* Európai Jog *Vol.* 24, Issue 2, 2014, pp. 2-3

47 Article 1 Subsection 2 h

members do not want to continue the activity of the company. The members of family firms plan to operate the company for a long time, through several generations; if they do not want it to dissolve in case of the death of a member, they have to state this regulation in the memorandum of association.[48]

With respect to the fact that the heirs are not known until the member' death, the memorandum of associations does not have to name this person; it must only contain the opportunity of succession. The living members also can decide to continue the activity of the company.[49]

The Austrian limited partnerships have almost the same regulation as general partnerships because unless otherwise prescribed, rules of general partnerships[50] have to be applied for limited partnerships. The general partner's death dissolves the company, but the limited partner's death does not, so his/her contribution can be inherited. This article is dispositive;[51] because of this the memorandum of association can allow the dissolution of company in case of the limited partner's death.

There are four different clauses; they can be settled in the memorandum of association of both general partnerships and limited partnerships:[52]

1. Proceeding clause (Fortsetzungsklausel): the living members agree on continuing the business activity, if one of the members dies. The heirs are neither allowed nor obliged to become members; the contribution is redemption in the legacy.[53]

2. Succession clause (Nachfolgeklausel): the heirs are allowed to become members, so the company is not dissolved, and there is no redemption.[54]

3. Qualified succession clause (Qualifizierte Nachfolgeklausel): there is an accurately determined person in the memorandum of association who is allowed to enter into the company, if a member dies. This person has to meet certain requirements; the new member can be for example an employee of the company, or another person, it is also possible that the heir is the member. Those heirs, who are not allowed to join to the company, are entitled to redemption.[55]

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[48] Kalss, S., Probst, S. *Familienunternehmen.* Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2013, p. 212, *ibid* p. 661

[49] Unternehmensgesetzbuch § 141 (1)

[50] Unternehmensgesetzbuch § 161 (2)

[51] Kalss, Probst *op. cit.* note 45, pp. 215-216

[52] *Ibid.* p. 661

[53] *Ibid.* pp. 662-663

[54] *Ibid.* pp. 663-664

[55] *Ibid.* pp. 664-665

4. Entry clause (Eintrittsklausel): a third person can join to the company, who was not a member until the death of the deceased person, but he/she is not obliged to do so.[56]

At Austrian limited liability companies and private limited companies the business shares and securities are inheritable. Based on Art. 75 of the Act on Limited Liability Companies members have business shares, and in the next article it declares that business shares are inheritable[57] without any further explanations, because it also says that business shares are transferable,[58] and rest of this article is about transfer. Upon this, the business shares do not dissolve in case of death of a member, and compared to general partnerships and limited partnerships it is not possible to exclude the inheritance of business shares. Private limited companies have the same regulation as limited liability companies, securities are parts of the estate.[59]

## 4. Family firms inheritability of shares in family firms

The aim of the regulation of company law is to coordinate the different interests of members of company, to guarantee balance between them, while the most important goal of inheritance law is to distribute the estate of the deceased person. Since companies are established vitally for a longer period, members would like to regulate succession.[60] The heirs want to acquire the inheritance and dispose of it, the company would like a proper decision-making and management, the members want power and profit.[61] All of these interests have to be conciliated.

In Hungary there is no legal definition for family firms, although the term "family business" is used in legal practice[62] without giving any hints about its precise content. The question is how courts interpret "family", and whether Austrian solutions can be used in Hungary.

In the Austrian and German legal literature one can find several scientific articles on family firms, as a possible type of company. Compared to "traditional" com-

56 *Ibid.* p. 665

57 Brünner, G.; Pasrucker, Ch., *Die GmbH von der Gründung bis zur Auflösung*, 2. Auflage, dbv-Verlag, Graz – Wien, 2016, p. 95

58 GmbHG § 76 (1) Die Geschäftsanteile sind übertragbar und vererblich

59 Kalss; Probst *op. cit.* note 45, p. 671, Kalss, S., *Die Vererbung von Aktien,* Journal für Erbrecht und Vermögensnachfolge, *Vol.* 9, Issue 4, 2015, pp. 112-119

60 Kalss, Probst*, ibid.,* p. 654, Czernich, D.; Guggenberger, B.; Schwarz, M. (ed.) *Handbuch des österreichischen Familienunternehmens*. LexisNexis Verlag, Wien, 2005, p. 345

61 Kalss; Probst *op. cit.* note 45, p. 655., Probst, S., *Erbrechtsnovelle 2014 aus dem Blickwinkel der Erhaltung der österreichischen Unternehmen.* Die Wirtschaftstreuhänder Issue 5-6., 2014, p. 341

62 FIT-H-PJ-2014-284.; BDT 2005. 1288.; ÍH 2009. 130

panies, there are differences in connection with members, since they are members of in almost most cases the same family, and they have different aims in a certain way. Their purpose is not only making large profits but also to save the fortune of the family and to ensure them financial care.[63] These companies have sometimes fewer members than other companies.[64]

We do not find legal definition in Austria, there are different definitions laid down in legal literature. Certain companies are named after the family and maximum three family members have at least 50% of the votes; in other family firms they do not have only at least 50% of the votes, but they also manage the company.[65] These are objective criteria, but there are subjective requirements, just as the mentioned will to continue the activity of the company through several generations.[66] Family firms can have members from different families and there could be members in a family firm, who are not members of the dominant family. [67] It might be surprising, but it is also possible that a family firm is a one-man business enterprise.[68] In my opinion, the acceptance of this Austrian legal and economical analysis in Hungary does not mean strange result, this kind of definitions would be proper.

In Hungary there is no legal definition for family firms, although the term "family business" is used in legal practice without giving any hints about its precise content. The question is how courts interpret "family", and whether Austrian solutions can be used in Hungary.

We hardly find any scientific articles and references in Hungarian literature to answer this question. In legal practice, family firms have the same company types what we find in Hungarian Civil Code, they are widely ranged, approximately 70% of the Hungarian companies are controlled by families, they produce nearly 50% of the GDP and they employ about 50% of the employees. The generation-change is a large challenge for them, on the other hand, they do not have finished plans for succession so during changes of generation nearly two thirds of them dissolve.[69]

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63 Kalss; Probst *op. cit.* note 45, p. 2., *ibid* p. 16

64 LeMar, B. *Generations- und Führungswechsel im Familienunternehmen.* 2. Auflage, Springer Fachmedien, Wiesbaden, 2014, p. 6

65 Kalss; Probst *op. cit.* note 45, pp. 9-12

66 *Ibid.* p. 17

67 *Ibid.* p. 77

68 *Ibid.* pp. 12-13., *ibid* p. 191

69 Cs. K., *Optimisták a családi cégek*, 2016. [http://www.vg.hu/kkv/optimistak-a-csaladi-cegek-475310]. Accessed 27.08.2018

The legal status of family firms is special in that way, although there is no proper legal definition for them, but this expression is used in legal practice and everyday life. It cannot be understood completely why there are no any further legal consequences or results if the court establishes the fact that the company is a family firm. Based on the Austrian legal literature, a coherent and not too casuistic definition should be created, and if a legal person meets these requirements, it should get several discounts.

This definition must have a proper unit, what "family" means. I believe the term 'relative'[70] in Closing Provisions in Hungarian Civil Code is not enough, Section 4:96 would be more proper for it.[71] In order to determine more accurately these persons and to avoid not knowing who a family member is, because they hardly know each other, provisions of inheritance law should be used. This circle should be circumscribed in that way that only the deceased member's great-grandparents and all of their descendants should be understood as 'family'.

In Hungarian, the term 'family firm' is equal to 'family business' („családi vállalkozás"). 'Business' („vállalkozás") is equal to 'business party' (in term of the Hungarian law system) that means any person acting for purposes which are not outside his trade, business or profession. We have to call attention to the fact that family firm (family business) are not only some kind of distinguished parties in connection with consumer contracts. For this purpose, the Hungarian version of 'family firm' ('családi cég') can be used. This is more proper because firms are such legal persons, their certain aspects regulated in Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings, as their aims of most of those could be both profit and durable operating, and both capital consolidation and partnership features can be strong.

All of these should have effects on succession in companies: in respect of the possibility of succession, if there is any special point, the living members of the family who are also members in the company would have priority to get the deceased member's contribution; irrespective of the fact that they are not the heirs. In order

[70] Act V of 2013 Section 8:1 (1) For the purposes of this Act:
1. 'close relative' shall mean spouses, next of kin, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, and siblings;
2 'relative' shall mean close relatives, domestic partners, spouses of the next of kin, spouse's next of kin and siblings, and spouses of siblings

[71] Act V of 2013 Section 4:96 [Family relationship]
(1) Lineal descent refers to a blood relative in the direct line of descent.
(2) Collateral descent refers to relatives not in direct line of descent, having at least one common ancestor.

to make a legal definition for family firms, it must have another aims, such as tax relief.

## 5. CONCLUSIONS

The creation of the Regulation was necessary with respect to the inheritance matters having cross-border implications; the aim of the Regulation was to cover all of these legal relations that are possible from the aspect of conflicting legislation and international civil procedure, and tried to pay attention to every situation that may arise from the different solutions of the Member States.

Although the material scope of the Regulation does not include certain aspects of company law, even if they are relevant from the aspect of inheritance law, the examination of excluding rules are necessary to determine their expanse.

The Hungarian and Austrian company law have a lot of common points, but some crucial differences as well. On the other hand, Austrian law allows certain solutions and with those the Hungarian regulation can be reached, this shows that the two legal systems in this field if law can converge, and Hungarian legal literature should pay attention on Austrian scientific articles in connection with family firms. Scholars must create a dogmatically coherent system to set place of family firms, so legislators can lay down different preferences for them. With these preferences, people are more likely to establish family firms, so they can help families to earn for their living.

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Topic 6

# EU and Economic challenges

# CROSS BORDER MOVEMENT OF COMPANIES: THE NEW EU RULES ON CROSS BORDER COVERSION


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***ABSTRACT***

*Cross-border companies' mobility is issue which has been gaining public attention in Europe since the end of the 1980's. Although it is clear, from the wording of the articles 49 and 54 of the TFEU, that companies should benefit from a freedom of establishment, in practice, the scope of this freedom is quite unclear. Companies wishing to move abroad are usually facing insurmountable obstacles which are still, more than 30 years after the famous Daily Mail case, very present. The recent EU legislative activity may finally bring this problem to an end. In April 2018 the European Commission proposed new rules on cross-border mobility. By enacting the Proposal of the Directive on cross-border conversions, mergers and divisions European Commission introduced important novelties to the cross-border mobility with an aim to simplify procedures, bring legal certainty and create such a legal environment which will enable companies to operate easily on the Single Market. In this paper authors will analyse only the rules of the Proposal that apply to cross- border conversions of companies. The new Proposal on cross-border conversions seem to be an adequate tool for companies that wish to convert abroad. However, the process of conversion is far from being simple. It is a very specific, multi-layered process which involves different stakeholders and authorities and requires their coordinated action. Authors will provide for a critical overview of the proposed legal solutions with special respect to the recent ECJ decision in Polbud case, in which the ECJ reaffirm the right of companies to cross-border conversion.*



***Keywords:*** *Cross-border mobility of companies, Cross-border conversion, Transfer of registered seat, Freedom of establishment, Polbud-case*

## 1. INTRODUCTION

Companies' conversion typically refers to the situations where company decides to change its legal form and continues to exist but now as a company of another legal form. This legal operation is not particularly intriguing when it happens within national boundaries. Besides the fact that company changes its legal form, everything else stays more or less unchanged, employees keep their rights, creditors automatically become creditors of converted company. There may be some differences with regard to ownership rights, but that issue is usually resolved in the process of conversion.

However, situation is completely different when conversion has cross border dimension or said differently, when a company from one Member State (hereinafter: MS) decides to convert in company of similar or different form of another MS. In such a situation, there are number of issues to be dealt with. Some of the most important concern rights of shareholders, employees' rights, dissolution of company in home MS or not, tax issues etc.

It is noticeable that cross- border companies' conversion opens number of important issues. Therefore, one might ask why, for what reason, a company would wish to carry out cross-border conversion? Generally, there are two main group or reasons for companies' conversion. The first are those which are fully legitimate and have sound economic justification such as, better investment climate, a more favorable market conditions, a more favorable legal framework etc. The second are those which are not necessarily illegitimate, but which may raise some concerns with regard to tax avoidance, reduction of workers' or shareholders' rights, etc.

Although there is a full awareness that some companies' mobility will have fraudulent intention, the question, as to whether a company can move its corporate seat or migrate to another MS has been answered at the EU level years ago. Cross-border mobility of companies is fully recognized by the EU as well as by the ECJ.

However, despite that, in practice, companies from the EU that are wishing to move their seats to another MS through process of conversion or by any other way, face insurmountable obstacles such as complicated and expensive proceedings on cross-border conversions[1], nonexistence of national rules regulating cross border conversion, etc.

For many years, EU has dealt with the issue on cross border *ad hoc* and unsystematically, mostly leaving things for clarification to the ECJ[2]. So for example, the

[1] For more see: Gelder, G., *Polbud-Case and New EU Company Law Proposal: Expanding the Possibilities for Cross-Border Conversions in Europe*, EC Tax Review, *Vol.* 27, No. 5, p. 260

[2] The ECJ has been trying to fill up the mentioned legal gaps with its interpretations of freedom of establishment, which, in a broader sense represents cross-border conversion. The ECJ judgments (such

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) had some provisions on cross-border conversion but only those regulating conversion of public limited liability company to *Societas Europaea*.[3] Also, the Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law[4] selectively dealt with some issues regarding cross- border mergers. Evidently, the EU lacked systematic approach in regulating cross border companies' mobility.

Faced with an increasing demand of companies to move, the EC had finally on 25 April 2018 published a Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and division. (hereinafter: Proposal)[5]. Proposal introduces important novelties regarding three cross-border statutory changes of the company: conversions, mergers and divisions.[6]

However, this paper will only focus on the analysis of the rules from the Proposal relating to the cross-border conversions. It will analyze whether the Proposal's solutions are adequate to meet the Proposal`s goals. It will also analyze how the Proposal addresses shareholders rights, employees' rights and other important issues that arise in connection to cross-border conversion.

Secondly, paper will provide for an overview of the most important ECJ decisions dealing with cross–border mobility of companies. It will particularly analyze the ECJ's conclusions in *Polbud* case, in which the ECJ affirmed the right of companies on cross-border conversion.[7]

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as *Cartesio*, *Vale* and *Polbud*) has revived this matter and the lack of rules on cross-border conversions and the need for their regulation at the EU level. Even though the ECJ has recognized the right of the companies to convert abroad, the ECJ is not a legislative body and therefore not entitled to create rules on cross-border conversion. It is limited by its interpretational role

[3] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21

[4] Gorriz, C, *EU Company Law: Past, Present and … Future?,* Global Jurist, *Vol.* 19, No. 1, 2018, Abstract; Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46–127

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[6] *Ibid.*

[7] Szydło, M., *The Right of the Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishement,* pp. 414. More about the fact that the existing secondary legislation of the EU does not

## 2. THE STRUCTURE AND MAIN GOALS OF THE PROPOSAL

As it is evident from the Proposal's title, the Proposal deals with three different types of cross-border proceedings: conversions, divisions and mergers[8]. Since the purpose of this paper is to explore only the rules regarding cross-border conversion, the focus will be only on the part of the Proposal that regulates this particular business operation.

Rules on cross-border conversion are part of the Chapter I of the Proposal. The Proposal encompasses substantive rules as well as procedural rules on cross-border conversion[9]. It defines following the most important issues:

- Obligation for the MS to enable cross-border conversion and conditions relating to cross border conversion,[10]
- Draft terms and reports that must be drawn up by the company and the duties of an independent expert which precede cross- border conversion,[11]
- Rules on disclosure of relevant documents to all stakeholders,[12]
- Approval by the general meeting on cross-border conversion,[13]
- Large part of the Proposal gives significance to the protection of members, creditors and employees' rights,[14]

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regulate the cross-border conversion see: Rammeloo, S. *Cross-border company migration in the EU: Transfer of registered office (conversion) – the last piece of the puzzle? Case C-106/16 Polbud*, EU:C:2017:804. Maastricht Journal of European and Comparative Law, *Vol.* 25, No. 1, pp. 87-107; Markovinović, H.; Bilić, A., *The Transfer of a Company Seat to a Different Member State in the Light of a Recent „Polbud" Decision,* InterEULawEast: Journal for the International and European Law, Economics and Market Integrations, *Vol.* 5, No. 2, 2018, p. 100. See also: Bouček, V., *Prekogranično preoblikovanje trgovačkog društva i sloboda poslovnog nastana u presudi Vale Europskog suda: a sada nešto (ne) sasvim drugo!?,* Hrvatska pravna revija, *Vol.* 3, No. 5, 2013, pp. 60-67.; Horak, H. et al, *Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije,* Sveučilište u Zagrebu, Ekonomski fakultet, Zagreb, 2013, p.9

8 Although those proceedings are very different, the common feature of all three proceedings is that they may result with transfer of corporate seat or economic activity of the company abroad

9 More about the content and structure see: Mörsdorf, K., *Der Entwurf einer Richtlinie für grenzüberschreitende Umwandlungen – Meilenstein oder* Scheinriese?, EuZW, 2019, rn. 145. Available: [https://beck-online.beck.de] Accessed 18.03.2019

10 Art 86c of the Proposal. For more information about other cross-border transformation see: *ibid.*,, rn. 142

11 Art 86d, 86e and 86f of the Proposal.

12 Art 86h 86g of the Proposal

13 Art 86i of the Proposal.

14 Art 86j, 86k, 86l of the Proposal.

- Lastly, the final part of the Proposal regulates issues regarding the effects of cross-border conversion.[15]

Purpose of those rules are at least two-fold. On one side they are aimed at creating common European legal framework on cross-border conversions. Lack or nonexistence of common legal framework for cross-border conversion was recognized as a serious obstacle to companies' mobility on the EU level. Thus, the new rules, among others, aim to facilitate and simplify procedure for cross-border conversions.[16]

On the other side, those rules also have task to ensure adequate level of protection to different stakeholders affected by the process of cross-border conversion (creditors, employees and shareholders), particularly from fraudulent and abusive behavior and /or artificial arrangements which are on the EU level recognized as a problematic form of competition. It is expected that the new Proposal on cross-border conversion will significantly develop the Single Market, since it will enable companies to spread their activities cross-border[17] and thus to enjoy and maximize all benefits of working at the Single Market.

Although there is no doubt as to regards of the necessity of having common European rules on cross-border conversion, still, there are many reasons for concern.[18]

[15] Art 86r and 86s of the Proposal. For more information about the structure see: Mörsdorf, *op. cit.,* note 9, rn. 142; H., *Optionen und Komplikationen bei der Umsetzung des Richtlinienvorschlags zum grenzüberschreitenden Formwechsel (Teil I)*, DStR 2018, rn. 2644. Available: [https://beck-online.beck.d] Accessed 18.03.2019

[16] For more about the previous rules on cross-border conversion see: Jurić, D., *Prekogranični prijenos sjedišta trgovačkog društva u europskom i hrvatskom pravu,* Zbornik PFZ, *Vol.,* 66, no. 6,2016, p. 743-745. Also, there was an initiative in 1997 by the Commission when it proposed 14th Directive aiming at regulating the cross-border transfer of seat, which was accompanied by lot of discussion and studies but then left in unpleasant silence. See more: Horak, H., Dumančić, K., *Cross-Border Transfer of the Company Seat: One Step Forward, Few Steps Backward,* US-China L. Rev. 711, 2017, p. 712 – 713. See also Horak, H., *Societas Unius Personae - Possibility for Enhancing Cross Border Business of Small and Medium Sized Enterprises, Economic and Social Development*, International Scientific Conference on Economic and Social Development: The Legal Challenges of Modern World 180, 2018, pp. 180-186

[17] *Ibid*. Proposal, p. 4. One of the motives for proposing the Directive is the fact that statutory changes of companies, such as conversion, are common event in a life of a company. For that reason, the targeted group of this Proposal are limited liability companies which represents 80% of companies at the Single Market. 98-99% of these companies are SMEs, which are, due to their market power, the group most affected by the obstacles of cross-border conversion. (*Ibid*. Proposal, p. 1.). Absence of the rules on cross-border conversions and divisions, makes these proceedings highly complicated and in some cases even impossible to conduct. (*Ibid*. Proposal, p. 18; see also case Polbud, Case C-106/16, Polbud v Wykonawstwo sp. z 0.0., [2017], ECLI:EU:C:2017:351). In that line see also: Mörsdorf, *op. cit.,* note, 9, rn. 141-142

[18] Szydło, M., *The Right of the Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishement*, pp. 414

It is clear that the process of cross-border conversion which involves different MS, different types of authorities etc., is far from being simple. It is a very specific, multi-layered process, which requires coordinated action, interaction and mutual understanding of all included stakeholders and authorities.[19]

In lines that follow, authors will give an analysis of the course of proceeding and will address the main problems and doubts that arise in connection to the Proposal on cross-border conversion.

## 3. SCOPE OF APPLICATION- TO WHOM THE PROPOSAL APPLIES?

One of the things that should be examined before any further analysis, are Proposal's rules regarding the scope of application. Those rules provide for an answer to the question to whom the Proposal applies, or said differently, which type of companies can go through the process of conversion. As we know, under the national company law rules, it is possible to establish companies of different legal forms. Thus, the question is, is the process of conversion available to companies of all forms or only to some particular types of companies?

According to the article 86a of the Proposal, the provisions regarding cross-border conversions refer to a limited liability company (hereinafter: company) which is established under the national law of one MS in which a company has its registered office or principal place of business and which converts into a company governed by the law of another MS.[20] This rule does not leave space to any doubts. It clearly indicates that the conversion is possible only for limited liability companies, while other types of companies are deprived from that possibility.

Since the Proposal itself does not have any specific explanation why other types of companies, such as limited or unlimited partnerships are excluded from the scope of the future Directive, it is hard to figure out why the possibility for conversion is not opened to companies other than limited liability companies.[21] That particularly in light of interpretations of the ECJ according to which the freedom of establishment is not limited only to the corporations but also includes other types

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19 *Ibid*.

20 Proposal, p. 18; Art 86b par 1 Proposal

21 The same for cross-border merger at: Boulogne, G., F., *Shortcomings in the EU Merger Directive*, doctoral thesis, Vrije Universitet, 2016, pp. 34-35. Available at: [http://dare.ubvu.vu.nl/bitstream/handle/1871/55058/complete%20dissertation.pdf?isAllowed=y&sequence=6] Accessed 20.03.2019

of companies such as partnership.[22] Therefore cross-border conversion  should be also allowed to companies other than those covered by national laws under the term limited liability.[23]

The Proposal is also rather specific with regard to the types of companies to which the Proposal does not apply. Firstly, with regard to cooperative society, the Proposal leaves open for the MS to decide whether they will allow cross-border conversion for cooperative society or not.[24] Secondly, the Proposal clearly indicates that it shall not apply to cross-border conversion involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company.[25] And lastly, the Proposal provides for an exhaustive list of situations in which conversion will not be possible. Cross-border conversion is permitted if a company is a subject to winding up, liquidation or insolvency or preventive restructuring proceedings, or if there is a likelihood of insolvency, or if it is a subject to the suspension of payments.[26] Likewise, companies constituting an artificial arrangement with an aim to obtain undue tax advantages or unduly prejudicing the legal or contractual rights of employees, creditors or minority members (shareholders) would also be prevented from performing cross-border conversion.[27]

It is noticeable that the EC is particularly concerned with those conversions which are carried out with fraudulent or even criminal purpose such as for the evasion, avoidance or circumvention of labor standards, social security payments, tax obligations, creditor's, minority shareholders rights or rules on employees participation, etc.[28] Therefore, the Proposal, with a good reason, contains detailed rules regarding the protection of the creditors, shareholders, employees etc.

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22 Van Eck, G., Vale: *Increasing Corporate Mobility from Outbound to inbound Cross-Border Conversion*, European Company Law, *Vol.* 9, no. 6,2012, p. 323

23 See also for foundations in: *Ibid*.

24 Art 86a para 3 of the Proposal MS may not apply the provisions of the Proposal on cooperative society even if it is held as a limited liability company in MS

25 Proposal, p. 4; Art 86a para 4 of the Proposal

26 Art 86c para 2 of the Proposal. It is unclear why the companies which are subject to preventive restructuring proceedings should be prevented from the cross-border conversion proceedings, when these preventive measures could serve as an opportunity for the company to solve its financial difficulties and to avoid insolvency

27 Art 86c para 3 of the Proposal. Available also at: Proposal, p.4

28 Report on the Proposal for a Directive of the European Parliament and of the Council amending Directive  (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, (COM(2018) 0241-C8-0167/2018-2018/0114 ( COD)) 9. 1. 2019., p.14

## 4. PROCEDURE FOR THE CROSS-BORDER CONVERSIONS

Significant part of the Proposal is devoted to procedures for the cross-border conversions. Process of conversion should be carried out in several steps. The first step is preparation of draft terms for the cross-border conversion.[29] Draft terms must be supplemented by two targeted reports addressed to shareholders and employees.[30]

### 4.1. Draft terms and reports for cross-border conversion

According to the Proposal the procedure for cross-border conversions begins with the drawing up of draft terms and preparing reports on the implications of the cross-border conversion on shareholders and employees.[31]

With regard to the draft terms, draft terms represent framework document for conversion. It should be prepared by the management or other administrative organ of the company.[32] It must contain all relevant information on proposed conversion based on which employees, creditors and other stakeholders will be able to determine how conversion will impact their position and rights. Except for the stated purpose, specific value of the draft terms lays in the fact that it serves as a basis for the determination whether the intended cross-border conversion constitutes an artificial arrangement.[33]

Content of draft terms is prescribed by the Proposal. It shall contain information regarding departure and destination MS (e.g. the legal form, name, registered office),[34] instruments of the constitution of a company in the destination MS and the timetable of the actions planned for the cross-border conversion.[35] Furthermore, this draft terms should specify the rights granted to stakeholders enjoying the special rights or to holders of securities, then mechanisms for protection of the creditors, special advantages for administrative, management, supervisory or controlling organs as well as likely reprecussions on employment.[36] It should also

29 Proposal, p. 4

30 *Ibid.*

31 Proposal, p. 4; Mörsdorf, *op. cit.,* note, 9, rn. 143

32 Proposal, p. 4

33 *Ibid.*

34 Art 86d para 1(a) and (b) of the Proposal

35 Proposal, p. 34, (10). See also art 86d para1 (c) and (d) of the Proposal. Regarding timetable the question arises, what is the purpose of providing the timetable if later timetable deviates from the firstly planned timetable. In that line some authors recommend that this provision should be deleted. See: Wicke, H., *Optionen und Komplikationen bei der Umsetzung des Richtlinienvorschlags zum grenzüberschreitenden Formwechsel (Teil I)*, DStR 2018, rn. 2644. Available: [https://beck-online.beck.de] Accessed 18.03.2019

36 Art 86d para 1 (e), (f), (h) and (j) of the Proposal; Wicke,*ibid.*

include information on the date from which the transactions will be treated for accounting purposes as being those of the converted company[37], details for cash compensation for the shareholders which oppose the conversion and information on possible involvement of employees in the converted company.[38]

In order for the draft terms to be more purposeful, the recommendation is to include additional information on the financial situation of the company as well as the amount of the unpaid taxes or public debts. It would be also valuable to add explanation of the method that was used to calculate cash compensation that have to be provided to members.

Besides preparing draft terms for conversion, management or administrative organ of the company also have to prepare two separate reports explaining and justifying the legal and economic reasons for cross-border conversion.[39] One report should be written for members of the company (shareholders) and another for the employees.[40] Since the interests of shareholders and employees are not necessarily complementary, proposed content of those reports is somewhat different. In line with the EC suggestion that the report for members shall in particular include explanations of impact on company's activities (future business and strategic plan for the company), implications on the shareholders' interests and measures to protect shareholders (rights and remedies when they do not agree with conversion)[41], while the report for employees shall contain all potential implications on future business and strategic plan for the company, on protection of employment relationships, any changes in the conditions of employment and location of the company and its subsidiaries.[42]

An idea of preparing and disclosing the reports to members and employees seems very useful. But it should be also said that preparing such reports is not a legal novelty. On the contrary, it is a legal standard applied in national company laws in similar types of proceedings.

Furthermore, the Proposal anticipates sufficient time for shareholders and employees to analyze proposed draft terms and reports. The report for company

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[37] Art 86d of the Proposal

[38] Art 86d para 1 (g), (i) and (k) of the Proposal

[39] Proposal, p. 38. See also art. 86e para 1

[40] Art. 86e of the Proposal¸ Rec. 11 and 12, Art 86e para 1 and 86f para 1 of the Proposal; Mörsdorf, *op. cit.,* note, 9, rn. 145

[41] Art 86e para 2, pg. 23 of the Proposal. Art 86e para 3 of the Proposal

[42] European Company Law Experts (ECLE), *The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment*, *September 2018*. Available at: [https://europeancompanylawexperts.wordpress.com/publications/the-commissions-2018-proposal-on-cross-border-mobility-an-assessment-september-2019] Accessed 20.03.2019; Art 86f para 2 and 4 of the Proposal.

members shall be made available to the members at least two months before the date when general meeting votes on approval of conversion.[43] During those two months company members and employees can comment on the draft terms, they can propose amendments to the original draft terms presented to them. If the management of the company finds those comments and proposals justifiable, they will amend draft term in accordance with that.

### 4.2. Examination by an independent expert

In order to avoid abuses of accuracy of information provided in the draft terms and reports,[44] the Proposal prescribes that draft terms and reports have to be examined by an independent expert. This obligation is mandatory only for medium size and big companies[45], while micro and small companies are exempted from this requirement.[46]

Examination by an independent expert serves as an assistance to the competent authority of the departure MS to make a correct decision as to whether or not to issue the pre-conversion certificate on cross-border conversion.[47]

The Proposal further requires that in its written report the expert provides for an assessment of accuracy of the information provided in the draft terms and reports. In particular that means the expert must provide factual elements that are necessary to assess whether the conversion constitutes an artificial arrangement[48], to collect all the relevant information and documents for cross-border conversion, and also, if necessary, to conduct an investigation. [49]

Although Proposal's rules regarding mandatory external expert report have great practical value and they reduce risks associated with the fraudelent cross-border conversions, and thus they are justified, they also create some doubts.

Obviously, the whole process of conversion largely depends on the opinion given by an independent expert. This means that burden of proof that the cross-border conversion is legitimate, justified and fair (for all included stakeholders) lays on

43 Wicke, *op. cit.,* note 35, rn. 2708

44 Proposal, p. 4

45 Proposal, p. 4. See also art 86g para 1 of the Proposal; Wicke *op. cit.,* note 35, rn. 2646

46 Proposal, p. 23; Art 86g para 6, Rec 14 of the Proposal

47 Rec 13 of the Proposal. Independent experts are appointed by the competent authority of the departure MS. Art 86g para 2 of the Proposal The competent authority of the departure MS appoints individual expert within 5 working days from the application for examination

48 Proposal, p. 8-9

49 Art 86g para 3 and Rec 13 of the Proposal

the independent expert. This also means that once when independent expert has confirmed that draft terms and management reports are accurate and true, the process of conversion can continue. That should also mean that the employees, companies' members and others should rely on findings in his report.

Evidently, an independent expert has a very important role in a process of conversion. Therefore he/she should be a top-class specialist, who is not only able to detect irregularities, but also to foresee whether the proposed conversion has fraudulent purpose. That leads us to the question of "quality" or the question of "necessary expertise" that an independent expert should have. For example, what type of expertise should the independent expert have (*e.g.* auditor, economist, tax expert)? Furthermore, since information on various aspects of companies' activity should be collected *e.g.* financial, tax or employment, it is unclear whether there should be only one independent expert for the whole procedure or there should be few different experts. It is hard to imagine that only one person can provide an in-depth expert opinion for all above mentioned segments for which an expert's opinion is required. And lastly, the question is how realistic is to expect from someone who is not a member of the company or part of management to be able to determine *ex ante* an intention of constituting an artificial arrangement?[50]

Therefore, regardless the good intention that obviously lays behind the idea of involvement of an independent expert, it seems that the expectations regarding to independent expert reports are too high and that his/her role is overestimated. It would be much more realistic to expect that he/she carry one more or less formalistic examination of draft terms and reports. That particularly in light of the fact that the Proposal suggests that MS provide civil liability rules for situation when an independent expert commit an act of misconduct in the performance of his/her duties and in the light of the fact that the competent authority of the departure MS is obliged to carry out an in-depth assessment upon the facts provided by the independent expert to determine if the proposed conversion constitutes an artificial arrangement by the means of article 86c para 3 of the Proposal.[51]

### 4.3. Approval by the general meeting

After taking note of the reports by an independent expert, management of the company can call shareholders meeting, where companies' members should vote on proposed conversion.[52] The decision of the general meeting must be delivered

[50] Proposal, p. 23; art 86g

[51] Proposal, p. 25; Art 86n of the Proposal

[52] Art 86i of the Proposal

to the competent authority of the departure MS.[53] The general meeting has the possibility to change conditions for the cross-border conversion. To reach the decision on changing the conditions, the Proposal requires the majority of not less than two thirds but not more than 90 % of the votes attached either to the shares or to the subscribed capital represented.[54] Few things with regard to that are unclear.

Proposal says nothing regarding the form of the decision on changing of conditions of cross-border conversion. Moreover, it is unclear what would be the effect of such a decision with regard to continuation of the conversion. Is such a decision completely new legal document or only an annex to the existing one? It is also unclear how this resolution should be prepared.

The general meeting shall also decide whether the cross-border conversion would require making amendments to the constitutional instruments of the company carrying out the conversion.[55] The decision of the general meeting giving approval to the conversion according to the Proposal cannot be challenged solely on the ground of insufficient cash compensation for the shareholders who were against conversion.[56]

### 4.4. Role of the responsible authorities in departure and in destination Member States

When and if the general meeting of the company votes for the conversion, proceedings continues before the competent authorities[57] of the departure and destination MS. In this process, competent authority of the departure and destination MS scrutinize the legality of the operation, each of them within its competences. According to the Proposal, the competent authority of the departure MS will assess whether the conversion is lawful. It will examine whether shareholders meeting approved conversion with the requisite majority of votes, whether creditors and employees are protected as prescribed by the Proposal etc.

[53] Art 86i para 1 and Rec 15 of the Proposal

[54] Art 86i para 2 and 3 of the Proposal

[55] Art 86i para 4 of the Proposal

[56] Art 86i para 5 of the Proposal

[57] The Proposal does not indicate which body should be considered as a competent authority, whether it would be a court or other public body. This could be important from the view of the competences of the bodies and credibility of their decisions, since there is for sure the difference in the persuasiveness of the decisions of different bodies. MS by all means should not be limited in defining the competent authority in accordance with their national systems, however, it would be preferable that it is at least indicated whether e.g. public notaries could also be held as a public authority, or should that responsibility be given only to the courts as the highest authority

If the competent authority of the departure MS has no objection, it will issue a pre-conversion certificate.[58] If on the other hand the competent authority of the departure MS determines that conversion does not meet national law requirements, it will not issue the pre-conversion certificate and it will inform the company about that decision.[59]

And finally, if the competent authority suspects that conversion is unlawful (meaning that it aims to obtain undue tax advantages or unduly prejudices the rights of employees, creditors or members), it will carry out an in-depth assessment with an aim of determining if the conversion constitutes an artificial arrangement.[60] The competent authority carries out the assessment on case-by-case basis and it should take into account the factors laid down by the Proposal only indicatively.[61] When conducting an in-depth assessment, the competent authority may hear the company and interested third parties.[62]

The purpose of the in-depth assessment seems puzzling, since it is not clear what artificial arrangement it entails. Whether it aims only to obtain tax advantages and/or prejudice rights of employees, creditors or minority members or it also enclose other types of fraudulent behavior.[63] Moreover, the question is does the competent authority have necessary skills, expertise and time to involve in a such demanding task.

However, if finally, after all assessments and inquiries all doubts regarding legality of conversion are removed, competent authority of the departure MS will issue the pre-conversion certificate.

Once issued, the pre-conversion certificate is immediately delivered to the competent authority of the destination MS. At that point, the departure MS is no longer competent for the rest of the proceeding.[64] Issuing pre-conversion certificate can be deemed as a proper solution, since it shows that all the formalities for a cross-border conversion required by the departure MS have been duly completed. The competent authority of the destination MS should be bound by this preliminary ruling.[65]

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58 Art 86m para 1 and 2 of the Proposal

59 Art 86m para 7 of the Proposal

60 Proposal, p. 20; Art 86n, p. 4 of the Proposal

61 Rec 22 of the Proposal

62 Art 86n para 2 of the Proposal. See also art 86o of the Proposal

63 Proposal, pp. 22; Art 86c para 3 of the Proposal

64 Proposal, p. 5

65 DAV, 862. For more see: Wicke, H., *Optionen und Komplikationen bei der Umsetzung des Richtlinienvorschlags zum grenzüberschreitenden Formwechsel (Teil II),* DStR 2018, rn. 2706

When the competent authority of the destination MS receives the pre-conversion certificate it carries out the rest of the procedure.[66] In that sense the destination MS's competent authority assesses whether the conditions for establishing the company in the destination MS are met.[67] This separation between responsibilities of the departure and destination MSs' authorities is in line with the principle of the mutual trust between the authorities of the MS.[68] Such a division of the responsibility is therefore very welcomed.

### 4.5. Registration and legal consequences

Once the pre-conversion certificate is issued and it is determined that national law requirements of the destination MS are met, the company shall be entered into the register of destination MS, while at the same time struck off from the register of the departure MS.[69] Destination MS shall notify the departure MS on registration through the system of interconnection of business registers (BRIS).[70] This system fosters efficiency, cooperation and communication between MS.[71]

Once the company enters into the register of destination MS, the cross-border conversion takes effects from that date.[72] Further consequences of the cross-border conversion are that all assets and liabilities of the company being converted become the assets and liabilities of the recipient company and that all members of the company being converted become the members of the recipient company.[73] Also, rights

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66 Some authors warn that here should be used a clear wording *a full recognition by the destination authority* of *the preliminary certification*. I. g. Mörsdorf considers that only that strong wording corresponds to the principle of the mutual trust and recognition of all legal, technical and procedural rules of the MS (ger. *Prinzip des Vertrauens in die Gleichwertigkeit*). In that line see: Mörsdorf, *op. cit.,* note, 9, rn. 144

67 Art 86p, pg. 5 od the Proposal. For more about the legal consequence see: Mörsdorf, *ibid.*, rn. 147

68 In that line see: Mörsdorf, *ibid.,* rn. 144

69 Proposal, p. 25; Art 86q para 1 and 2 of the Proposal state that the registration is carried out according to law of destination MS. Proposal prescribes the minimum of information that have to be entered into registers: entry number, date of registration and date of removal of company from the registration

70 Art 86o and 86p para 3 of the Proposal

71 Cooperation is carried out through the digital systems, since the EU recognized the need for digitalization, therefore it promotes usage of digital tools in order to make the communication between registries as efficient as possible. The mentioned BRIS system is a system used on the Single Market aiming at the fastening and promoting, among others, cross-border conversions. BRIS system is regulated by Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers. Proposal, pp.5-10

72 Art 86r of the Proposal

73 Proposal, p. 8

and obligations arising from the contracts of employment or employment relationships that exists at the moment when conversion takes effect, are transferred to the recipient company on the date on which the conversion takes effect.[74]

However, the place of the registered office in the departure MS will be held as the company's seat, as long as the company is not struck off from the registry of the departure MS, unless the third party knew, or ought to have known of the conversion. [75] Contrary to that, all the activities of the company being converted shall be considered as the activities of the converted company, regardless the fact that the company is still registered in the departure MS and not struck off from its register.[76]

Additionally, the liability for any losses that arise from the differences in national legal systems, which were not communicated to the counterparties of the company carrying out the conversion, before the contract was concluded, shall bear the converted company, unless the contracting party has been informed of the change of policy prior to the conclusion of the contract.[77]

Finally, it could be concluded that the result of cross-border conversion is that the converted company ceases to exist and is replaced by the company of another legal form available in the destination MS. The Proposal underlines the continuity of legal personality of the company in the destination MS by contrast to the creation of a new company. However, it should be empahsized that the national rules can make cross-border conversion a subject to special approval requirements which will be applicable to the company once it is converted. [78]

## 5. PROTECTION OF MEMBERS, EMPLOYEES AND CREDITORS

Since one of the main aims of the Proposal is protection of the interests of members, creditors and employees of the company this chapter pays special attention to it. According to the Proposal two categories of shareholders are protected: shareholders holding shares who did not vote for the approval as well as the ones holding shares with no voting rights.[79]

[74] Art 86s para 1 of the Proposal

[75] Art 86s para 1 of the Proposal

[76] Proposal, p. 25; Art 86s of the Proposal

[77] Art 86s of the Proposal

[78] Here should be added that the Proposal prescribes that cross-border conversion may not be declared null and void if it already took effects in accordance with the procedures transposing the Directive. Art 86u of the Proposal

[79] Proposal, p. 26; Art 86j para 1 of the Proposal

If any of the above mentioned category of shareholders decide to exit company, they have right to substitute their shareholdings for adequate cash compensation.[80] As mentioned, the company should offer the adequate cash compensation in the draft terms and shareholders wishing to exit company have to decide upon it in the period of one month after the general meeting on approval of draft terms took place.[81] After the agreement on the adequate cash compensation is reached, the company shall pay due amount to shareholders in the period of one month after the conversion takes effect.[82]

The Proposal gives the opportunity for members to challenge the calculation of the cash compensation amount before the national courts during the one-month period of the acceptance of the offer.[83] It is interesting that this opportunity is given to members even though they accepted the offer.

The proposed protection of shareholders is, in principle, appropriate. However, the scope of the cash compensation might be going too far. According to the Proposal for the cash compensation are entitled, not only shareholders who actively opposed conversion, but also those who did not vote at all (either because they did not participate in the meeting or they did not have voting right). While this can be acceptable for those shareholders who do not have voting rights, it is questionable whether it is acceptable for the passive shareholders. This solution is also not in line with the existing rules on cross-border mergers regulated in the Directive 2017/1132[84], since those rules are granting the right to exit the company only to shareholders who have voted against the cross-border merger or those holding shares without voting rights.

Creditors are protected in various ways, since there is a risk that their interests will be adversely affected by the conversion, in particular, by being henceforth subject to less stringent rules in relation to capital protection and liability.[85] The converting company shall give a declaration that financial status of the company is equal to the one presented in the draft terms and that conversion will not affect the existing relationship between company and creditors and that the company will be able to meet the liabilities when they fall due (declaration of solvency). The declaration must be made within the period of one month of the disclosure of draft terms.[86] The question which arises here is how to prescribe the conditions

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80 Art 86j para 2 of the Proposal

81 Art 86j para 3 of the Proposal

82 Art 86j para 4 of the Proposal

83 Proposal, p. 24; Art 86j para 5 of the Proposal

84 See note 5

85 Horak, Dumančić, *op. cit.,* note 15, p. 725

86 Art 86k para 1, Rec 17 of the Proposal

which would ensure that the declaration is be reliable and verifiable. Moreover, it is questionalbe until when, or for what period in future, such declaration commits company. Furthermore, a statement that turns out to be incorrect, may lead to the liability of the company, and it is unclear whether such liability would be fault or neglect based.[87]

Creditors, who find that their interests in the conversion are not sufficiently or adequately protected have right on adminitrative or judicial protection of their rights within one month of the disclosure.[88] Since there is a possibiltiy that they can missuse their rights and thus to obstruct conversion, this right should be granted to creditors only if they can prove that the company failed to provide adequate collateral.[89]

Proposal deals with this issue in a following way. Firstly, according to the Proposal, when the independent expert concludes that the conversion does not jeopardize the right of the creditors, it will not be considered that their rights are unduly prejudiced.[90] Secondly, it will not be considered that the creditors are unduly prejudiced if the creditors are offered to be paid against the coverted party or if there is the third party guarantee of the value equivalent to the original claim and which can be brought to the original claim's jurisdiction.[91] Finally, the Proposal also prescribes employees participation in the company carrying out a conversion and provides mechanisms for protection of employees, since their rights are put at risk by the conversion procedure. In the first place the rules on employee participation of destination MS must be followed, unless the rules of departure MS provides the same level of protection.[92]

It is completely justified to protect rights of employees, however, these rules should not be too burdensome in a way that they hinder cross-border conversion, which would consequently jeopardise the Single Market and the freedom of establishment. Holding an employee protection policy for a sensitive issue and a topic of utmost importance in the EU, this topic for sure need a thorough approach, which unfortunately exceedes the scope of this paper.[93]

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87 DAV, 860

88 Art 86k para 2 of the Proposal

89 DAV, 860

90 Proposal, p. 24; Art 86k para 3

91 Proposal, p. 24; Art 86k para 3, Rec 18 of the Proposal

92 Art 86l para 1 and 2 of the Proposal

93 Employees protection has always been one of the priorities of the EU. It is evident from the Juncker's Commissions Priorities for the period 2015-2019, as well as from the Europe 2020 Strategy

## 6. ECJ DECISIONS REGARDING CROSS-BORDER COMPANIES' MIGRATION AND CONVERSION

Over the last few decades the EJC has addressed companies' mobility in a series of judgements. The central issue in all those cases was whether the home MS can raise barriers to both, ingoing and outgoing transfer.[94]

At the very beginning of the ECJ rulings on the cross-border conversion, in so-called 'first generation of the ECJ judgments', the Court dealt only with the issue of the transfer of corporate seat from one MS to another. According to the Court's view, only departure MS may prohibit company established in that MS to move to another MS since the company exists only by the virtue of the national legislation.[95] Therefore destination MS cannot prevent the change of seat on the ground that the company does not comply with its rules.[96] However, that does not entitle companies to use the freedom of establishment for fraudulent or abusive actions.[97] The ECJ thus stated that MS may restrict freedom of establishment when company constitutes an artificial arrangement only to bypass the national rules of MS.[98]

In so-called 'second generation of the ECJ judgments' such as *Cartesio*[99], *Vale*[100] and *Polbud*[101] the ECJ broaden its interpretation of the freedom of establishment not only to the transfer of corporate seat but also to the cross-border conversions.

In *Cartesio* the EJC ruled that the departure MS may impose its national rules on a cross-border changing of the seat when the company wants to remain within the scope of the national rules of the MS where it was established, while when the

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94 European Company Law Experts (ECLE), *The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment, September 2018*. Available at: [https://europeancompanylawexperts.wordpress.com/publications/the-commissions-2018-proposal-on-cross-border-mobility-an-assessment-september-2019] Accessed 20.03.2019

95 C-81/87 - The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC, para. 19 and 24, See also: Horak, *op. cit.,* note 15, p. 182 and Jurić, *op. cit.,* note 15, p. 740

96 In Case C-212/97 - Centros Ltd v Erhvervs- og Selskabsstyrelsen the ECJ found that the destination MS, cannot reject the transfer of a real seat only because the company wants to exercise its activities in a MS which rules are less restrictive. In Case C-208/00 - Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) the ECJ stated that destination MS cannot prevent the change of the seat only upon the theory of the real seat applicable in that MS, while in Case C-167/01 - Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd the rule on minimum share capital of the destination MS could not be set as an obstacle for a foreign company to move a seat

97 Centros, para. 25

98 Case C-196/04. - Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, para. 5

99 Case C-210/06 - CARTESIO Oktató és Szolgáltató bt

100 Case C-378/10 - VALE Építési kft.

101 Case C-106/16, Polbud v Wykonawstwo sp. z 0.0., [2017], ECLI:EU:C:2017:351

company wants to detach itself from the departure MS by converting to a company form of the destination MS, then the departure MS cannot impose its rules on the cross-border conversion of that company.[102]. In *Vale* the ECJ stated that in cases where there are no rules on cross-border conversions in the national system, the national rules on conversions must be applied by analogy.[103]

In its last decision, the so called *Polbud case*, which was in a way the incentive for the EC to propose here analyzed Proposal of the Directive on the cross-border conversion, mergers and division, the ECJ concluded that the freedom of establishment must be interpreted as giving the right to the company for the cross-border conversion even when the company does not intend to obtain an economic activity in that MS and as preventing the departure MS to impose restrictions during that process which goes beyond what is necessary to protect the minority shareholders, such as that prior to the change of seat the company must undergo the process of liquidation.[104]

By this particular interpretation the ECJ extended the freedom of establishment on the cross-border conversion and stated that the company can convert and thus move its registered seat to another MS, without transferring its 'actual seat' *i.e.* conducting an economic activity in the destination MS.[105] According to the ECJ, the freedom of establishment is applicable to the cross-border process even if the transfer of the registered office does not change the location of the real head office of that company.[106] Even though the cross-border conversion did not change the location of the management or the place of the economic activities, according to the ECJ the cross-border conversion changes company`s nationality, name, applicable law for ruling company law issues, tax matters etc.[107]

The opponents of this opinion pointed out that the ECJ in *Polbud* case broaden to much the scope of the freedom of establishment[108] by protecting so called letter-

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102 Cartesio, para. 110 – 113, see also: Markovinović; Bilić, *op. cit.,* note 7, p. 102

103 Vale, para. 60 – 61, see also: Horak, *op. cit.,* note 15, p. 182, p. 716 and Mucha, A., Case C-106/16, Polbud-Wykonawstwo: *The Polish Supreme Court Requests the CJEU for a Preliminary Ruling on the Outbound Limited Company Seat Transfer.* SSRN Electronic Journal. 10.2139/ssrn.2954639., 2017, p. 13-14

104 Soegaard, G, *Cross-border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country*, European Company Law, Vol. 15, No. 1, 2018, pp. 21

105 Polbud, para 44

106 Soegaard, *op. cit.* note 104, pp. 21

107 *Ibid.*

108 Some legal experts recalled that the ECJ in its decisions in Vale and Cadburry Schweppes stated that an establishment 'involves the actual pursuit of an economic activity through a fixed establishment

box companies and by disregarding the interests and the rights of stakeholders.[109] They stated that cross-border conversion should not be caught by the freedom of establishment where it is an end in itself.[110]

Some scholars think that the findings from the *Polbud* case are not completely in line with the ECJ's previous cases where the ECJ stated that any restriction must be appropriate to protect interests of creditors, minority shareholders and employees and must not go beyond what is needed to achieve that objective.[111] Therefore a criticism was raised that the ECJ decision is not justified since the ECJ failed to provide sufficient reasons for the opinion that the liquidation which has an aim to determine the existence of the creditors and their claims does not take into consideration actual risk of detriment of the rights of creditors.[112]

All this activities of the ECJ, carried out in a number of mentioned ECJ judgments, have been drawing the attention to the lack of rules on cross-border conversions and the need for their regulation at the EU level.[113] Even though the ECJ has recognized, in particular, that companies are allowed to convert cross-border, decisions of the ECJ have only a limited scope, since the ECJ is not a legislative body, but only entitled to the interpretation of the EU law.[114] Moreover, without any doubt, the EJC's judgements by themselves cannot solve all the practical problems connected to issues of cross-border mobility.[115] In that sense, the Proposal of the new Directive on cross-border conversions, mergers and divisions seems like

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in the host Member State for an indefinite period' [https://www.law.ox.ac.uk/business-law-blog/blog/2017/11/last-word-cross-border-reincorporations-eu-freedom-establishment]

109 Markovinović; Bilić, *op. cit.,* note 7, p. 104-105

110 It is interesting that in this case and regarding this question the ECJ rebutted the arguments put forward by the Austrian and Polish governments but also rejected the arguments of AG Kokott See: h Kokott, A., G., [https://www.law.ox.ac.uk/business-law-blog/blog/2017/11/last-word-cross-border-reincorporations-eu-freedom-establishmen]t Accessed 20.03.2019. See also: Mucha, *op. cit.,* note 103, p. 19. Opinion of AG Kokott para 38, Horak; Dumančić, *op. cit.,* note 15, p. 721-722

111 Horak; Dumančić, *ibid.,* p. 726

112 Markovinović; Bilić, *op. cit.,* note 7, p. 117

113 The CJEU confirmed that it is upon MS to decide which national rules would be applicable to the cross-border conversion procedure of an incoming company, if those MS rules exist at all. (See: Case C-106/16, Polbud v Wykonawstwo sp. z 0.0., [2017], ECLI:EU:C:2017:351, hereinafter: *Polbud*). The Court also held that the existing absence of the EU secondary legislation on cross-border conversions distorts the functioning of the Single Market and also brings question whether the existing national rules on cross-border conversions are compatible with the freedom of establishment. Ibid. Proposal, p.3. More about the fact of the Polbud case see: Gelder, *op. cit.* note 2, pp. 260–262

114 *Ibid*. Proposal, p. 3. According to the *Szydło* the ECJ has done much but still not enough for cross-border conversions. Szydło, M., *Cross-border conversion of companies under freedom of establishment: Polbud and beyond,* Common Market Law Review, Vol. 55, No. 5, 2018, pp. 1549

115 European Commission, The Commission's 2018 Proposal on Cross-Border Mobility –An Assessment, European Company Law experts, p.3. Available at [https://europeancompanylawexperts.wordpress.

an appropriate tool that will foster companies' mobility in Europe, increase legal certainty and facilitate those operations by digitalizing the process of setting up and running businesses.

## 7. CONCLUSION

The paper provides for a critical overview of the Proposal for a Directive on the cross-border conversions, mergers and divisions. It is long-awaited document which should lead to more harmonized legal framework for cross-border conversions, mergers and divisions on the EU level and which should also bring to an end opposing national practices regarding companies' right to move.

On general level, the Proposal offers number of high-quality legal solutions and it pursues an ambitious agenda. However, conducted research also showed that there is space for improvements and that there is a need for clarity of some of the proposed solutions.

Some of the most problematic aspect of proposed solutions concern the concept and notion of artificial arrangements. Furthermore, more precise division of duties and powers between an independent expert and competent authority would prevent multiplication of work between those two bodies in the procedure. Also, broadening the scope of application of rules on cross-border conversion to companies other than limited liability would make conversion possible for larger number of European undertakings.

However, current text of the Proposal is still under revision. In that sense it should be emphasized that analyzed text of the Proposal is just a working document subject to further revisions and amendments. According to the official announcement of the Commission published in January 2019 a series of amendments have been submitted by the MS to relevant committee[116]. This means that a search for optimal regulatory model for cross-border conversion on the EU level continues.

com/publications/the-commissions-2018-proposal-on-cross-border-mobility-an-assessment-september-2019] Accessed 18.03.2019

116 European Parliament, *Theme deeper and fairer internal market with a strengthened industrial base services including transport*. Available at [http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-cross-border-mobility-for-companies] Accessed 18.03.2019

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# LEGISLATION KEY MILESTONES OF CAPITAL MARKET UNION IN THE REPUBLIC OF CROATIA AND THE EUROPEAN UNION

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***ABSTRACT***

*The paper presents an overview of the European Union legal framework related to capital markets, investment funds, credit rating agencies, securitization subjects and structures, primary and secondary markets' actors and mechanisms, venture capital, social entrepreneurship and long-term investment funds. It also deals with short selling, benchmarks and prospectuses. The content of the paper is defined by the scope of activities of the European Securities and Markets Authority (its supervised entities and the scope of its prudential activities), the consequences of the 2008-2009 financial crisis, and the promises to reshape and develop financial markets and instruments in the European Union and Croatia. The paper intentionally excludes major players in the financial markets in Europe, such as credit institutions, pension funds, insurance undertakings, factoring and leasing companies.*

*The above-mentioned elements are all key points of the strategic project of a Capital Market Union in the EU with the main goals of promoting non-banking financial services to entrepreneurs and SMEs, introducing and developing an alternative to banking loans and other traditional financing tools. These rules and regulations, colloquially called single rulebook, are also applied in the Republic of Croatia as a member of the European Union. Finally, an overview of the evolution of financial markets regulation and supervision infrastructure in Croatia starting since 1990 up to today is provided, including the laws transposing the above-mentioned EU directives.*

*The descriptive methodology, detailed analysis, critical resume and synthesis of all the researched elements are used to approach the different levels of rules necessary for future development of financial markets and instruments in Croatia and the EU. The hypothesis tested is whether the new regulatory framework achieves its goals of promoting non-conventional financial instruments in Europe and supporting economic growth.*

***Keywords****: Capital Market Union, financial market, ESMA, financial instruments, market abuse, securitization*

## 1. INTRODUCTION

The current capital markets' legislative framework in the EU consists of an extensive set of acts covering multiple aspects of capital markets. The establishment of a single market is at the root of the legislation dating back to the 1980s. A major regulatory overhaul was undertaken during the last decade after the financial crisis of 2008-2009 brought to surface a series of flaws in the financial system that were previously overlooked or underestimated. The purpose of this regulatory reform, coordinated at a global level,[1] was to increase the robustness and resilience of the capital markets and to restore investors' confidence through more efficient regulation and supervision of integrated financial markets, privation of regulatory arbitrage and promotion of more competence on the market. The crisis also led to the creation of the European system of financial supervision (ESFS) in 2011 consisting of three European supervisory authorities (ESMA, EBA and EIOPA) and a board to monitor systemic risks (ESRB).[2] The mission of the European Securities and Markets Authority (ESMA) is to protect investors and promote orderly markets and financial stability. It achieves this by: "assessing risks to investors, markets and financial stability, completing a single rulebook for EU financial markets, promoting supervisory convergence and directly supervising credit rating agencies and trade repositories."[3] The goals of the European Commission are stronger financial markets supporting investments in the European Union. The European Commission aims at completing the Capital Markets Union till the end of 2019 through three main directions: a European licence for European products, harmonized and more simple rules for deeper financial markets, and more consistent and efficient supervision.

[1] *Leaders' Statement, the Pittsburgh Summit*, September 24-25 2009, p. 2 [https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_ statement_250909.pdf] Accessed 30 January 2019

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[3] [https://www.esma.europa.eu/about-esma/who-we-ar] and [https://www.esma.europa.eu/rules-databases-library/interactive-single-rulebook-isrb] Accessed 1February 2019. Official sources of EU legislation is Official Journal of the European Union but also ESMA Interactive Single Rulebook is an on-line tool that aims at providing a comprehensive overview of and easy access to all level 2 and level 3 measures adopted in relation to a given level 1 text in the field of securities markets. Relevant tags signal the existence of Implementing ("IA") or Delegated Acts ("DA") adopted by the European Commission (including Technical Standards developed by ESMA and endorsed by the European Commission: "RTS" or "ITS"), as well as Guidelines ("GL"), Opinions ("OP") and Q&As ("Q&As") issued by ESMA

### 2.1. Markets in financial instruments

Directive 2014/65/EU[4] (MIFID II) is the cornerstone piece of regulation related to capital markets. It broadened the scope of Directive 2004/39/EC[5] (MIFID) and brought new provisions adapted to contemporary developments. MIFID II defines the scope of its application[6] and lays down the list of services, activities and instruments to which it applies.[7] It also establishes operating requirements applicable to investment firms, regulated markets and data reporting service providers. MIFID II has been transposed into the Croatian Law on capital market.[8]

In addition to horizontal organisational requirements applicable across the financial services industry, MIFID II brings specific provisions related to algorithmic trading.[9] These provisions, together with new provisions introducing the requirement for regulated markets to have in place resilient systems capable of operating under conditions of severe market stress,[10] demonstrate how the legislation is adapting to technological innovation and increased systemic risk. Concern for mitigating systemic risk is also demonstrated in Title IV where a set of rules has been introduced, imposing limits, controls and reporting requirements in relation to commodity derivatives trading. In a similar vein, rules are imposed upon multilateral trading facilities (MTFs) and organised trading facilities (OTFs) with the aim of increasing the level of transparency and orderliness in transactions taking place outside of the regulated markets.[11] By doing so, such rules bring MTFs and OTFs closer to the transparency level required from regulated markets. The introduction of data reporting service providers with the purpose of collecting, consolidating, reporting and publishing information about transactions in financial instruments at the EU level are completing this purpose.[12]

Finally, emphasis is put on provision of adequate and timely information, procedures assessing suitability and appropriateness of services to individual clients, or-

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4 Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 (MIFID II)

5 Directive 2004/39/EC of the European Parliament and of the Council 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.

6 MIFID II, art. 1-3

7 MIFID II, Annex I

8 Law on capital market, Official Gazette of the Republic of Croatia No. 65/18

9 MIFID II, art. 17

10 MIFID II, art. 48

11 MIFID II, art. 18-20 and 31-33

12 MIFID II, art. 59-66

der handling and execution rules,[13] and record of all services, activities and transactions undertaken.[14] Important modifications brought by MIFID II in the area of consumer protection include the introduction of the products approval process and specific requirements for independent financial advisers. The purpose of the product approval process is to avoid misselling by specifying target markets in advance and ensuring that all relevant risks are assessed.[15]

MIFID II is supplemented by four delegated acts (DAs), five implementing acts (IAs), eleven implementing technical standards (ITS), and nineteen regulatory technical standards (RTS). These numerous second level legislative acts leaves little room for divergent implementation of the directive and reflect the will to regulate in detail activities on capital markets.

MIFID II is also supplemented by Regulation (EU) No 600/2014 on markets in financial instruments[16] (MIFIR). MIFIR is a very technical regulation setting forth transparency requirements for trading venues and OTC trading in financial instruments. MIFIR also brings an important innovation in the supervisory powers of ESMA, EBA and national competent authorities by granting them the power to restrict (where certain conditions are fulfilled), the sale of certain financial products or certain activities or practices.[17] Corresponding product intervention powers have been granted to EIOPA and national competent authorities in relation to insurance-based investment products in the PRIIPs Regulation.[18] MIFIR is supplemented by seventeen RTS.

Regulation (EU) No 648/2012[19] (EMIR) is a direct consequence of the 2008-2009 financial crisis after which it became apparent that the complexity of interdependencies and related risks created by OTC derivatives required regulatory intervention.[20] The speculative nature and lack of transparency of derivatives before the crisis pushed the regulation towards the adoption of rules aimed at managing systemic risk, bringing more standardization and transparency in their use

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13 MIFID II, art. 25-28

14 MIFID II, art. 16 and art. 23

15 MIFID II, art. 16(3) and art. 24

16 Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) 648/2012 [2014] OJ L 173/84 (MIFIR)

17 MIFIR, art. 40-42

18 Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1, Chapter III

19 Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories OJ L 201/1 (EMIR)

20 EMIR, recital par. (4)

and trading and improving investor safety. In line with the agreement reached at the 2009 G20 meeting in Pittsburgh, EMIR introduced risk management techniques such as clearing or bilateral collateral management for over-the-counter (OTC) derivative contracts, reporting to trade repositories and operational and organisational requirements applicable to central counterparties (CCPs) and trade repositories. EMIR is supplemented by six DAs, twenty-five RTS, twenty-two IAs and five ITS.Central securities depositories (CSDs) and CCPs are key elements of the post-trade market infrastructure. Together, they help maintaining participants' confidence that transactions will be executed within agreed terms and conditions. Regulation (EU) No 909/2014[21] (CSDR) is aligning rules applicable to CSDs and securities settlement with international principles for financial market infrastructures.[22] The purpose of these principles and rules is to minimise risks of disruption in settlement systems, to ensure common prudential rules necessary to mitigate risks stemming from an increasing number of cross-border settlements, and to promote an open internal market.[23] The CSDR is supplemented by one DA, four RTS and two ITS.

Several other regulations related to markets in financial instruments need to be mentioned. Among them, Regulation (EU) 2016/1011[24] introduces authorisation and supervision of benchmark administrators and rules related to the calculation and publication of benchmarks used in the financial industry. This regulatory attempt to rein in conflicts of interest related to benchmarks is a direct reaction to cases of manipulation, the most infamous being the LIBOR scandal.[25] In a similar vein, Regulation (EU) No 236/2012[26] is the regulatory answer to systemic risks unveiled by the 2008-2009 financial crisis. This Regulation introduces transparency rules on net short positions, restrictions on uncovered short sales and powers of intervention of competent authorities and ESMA in exceptional circumstances.

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21 Regulation (EU) No 909/2014 of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L 257/1 (CSDR)

22 Principles for Financial Market Infrastructures. BIS and IOSCO. April 2012 [https://www.bis.org/cpmi/publ/d101a.pdf] Accessed 1 February 2019

23 CSDR, recital, par. (1)-(4)

24 Regulation (EU) 2016/1011 of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48EC and 2014/17/EU and Regulation (EU) No 596/2014 [2016] OJ L 171/1

25 Rose, C.S., Sesia A., *Barclays and the LIBOR Scandal,* Harvard Business School Case 313-075, January 2013. (Revised October 2014)

26 Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps [2012] OJ L 86/1

### 2.2. Transparency and market abuse

Information provided to the public by the issuers of financial instruments is vital to investors' confidence and markets' functioning. As a rule, securities offered to the public or admitted to trading on a regulated market have to be accompanied by a prospectus. In addition, there is also an ongoing obligation to continue disclosing information relevant to investors.

Matters related to prospectuses are regulated by Regulation (EU) 2017/1129[27] (Prospectus Regulation). The aim of the Prospectus Regulation is to protect investors, achieve market efficiency by imposing rules on disclosure of information, and support the internal market for capital through a harmonised framework at EU level.[28] The Prospectus Regulation lays down in great detail the form and content of the prospectus, describes the process of its approval and publication, and defines specific rules in relation to issuers established in third countries. At the same time, the Prospectus Regulation is offering many exemptions aimed at reducing the administrative burden in specific situations that do not require the highest level of investor protection.[29] In line with the CMU initiative, it also introduced a lighter disclosure regime for SMEs[30] aligned with provisions from MIFID II.[31] The Commission has not yet adopted delegated or implementing acts related to the Prospectus Regulation.

Directive 2004/109/EC[32] (Transparency Directive) applies to securities admitted to trading on a regulated market. It imposes disclosure requirements regarding periodic (annual financial reports, half-yearly financial reports, etc.) and ongoing information (acquisition or disposal of major holdings, changes in the rights attached to financial instruments). It also determines how the information shall be conveyed to the public. The Transparency Directive is supplemented by three DAs, two IAs and one RTS. The Transparency Directive has been transposed into the current Croatian Law on capital market.

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27 Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC [2017] OJ L 16/12 (Prospectus Regulation)

28 Prospectus Regulation, recital, pars (3) and (7)

29 Prospectus Regulation, art. 1 and art. 3

30 Prospectus Regulation, art. 15

31 MIFID II, art. 33

32 Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38

Finally, Regulation (EU) No 596/2014[33] on market abuse (MAR) provides for a uniform framework related to insider dealing, unlawful disclosure of inside information and market manipulation. MAR broadens the scope of regulation to MTFs, OTFs and financial instruments such as credit default swaps and contracts for difference.[34] It also puts down detailed rules for public disclosure of inside information, the administration of insider lists, reporting of managers' transactions, market soundings, investment recommendations and statistics and disclosure or dissemination of information in the media. MAR is supplemented by one IA, six RTS and six ITS.

### 2.3. Investment funds

Investment funds in the EU are regulated by two directives and three regulations.

Directive 2009/65/EC[35] and Directive 2014/91/EU[36] amending it, together form the so called UCITS Directive. Separately, Directive 2009/65/EC is referred to as UCITS IV, while Directive 2014/91/EU, introducing specific provisions related to remuneration policies and depositaries, is called UCITS V. The UCITS Directive has been transposed into the Croatian Law on open-ended investment funds with public offer.[37] For the purpose of the UCITS Directive, UCITS means an undertaking "(a) with the sole object of collective investment in transferable securities or in other liquid financial assets … of capital raised from the public and which operate on the principle of risk-spreading; and (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets."[38] Those key elements are differentiating UCITS from alternative investment funds.

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33 Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 (MAR)

34 MAR, art. 2

35 Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32 (UCITS Directive)

36 Directive 2014/91/EU of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions [2014] OJ L 257/186

37 Law on open-ended investment funds with public offer, Official Gazette of the Republic of Croatia No. 44/16.

38 UCITS Directive, art. 1(2)

Alternative investment funds (AIFs), regulated by Directive 2011/61/EU[39] (AIFMD) are such collective investment undertakings which "(i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do not require authorisation pursuant to" the UCITS Directive.[40] However, allowing for the fact that the stringent conditions from the AIFMD need not to apply to smaller fund managers, the AIFMD introduces thresholds applicable to total assets under management and allowing operations under a lighter regime. The AIFMD has been transposed into the Croatian Law on alternative investment funds.[41]

The goal of the UCITS Directive is to facilitate cross-border offerings of investment funds to retail investors. Having in focus consumer protection, it deals in great detail with both the management companies and the UCITS. On the other hand, the AIFMD deals primarily with management companies. This can be explained by the diversity of investment strategies in the alternative funds realm and regulatory will, in the aftermath of the 2008-2009 financial crisis, to set up a framework ensuring at least minimum organisational standards and reporting obligations in a sector which was traditionally very lightly regulated.

The UCITS Directive and the AIFMD lay down general requirements in line with the usual structure of legislative acts dealing with financial services. In addition, both directives include obligations regarding the depositary of the funds. The UCITS Directive also deals with some specific issues in the context of cross-border activities (mergers of UCITS and master-feeder structures).[42] Unlike the AIFMD, the UCITS Directive deals in great detail with obligations concerning the investment policies of UCITS, including acceptable investment instruments and investment limits.[43] The UCITS Directive is supplemented by five DAs and two ITS, whilst four DAs, one RTS and four IAs supplement the AIFMD.

It is important to note that units in collective investment undertakings are considered to be financial instruments according to Annex I, Section C, of MIFID II. This provision means that MIFID II, in particular its provisions related to distribution by investment firms, apply to units and shares in investment funds.

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[39] Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L 174/1 (AIFMD)

[40] See AIFMD, Art. 4(1)(a)

[41] Law on alternative investment funds, Official Gazette of the Republic of Croatia No. 21/18

[42] UCITS Directive, art. 37-48 and art. 58-67

[43] UCITS Directive, art. 49-57 and art. 83-90

Regulations (EU) No 345/2013,[44] (EU) No 346/2013[45] and (EU) 2015/760,[46] lay down rules for fund managers that apply specific investment strategies and wish to use the EuSEF, EuVECA and ELTIF designations in relation to the marketing of such funds. The regulations set down uniform rules for both fund managers exempt from AIFMD requirements and for fund managers fully authorised under the AIFMD. They can be seen as a vehicle for the facilitation of fund-raising in three under-represented niche investment strategies which are stated as a priority in the CMU initiative.

### 2.4. Structured products regulatory frame

The European Commission aftermath the financial crisis wanted to revitalize the securitisation market in the EU, in order to offer new financing tools, especially for small and medium-sized enterprises and other deficitary subjects. "Securitisation frame initiative" is initialised in form of a proposed regulation in 2015, should establish a new framework for "simple, transparent, and standardised (STS) securitisations" which have direct implications for the overall prudential framework for credit institutions and investment firms, after what it is need to redefine amendments on the Capital Requirements Regulation (EU) No 575/2013[47]. Amendments have aims to adjust risk retention profiles to reflect a new risk calculation methods and rates and, consequently capital requirements for new tranches. New rules for simple, transparent and standardised securitisation adopted by the co-legislators in 2017 should supply wider investment opportunities and intensive lending to Europe's businesses subjects. Also promotion of covered bonds as a source of funding for banks, thereby have to increase lending to the economy while protecting consumers and investors on the other hand.[48]

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44 Regulation (EU) No 345/2013 of the European Parliament and of the Council on European venture capital funds [2013] OJ L 115/1

45 Regulation (EU) No 346/2013 of the European Parliament and of the Council on European social entrepreneurship funds [2013] OJ L 115/18

46 Regulation (EU) 2015/760 of the European Parliament and of the Council on European long-term investment funds [2015] OJ L 123/98

47 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 Text with EEA relevance L 176/1

48 According to Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 L347/35 and Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms L 347/1

The CRR (Regulation (EU) 2013/575), covers standardised rules for credit institutions and investment firms concerning general prudential requirements regarding capital connected to exposures to credit risk, market risk, operational risk and settlement risk. International standards on bank capital adequacy through Basel standards provisions were transposed into EU law through Capital Requirements Directive, CRD (2013/36/EU) and the Capital Requirements Regulation, CRR (575/2013). This current "CRR Regulation" became effective from the first of January 2014 and replace Capital Requirements Directives (2006/48/EC and 2006/49/EC). The Regulation is supplemented by two Commission Delegated Acts, four Commission Implementing Acts, Regulatory technical Standards (RTS), and Implementing Technical Standards (ITS). While CRD IV governs access to deposit-taking activities, the CRR establishes the prudential requirements that institutions are obligated to. Developments at global level lead to the need to adjust EU legislation consequently to Commission's securitisation proposal directed to amendments to the CRR.[49]

Capital requirements for securitization exposures, including the more risk-sensitive treatment for STS securitizations, are set out in the CRR proposal, while STS eligibility criteria, due diligence and disclosure requirements, previously accompanied in Part V of CRR, were removed to the new securitization frame. The new Articles from 254 to 270a, coordinated with the revised BCBS framework, implement a new range of applicable approaches for the calculation of risk-weighted assets. Securitization Internal Ratings-Based Approach is the primary credit risk calculation approaches with KIRB information as a key input. An institution that cannot calculate KIRB for a given securitization position have the External Ratings-Based Approach (SEC-ERBA) for the calculation of the risk-weighted exposure amounts.

Covered bonds as one of financial structured products are a long-term finance tool in some EU countries for public sector entities and property market. It is issued mainly by credit institutions. Primary benefit is double-recourse protection to bondholders: the bondholder has a direct and preferential claim against assets if the issuer fails and an ordinary claim against the issuer's remaining assets. It is a huge heterogeneity on this market in Europe now and this fragmentation need standardization in underwriting and disclosure practices and form the field for more deeper, liquid and accessible markets across Europe. This is also Capital Market Union action plan segment. In March 2018, the Commission proposed a

[49] Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) 648/2012 [2014] OJ L 173/84

dedicated EU framework for covered bonds, consisting of a directive and a regulation.[50]

There is no formal, universally accepted definition of covered bonds, but three characteristics are considered to define them: dual recourse mechanism; asset segregation and dynamic cover pool; and strict legal and supervisory frameworks. They are regulated mainly at national level. At EU level, there is no single, harmonised legal framework for covered bonds, and the legislation relating to them is interwoven in the provisions of different regulations and directives. Due to their features, covered bonds are considered a low-risk debt instrument, therefore banks investing in them do not have to set aside as much regulatory capital as when they invest in other assets, and covered bonds has privileged preferential prudential and regulatory treatment.

Against this background, the European Commission is proposing an EU legislative framework for covered bonds. The proposal is based on the European Banking Authority's (EBA) 2014 and 2016 reports the latter advocating legislative action to standardize covered bonds at EU level. The European Parliament's resolution of June 2017 on covered bonds supported their integration at EU level. The enabling framework for covered bonds was included in the 2018 Commission work programme (CWP) under the new initiatives aimed at completing the Capital Markets Union (CMU).[51]

### 2.5. Credit ratings and capital markets landscape

The CRA Regulation (EC) 1060/2009 was introduced in 2009[52] in European Union and was amended by Regulation (EU) 513/2011 in 2011[53] and Regulation

[50] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Capital Markets Union; time for renewed efforts to deliver for investment, growth and a stronger role of the euro, Brussels, 2018, COM/2018/767 final [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0767] Accessed 1 February 2019

[51] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Capital Markets Union; time for renewed efforts to deliver for investment, growth and a stronger role of the euro, Brussels, 2018, COM/2018/767 final [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0767] Accessed 1 February 2019

[52] Regulation (EC) No 1060/2009 of the of the European Parliament and of the Council on credit rating agencies (CRA), [2015] OJ L 302

[53] Regulation (EU) No 513/2011 of the of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies [2011] OJ L 145/30.

(EU) 462/2013 in 2013[54] with the mission of a common approach to the regulation and supervision of credit rating agencies within the European Union, and also independence and quality of rating activities, resulted scores and high levels of investor protection. Regulation creates a common governance framework for credit rating agencies and the use of credit ratings on financial markets.

Regulation (EC) 1060/2009 introduces a common regulatory approach in order to promote the integrity, transparency, responsibility, good governance and reliability of credit rating activities, supporting the quality of credit ratings issued in the European Union. Also achieving a high level of consumer and investor protection is in focus. It covers also conditions for the issuing of credit ratings and rules on the organization and conduct of credit rating agencies to promote independence of ratings and the avoidance of conflicts of interest.[55] A credit rating agencies should be licenced under this Regulation and also be recognised as an External Credit Assessment Institution (ECAI).[56] Regulation contains definition and use credit ratings, issuing of credit ratings, independence and avoidance of conflicts of interest, methodologies, models and key rating assumptions, disclosure and presentation of credit ratings. Also it had included registration procedure and supervision fees, competent authorities and supervisory measures, coordination of authorities, exchange of information, etc. [57]

Amending regulation (EU) 513/2011 recommended that the three new European Supervisory Authorities with a network of national financial supervisors cooperate efficiently. The ESFS should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups through the setting up of supervisory colleges and establishing a European single rule book applicable to all financial market participants in the internal market, including credit rating agencies. ESMA should be exclusively responsible for the registration and supervision of credit rating agencies in the Union, while specific tasks can be delegated to competent authorities. Transparency standards are higher to meet the public interest and investors protection.[58]

Amending Regulation complements, the current regulatory framework for credit rating agencies. Some of the most important new issues is better solutions for is-

[54] Regulation (EU) No 462/2013 amending Regulation (EC) of the of the European Parliament and of the Council No 1060/2009 on credit rating agencies [2013] OJ L 146/1.

[55] CRA, art. 1.

[56] CRA, art. 2., Directive 2006/48/EC.

[57] CRA, art. 3-10.

[58] European Securities and Markets Authority (ESMA), [https://www.esma.europa.eu/about-esma/who-we-are] Accessed 1 February 2019.

suer - pays model and information disclosure for structured finance instruments. Reasons to transparency, procedural requirements and the timing of publication standards revision specifically for sovereign ratings was consequence of sovereign debt crisis. The data on the probability of default of credit ratings and rating outlooks based on historical performance will be published on the central repository created by ESMA and it will support future investment decisions.[59]

ESMA has published its Final Report on draft Regulatory Technical Standards (RTS) in 2014 required under the Credit Rating Agencies (CRA3) Regulation regarding information on transparency of structured finance instruments, the European Rating Platform and periodic reporting of charged fees. This Regulation also lays down obligations for issuers, originators and sponsors established in the Union regarding structured finance instruments.[60]

In order to increase market competition on a market that has been dominated by three subjects, measures should be taken to encourage the use of smaller credit rating agencies. If it is necessary to seek credit ratings from two or more credit rating agencies the issuer or a related third party should consider choosing at least one credit rating agency with smaller relative significance on the market. The Final Report on three draft RTSs under the CRA 3 Regulation, requires ESMA to develop a drafts RTS specifying the information that the issuer, originator and sponsor of a structured finance instrument must disclose; the frequency of information updating and the standardised presentation of the information[61]. The CRA regulatory frame is supplemented by two Delegated Acts (DAs), ten Regulatory Technical Standards (RTSs) and seven Implemented Technical Standards (ITSs). [62]

Also CRA Regulation requires ESMA to develop a draft RTS concerning the report content and the structure, including structure, format, method and timing of. It is also need to develop a draft RTS to specify fees charged by credit rating agencies for the purpose of on-going supervision by ESMA.[63]

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[59] ESMA/2014/685

[60] European Securities and Markets Authority (ESMA), [https://www.esma.europa.eu/about-esma/who-we-are] Accessed 1 February 2019

[61] Regulation (EU) No 462/2013, Article 8b (3)

[62] Regulation (EU) No 462/2013, Article 21(4a)(a)

[63] Regulation (EU) No 462/2013, Article 21(4a)(b)

### 2.6. Capital markets union building blocks and Croatian financial market structure

The strengthening of the role of capital markets in the European union face several challenges such as over-reliance on banks, differences in financial conditions, rules and practices among member states, and limited financial resources available to small and medium-sized businesses (enterprises). It is on these basic assumptions that the European Commission formulated its prerequisites for the strengthening of financial markets and the creation of a capital markets union. The political guidelines were disclosed in the Green Paper on EU capital markets in January 2015, in parallel to the banking union.[64]

The Action Plan was adopted in 2015, and the implementation of measures is expected by the end of 2019. Implementation faces obstacles and inertia due to various factors, among others various crises, major economic and political overhauls in priorities of the European policy, but also heterogeneity in the level of development of financial markets in the European Union. Building Capital Markets Union is part of the third step of the European Commission and so called Juncker's plan to improve the investment environment.

Proposed measures include 33 different areas: innovation, start-ups and unlisted companies; opportunities to increase capital collected from the public; investments in long-term infrastructure projects and sustainable investment; encouraging investment by retail investors; increasing the capacity of the capital market and encouraging international investment. Difficulties in the implementation of measures can already be seen, in large part due to indirect factors such as heterogeneous bankruptcy rules, supervisory practices, tax regimes, the status of Brexit etc. Capital Union in the EU is based on an established framework for the banking sector and its credit potential which is formalized through the three pillars of the banking union.[65]

The theory of financial intermediation is based on the assumption that the market size is positively correlated with the ability of the market to mobilize capital and diversify risk, and indicators of market activity (turnover in relation to GDP is the best indicator of market development). Although the scale of financial intermediation with the support of financial markets and traditional and modern financial instruments is at a low level of development in Europe, the European Union has

[64] Pavković, A., *Small and medium sized enterprises financing*, in: Competitiveness and European Integration, International Scientific Conference, Cluj-Napoca, Romania, October 2007, pp. 26-27

[65] Pavković, A., *Bankovna unija: conditio sine qua non financijske i fiskalne stabilnosti Europe, Interna revizija i kontrola*, HZRFD, 18. Savjetovanje, Opatija, 2015., pp. 91.-109

invested significant efforts in its development, while preserving financial stability. However, different European countries are divergently developed. For example, the market capitalization of the stock market in the UK stood at 120% of GDP, in the Netherlands 98%, while in Lithuania, Latvia, Cyprus amounted to less than 10%.[66]

Unlike countries with developed financial markets, the ratio of the domestic equity market capitalization of the national GDP in markets comparable to the Croatian financial market for the year 2012 were as follows: on the Warsaw Stock Exchange, 37.7%, 27.1% Vienna, Budapest, 16.1%, 14.3% Ljubljana. Market equity securities in the Republic of Croatia are still relatively undeveloped, which is particularly evident by observing the market capitalization of the comparable markets.

The latest wave of reform is motivated by the "Capital Markets Union" (CMU) political initiative from 2015, which is focused on employment and economic growth. Most of the action plan is focused on shifting financial intermediation towards capital markets, in particular with respect to small and medium-sized companies, and further breaking down barriers that are blocking cross-border investments and competition in financial services. Other goals include ensuring regulatory support to infrastructure financing and enhancing the capacity of banks to lend. The action plan consists of 13 legislative proposals[67] out of which three have been adopted till the beginning of 2019: the Prospectus Regulation, the revision of the EUSEF and EUVECA regulations, and the STS Regulation on securitisations.[68]

Generally, legislative acts related to financial regulation have in common a section stipulating provisions regarding the authorisation of service providers. They also contain organisational requirements with a focus on internal control mechanisms, conflict of interests and delegation of functions to third parties. Provisions related

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[66] *Ibid.*

[67] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union, Brussels, 2015, COM/2015/468 final, pp.3-6 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC04 68] Accessed 1 February 2019

[68] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Capital Markets Union; time for renewed efforts to deliver for investment, growth and a stronger role of the euro, Brussels, 2018, COM/2018/767 final, p.3 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0767] Accessed 1 February 2019

to the freedom of establishment and provide services within the EU and rules applying to providers from third countries are also given. Finally, there is a section laying down the supervisory powers and duties of cooperation of competent authorities. Such common features are aimed at ensuring the efficient functioning of the internal market and creating an area at the EU level. A noticeable legislative trend is the use of regulations instead of directives. The recitals of the regulations explain this trend by the need to create a true single market unhampered by costs and complexity created by local interpretations of the directives.

It is generally considered that the small and medium enterprises are an important part of both developed and developing economies and at the same time are a major source of innovation, creativity and new jobs. Entrepreneurial activity supports the economic development of each country and, consequently, is an important part of every national economy where it should be encouraged, not only with public funds, but also with the market founded mechanisms of the financial markets. Often such subjects are deficient in terms of new sources for business and miss the new investment opportunities because of these restrictions[69].

After the 1990-is when Croatia became independent there was a need to implement new rules in the financial sector. In that time, market based instruments were not present and in Croatia only banks' loans were available funds. First, the Law on issuing and trading of securities[70] was passed in 1995. Its second iteration was the Law on securities' markets from 2002, which was amended in 2006.[71] Also in 2005 HANFA was founded, the body for supervision of financial market participants and instruments in Croatia as a regulatory and supervisory body for non-banking institutions and financial markets in Croatia. HANFA operates according to the Law on the Croatian Agency for Supervision of Financial Services.[72]

The Law on capital market was introduced in 2008[73] and was amended seven times after that till the current Law[74]. During that time, stricter rules were implemented tightening sanctions and penalties.  Main reasons and motives to change that law are new rules about prudential standards of credit institutions and investments firms in European Union, ESMA and ESRB roles in new EU institutional

[69] Pavković, *op. cit.* note 64, pp. 26-27. The paper proposed a new model market-based for financing small and medium-sized companies, without relying on budgetary funds and applying claims from securitization

[70] Official Gazette of the Republic of Croatia No. 107/95

[71] Official Gazette of the Republic of Croatia No. 84/02 and No. 138/06

[72] Official Gazette of the Republic of Croatia No. 140/05

[73] Law on capital market, Official Gazette of the Republic of Croatia No. 88/08

[74] Official Gazette of the Republic of Croatia No. 146/08, 74/09, 54/13, 159/13, 18/15, 110/15, 54/13

framework, governance system and prerequisites on management and supervisory boards members, risk management, compliance standards, close links, investments companies' exposures, multilateral trading platform, reporting, regulatory capital, capital requirements, bonus schemes, disclosure standards, etc. These set of rules are more complex than the previous laid down by MiFID I. Numerous additional sub acts are implemented as a frame for mentioned areas, and also mechanism of investor protection become stronger. Also consequential principles are stronger investor protection, new places for trading and introduction of derivatives into trading. Importantly the base set of rules for credit institutions and investments firms prudential standards are determined and regulated 2013 but also Regulation in order to establish a European deposit insurance system and Directive from 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. Current Law on financial market implemented in 2018 transposed 15 directives and 9 regulations (MiFID II is most important). [75]

New trading venues are introduced alongside regulated markets and multilateral trading platforms as older systems, as well as a new platform for SME financing, new costs and reports for ESMA, investor protection rules, transparency rules, measures for market abuse and insider trading. In near time in Croatia should licence subjects for clearing and settlement with financial instruments post trading like in other countries. At EU level estimations are that one-time cost of implementation of these directives and regulations have to be between 500 to 700 million euros, and that the annual costs stand at between 250 and 500 million euros.[76]

## 3. CONCLUDING REMARKS

European financial systems are mainly bank centric and loan oriented. The same situation is in Croatia. In the aftermath of the financial crisis in the USA, the spill over to Europe and culmination in serious consequences in all economy, other obstacles also stopped the intensive recovery of the economy. Also with the aim to more integrated financial system in EU which should be competitive to USA, banking union is in force and in parallel Europe is trying to promote capital market union. In that sense primary goals are to promote innovative finance tools, develop SMEs as a key instrument of GDP growth, to reach financial instrument

[75] Regulation (EU) No. 575/2013 of European Parliament and European Council of June 26 2013. on prudential requirements for credit institutions and investment firms and amended Regulation (EU) No. 648/2012 and Regulation (EU) No. 806/2014 Directive No. 2014/59/EU

[76] European Securities and Markets Authority (ESMA) [https://www.esma.europa.eu/about-esma/who-we-are] Accessed 1 February 2019

structures and to move from bank loans to other instruments. Also new investment opportunities for institutional and individual investors are needed. European and Croatian financial systems should be transformed from deposit-taking model into stakeholders who use derivatives, structured products, other debt and equity instruments, etc. as a financing tool or risk transfer instruments. However, today's facts and historical practice suggest that the development and transformation will probably be slow because on Croatian market there is a trading with a dozen liquid equity issues and volume is about ten times smaller than in 2008. In Croatia it is expected increase in capital market transactions but not significantly because of different mentioned reasons, but otherwise it can produce synergy other positive effects on homogeneity, comparability, transferability of rights and solving other problems in economy and jurisdiction. Market for bonds is growing but other markets are not barely alive. Despite attempts to develop financial markets and instruments, there are obstacles which determine the European future like Brexit and FinTech, importance of London as financial centre and United Kingdom which accounts for 40 to 80 % of financial transactions in the European Union.

The main objectives of establishing a Capital Markets Union are: 1) diversify financial system complementary to bank financing deeper capital markets, 2) to activate the capital from all over Europe and transfer it into the economy within and outside Europe, and more investment chances in Europe, 3) to create a single capital market investors and financially deficient subjects from different sources and regardless of geographical origin. The benefits of EU capital markets should be exercised by citizens (greater availability and transparency of investment products or such longer forms of saving for retirement), businesses (start-ups and companies have easier access to cheaper capital), investors (more long-term investment opportunities), banks (healthy balance and credit possibilities, for example the wider application of securitization). It will also enable the more efficient supervision of financial markets and financial stability. Important elements of development are new rules on covered bonds that will become cheaper sources of banks especially in the less developed countries as well as easier distribution of investment funds outside national borders. In addition, it should have simplified cross-border transactions of receivables, which will resolve the present problems when the national laws and specific conflict are present. Capital Markets Union is complementary to banking union institute, not its substitute and should upgrade the framework of operations of financial institutions and markets. The Union could also improve monetary transmission mechanism of the development of market-based benchmark interest rates that are not directly related to the banking business. In addition, it would be easier to solve local crises and to access foreign capital and

potential securitization instruments reduce the pressure on bank financing and contribute to the well-functioning of the interbank market.[77]

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[77] Op.cit., str. 111.

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# CHALLENGES AND OPPORTUNITIES OF THE MACEDONIAN PENSION SISTEM ACCORDING THE EU RECOMMENDATIONS (SOCIAL, LEGAL AND FINANCIAL ASPECTS)

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***ABSTRACT***

*The reformed pension system in the Republic of North Macedonia has created an interest based on three poles: legal, financial and social. Therefore, the paper aims to provide not only overview of the North Macedonian pension legislative, the model of financing of the reformed pension system but also to take into account the social character of the pension system. Following the basic European values and the interception of the EC recommendations that were underline in the last 10 years for North Macedonia, the country remains moderately prepared in this area. The rapidly increased expenditure on pensions and the efforts to improve the legal, institutional and social framework on the North Macedonian pension system became new burden for the Public Pension Fund. Therefore, the sustainability and the efficiency of the contemporary pension system is under question mark.*

*This paper will explore the major challenges and opportunities that were foster by the new pension reforms from the reconstructed pension system. The one-pillared based system (Pay As You Go system– based on principle of generation solidarity,) has become system based on three*

*pillars (fully funded mandatory pension insurance and fully funded voluntary pension insurance). Regarding the legal and financial aspects of the reformed pension system, there will be three areas of research emphasis: delayed transfer of funds from the state pension insurance fund to private funds, the procedures for supervising voluntary pension insurance schemes and the limits on investing in non-domestic securities. These three aspects resulted in a breach of the legislation on the management of deposits in Republic of North Macedonia, and they were not in line with the acquis under Financial Services Chapter that consists mostly of legal arrangements concerning with capital markets, insurance (including individual pension systems) and banking sectors. This is why they found their place in the annual reports (for 2015, 2016 and 2018) of the European Commission on the Republic of North Macedonia in negative connotation. Analysis of the legislation, as well as comparing the legislation with EU recommendation, is expected to answer the question if our country is complying with the recommendations.*

*The paper will be based on a legal, comparative, analytical and synthetic method that will provide a multidisciplinary approach in acquiring knowledge and in delivering results that will be of relevance to all involved stakeholders (future pensioners, pension funds, central and decentralized government).*

***Keywords:*** *Reforms, pension system, EU recommendations, pensions, Public fund, fully funded mandatory, fully funded voluntary*

## 1. INTRODUCTION

The European Commission in its Green Paper on pensions has pointed out the importance of pension systems being both adequate and sustainable. "A sustainable pension system is a system which is not a Ponzi-scheme i.e. which does not rely on perpetual increases in public debt. An adequate pension system is a system which allows for retirement pensions that provide reasonable income in relation to wages of working people."[1] The sustainability is jeopardized by inadequate pensions and increases, and unaffordable pension systems that are not reformed may ultimately collapse under the weight of ageing populations, and so prove inadequate.[2] Following this major consultation, the Commission set out its definitive vision on Pensions in its 2012 White Paper an Agenda for Adequate, Safe and Sustainable Pensions.[3]

[1] Šonje, V., *Pension systems and pension reforms: Case of Croatia (with a review of reforms in 13 emerging European countries)*, October 2011, p.11, available at [http://arhivanalitika.hr/wp/wp-content/uploads/2017/02/PENSION-SYSTEMS-AND-PENSION-REFORM_final.pdf] Accessed 10.04.2019

[2] European Commission - Green Paper towards adequate, sustainable and safe European pension systems SEC(210)830, Brussels [2010]

[3] European Commission – White Paper An agenda for Adequate, Safe and Sustainable Pensions , Brussels [2012], available at [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDF] Accessed 02.03.2019

The two main themes to ensure pensions were adequate and sustainable were: better balancing the time spent in work and retirement and developing complementary private retirement savings.[4]

One of the main Europe's structural weaknesses concerning the pension system is the fact that the demographic ageing is accelerating. "As the baby-boom generation retires, the EU's active population will start to shrink as from 2013/2014. The number of people aged over 60 is now increasing twice as fast as it did before 2007 – by about two million every year compared to one million previously. The combination of a smaller working population and a higher share of retired people will place additional strains on our welfare systems."[5]

Facing the problems about the sustainability of the pension systems was not challenge only in the EU member-states, but in North Macedonia, also. The multi-pillar pension system reform was suggested by the World Bank, and three-pillar model that was conducted in the most of the Middle- East countries (Latvia, Lithuania, Estonia, Poland, Slovakia, Hungary, Romania and Bulgaria).[6] The aim for the governments was to build long –term pension strategy where the public pension funds will bear the unexpected economical situations in future on one hand, but also to provide adequate income in retirement for the pension insurances, on the other hand. Although, there are significant differences in the national pension systems in the EU member states, still they are following similar polices common to the rights of retirement, social security and the model of financing the pension systems. So most of the European countries have implemented the following three-pillar pension system:

- The Public pension system based on pay as you go system (First pillar). It`s a – solidarity system based on contributions. The Public pension and disability Fund is financed from the contributions of the gross income of the employee. The pension depends of the employee's years of service and income/ salary at the end of the working career and the Government, usually, defines the pensions.
- Mandatory Fully Funded Pension Insurance (The Second pillar). The system of defined benefits/defined contributions (individual approach and approach based on pension schemes) and has many different modalities. But, the base

[4] Eatock, D., European Union pension systems Adequate and Sustainable?, Briefing November 2015, European Parliamentary Research System, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571327/EPRS_BRI(2015)571327_EN.pdf] Accessed 02.03.2019

[5] European Commission: Europe 2020, A European strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010 Available at [http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf] Accessed 12.04.2019

[6] Talevski, P., *The Financing of the pension systems*, Selektor, Skopje, 2009, pp. 49

is that the contributions are defined, but the pensions will be defined after accumulation of the asset of the private fund which is consisted of units. The members of the mandatory pension fund have individual private account and the pension benefit will depend on the capitalization value of the fund.

- Voluntary Fully Funded Pension Insurance (the third pillar). This pension insurance system may cover pension beneficiaries that are not covered with the mandatory pension insurance and pension beneficiaries covered with the mandatory pension insurance for purposes of gaining additional income after retirement. This pension system works in similar way as the second pillar, by capitalization of the fund assets. The amount of the pension benefit is not defined before hand and it depends on the paid contributions and the investment policy of the pension management companies.

In the traditional pension system, all eligible employees are automatically enrolled in the pension plan defined by the state. In most of the counties, it is compulsory to pay monthly pension contributions, so the so-called "state pension" could be provide to the retired.[7]

The second pillar (the mandatory private fully funded system) is financed by the percentage of the pension contribution from the members of the public pension fund and the capitalization of the asset.

The model of three-pillar pension system was adopted also in the most of Ex-Yugoslavian countries, for example Slovenia, Croatia and Serbia. Three countries (Croatia, Macedonia, Kosovo) introduced the second pillar based on managed mandatory individual retirement accounts. Only Croatia and Macedonia have fully developed systems comprising all three pillars: the defined benefit PAYG system, second-pillar managed individual retirement accounts and third-pillar voluntary pension funds.[8]

## 2. SOCIAL ASPECTS OF THE PENSION SYSTEM REFORMS IN REPUBLIC OF NORTH MACEDONIA

A pension aims to protect retired people from poverty and allow them to enjoy decent living standard. They are the main source of income for a significant number of populations in every country. According to the public opinion in EU[9] the

[7] [https://dictionary.cambridge.org/dictionary/english/state-pension] Accessed 09.02.2019

[8] Šonje, *op. cit.* note 1, p. 11

[9] Public opinion survey on *The future of pension systems* that was carried out at the request of the Directorate-General Employment and Social Affairs and organised by the Public Opinion Analysis Sector of the Directorate-General Press and Communication in all the Member at States of the European

primary goal of a good pension scheme should be to protect elderly people against the risk of poverty, which stresses the 'social protection' function a good pension scheme should fulfil. It is also believed that a good pension system should allow everybody to maintain an adequate standard of living relative to their income before retirement, as well as that a good pension system should contribute to greater equality in income and living conditions amongst the elderly.

Most of the retired people during the working period contributed a part of their gross salary into funds of that time. They contributed with their own assets (generations insurance and a principle of solidarity) the purpose of which was future pensions. This means that their pension is a social category and that the state may not limit, stop or eliminate the right to social security.

In the Republic of North Macedonia (*following in the text: Macedonia*) , based on the fact that the complete economic and social system narrows the possibilities for the complete exercising of the right to pension as an economic category, more and more the pension gets a social character, causing changes / interventions as a financial category.[10]

According the scholars a social pension (or non-contributory pension) is a stream of payments from state to an individual that starts when someone retires and continues in payment until he/she dies. The social pension is different from other types of pension since its eligibility criteria do not require former contributions of an individual, but his citizenship or residency and age or other criteria set by government. [11]

The main feature that distinguishes social pensions from other types of pensions is that the eligibility criteria do not include a history of earmarked contributions having been made by the individual in question or his employer. They are pure cash transfers rather than savings or insurance schemes.[12]

On the basis of the assessment that there are people in our country who don't fulfill the conditions for any type of pension, the Ministry of Labor and Social Policy

Union between September 17 and October 26, 2001, p. 44-50, available at [http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_161_pensions.pdf] Accessed 14.04.2019

10 The right to income security in old age, as grounded in human rights instruments and international labour standards, includes the right to an adequate social security pension. In many countries with high shares of informal employment, pensions are accessible only to a minority, and many older persons can rely only on family support. Source: SOCIAL PROTECTION POLICY PAPERS, Social protection for older persons: Key policy trends and statistics, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_310211.pdf] Accesed 01.03.2019

11 Blake, D., *Pension Economics*. Hoboken, NJ: John Wiley, 2006, p. 19

12 Rajan, S.I., *Social pensions for the poor elderly: how effective?,* Economic and Political Weekly, 2001

proposed an introduction of this type of pension – the social pension, as a novelty in the Macedonian pension system. This type of pension was introduced in our pension system in the Proposal of the Law on Social security of old age people.[13] That is one more element in the strengthening the social character of the pensions in our country.[14] According to this Proposal, the state is determined to pay to people being 65 years old and above, about 6.000,00 MKD monthly, which is approximately equivalent to 100 EUR.

As mentioned before, there are significant country differences in the pension incomes. This is the reason why EU protects the pension rights of people who move between EU counties, insures protection of state pensions, and enables cross-border pensions.

The country's intention is to make consolidated pension system and to ensure a sustainable and adequate pension system, in long term. This is in line with the tendencies in EU strategic documents on pensions, according which "an adequate and sustainable retirement income for EU citizens now and in the future is a priority for the European Union. Achieving these objectives in an ageing Europe is a major challenge."[15] The authorities in Macedonia have based this process on the following: to adjust the rate of contributions, to harmonize the pensions, to adjust the replacement rate (one pillar/ two pillars) and to correct the miscalculations in distribution of the second pillar. [16]

The literature identifies several key factors that have an impact on the pension system, those are: demographic changes, movement in the labor market and the harmonization of the pensions with the economic potential.[17]

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13 Proposal: The Government of the Republic of North Macedonia, Skopje, March 2019

14 There are a noncontributory or "zero pillar" (in the form of a demogrant or social pension) that provides a minimal level of protection. Zero pillars address the risk of lifetime poverty and liquidity constraints. These may preclude, or be strongly associated with, minimal participation in the formal or wage economy and the related capacity to accumulate meaningful individual savings. See more in: Holzmann, R.; Hinz, R, *Old-age income support in the 21st century: an international perspective on pension systems and reform.* The International Bank for Reconstruction and Development, Washington, D.C., 2001, p.42

15 European Commission - Green Paper towards adequate, sustainable and safe European pension systems SEC(210)830, Brussels [2010], p.2

16 [http://mtsp.gov.mk/content/pdf/dokumenti/2018/MTSP%20prezentacija%2002.pdf] Accessed 03.02.2019

17 Verbič, M.; Majcen, B.; Nieuwkoop, R, V., *Sustainability of the Slovenian Pension System: An Analysis with an Overlapping-Generations General Equilibrium Model,* Institute for Economic Research, Ljubljana, Slovenia. 2014, p. 62

Following are the objective reasons for the necessity for changes and interventions in the Macedonian pension system:

Firstly, the dynamics of changes in the labor market, economic flows and demographic trends. There are high rates of unemployment in Macedonia according to the degree and type of education as well as according to the percentage (which is now about 20% of the population fit for work). In such conditions, the employers, particularly in the private sector, have opportunities and avoid the regular signing of employment agreements (so that they don't contribute in the pension fund), or they use other ways to evade the obligations towards the state. At the same time, the average life span of the population in the country is prolonged and the number of pension beneficiaries is on the rise (individually the period of use of pensions is on the increase, too).[18]

Second, a deficit in the Macedonian Pension and Disability Insurance Fund due to the reduced rates of contribution and harmonization of pensions according to parameters which were not adequate to the economic growth of the country.

The pressure for higher pension is moved, mainly, by the power of pensioners to make an impact on the politics, due to the fact that their number is on the rise and they form a significant electoral body.[19] Therefore, in the period from 2007 to 2016, on several occasions, all the pensions were increased linearly, most often in the periods of elections – campaigns and provision of voters**.** This action confirmed statistically and analytically, has no ground in the legal provisions and it doesn't arise from the economic results.

Practice shows situations when a part of the salaries of employees are regularly registered (through appropriation of respective contributions in the pension fund), and a part is given to employees as an author's fee which are subject to much lower tax rate and there are no pension contributions. So, employees, in reality, have higher income in relation to the salary which is a basis of the pension contribution.

Third, the problem of inequality of pensions of the present and future pensioners.

Fourth, the problem of unequal distribution in the two pillar pension system.

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[18] So, former average life span of about 75 years currently is between 77 and 78 years. Between 2005 and 2015 average expected life span in Macedonia increased 1,6 years. Compared with the data on the developed countries and countries from the region, Macedonia has the highest expected average life span (except Bulgaria) Nikolov, M.;, Shukarov, M; Velkovska, I., *Sustainability of the Republic of Macedonia pension fund,* Economic analysis centre, Skopje, 2017, p. 8

[19] Kruse, A., *A Stable Pension System: The Eighth Wonder*, in: Bengtsson, T. (ed.), Population Ageing - A Threat to the Welfare State? Research in Labor Economics 22, 2010, p. 369 – 413.

Population ageing, the fall of birthrate, the increase of the expected life span are part of the factors causing a pressure on the traditionally organized pension systems to be sustainable, fair and efficient.[20]

According the official statistical e- reports published by the Macedonian Pension Insurance and Disability Fund in 2015 the total number of the pensioners was 301.728, of which 299.640 were pension beneficiaries based on employment, the total average paid pension was 13.095 denars, but the average old-pension was 14.449 denars.[21] In 2016 the total number of the pensioners was 307.610, of which 305.766 are pension beneficiaries based on employment, the total average paid pension was 13.754 denars, but the average old-pension was 15.062 denars.[22] In December 2017 the total number of pensioners in Macedonia was 312.398, pension beneficiaries based on employment were 310.744, the total average paid pension was 13.954 denars. But, the average old-pension was 15.229 denars.[23] In December 2018 the total number of pensioners in Macedonia was 317.278, of which pension beneficiaries based on employment are 315.780, the total average paid pension was 14.445 denars. But, the average old- pension was 15.717 denars.[24]

This shows that there are tends of increasing the paid amount of the average pension and the number of pensioners (population ageing), therefore the fiscal burden caused form the Public Fund may lead to serious consequences to the entire pension system and in long term negative We consider that these indicators are in the framework of the general development of the country and possibilities for maintenance of the pension system.

A part of the pension treatment as a social category is the intention of the society to provide a systematic approach in the pension increase which will be based on economy real growth. It means to increase the pension amount two times per annum through an analytical review of the increase of the living expenses and provision of a real purchasing power by such frame of pensions. If a real growth

[20] Verbič; Majcen; Nieuwkoop, *op. cit.* note 17

[21] Statistical report, Pension and disability fund for December 2015. [http://www.piom.com.mk/statistika/statistika-2015/] Accessed 19.02.2019

[22] Statistical report, Pension and disability fund for December 2016. [http://www.piom.com.mk/statistika/statistika-2016/] Accessed 19.02.2019

[23] Statistical report, Pension and disability fund for December 2017. [http://www.piom.com.mk/statistika/statistika-2017/] Accessed 19.02.2019

[24] Statistical report, Pension and disability fund for December 2018. [http://www.piom.com.mk/statistika/statistika-2018/] Accessed 19.02.2019

of the gross domestic production higher than 4 percent is realized there will be an additional increase of the pension amount.[25]

A special topic is the increasing deficit of the Macedonian Pension and Disability Insurance Fund, due which, (and due to the regular payment of pensions) transfers from the central budget into the pension fund were necessary which is an evidence of the social character of pensions in Macedonia.[26]

Planned reforms project a stabilization of the amount to be appropriated from the central budget to provide the amount of funds necessary for payment of pensions in Macedonia.

As a long-term venture it is planned to provide a gradual adjustment of the contribution rate which is appropriated from the salary for the pension and disability insurance. So, the rate of 18 percent in 2018 (of which 12 percent for the Macedonian pension and disability insurance fund and 6 percent for the second pension pillar), in 2019 this rate is projected to be 18,4 percent (of which 12,4 percent for the Macedonian pension and disability insurance fund and 6 percent for the second pension pillar), and in 2020 general rate of 18,8 percent of which 12,8 percent for the Macedonian pension and disability insurance fund and 6 percent for the second pension pillar.[27]

What about the amounts to be transferred from the central budget of the state regarding the provision of pensions payment?

Without a realized reform the amount of transfer in 2019 would be MKD 29,5 billion, in 2020 – MKD 31 billion and in 2021 – that amount would be MKD 32 billion.

By the implementation of the reforms the amount of transfer from the central budget into the pension fund would be in 2019 – MKD 28 billion (that is MKD 1,5 billion less), in 2020 – would be in the amount of MKD 28,5 billion (that is

[25] In the application of this principle – harmonization of pensions based on overall / dominant movement of the living expenses: Portugal, Spain, France, Italy, Great Britain, Latvia, Poland, Hungary, Serbia, Montenegro, Turkey.

[26] So, total transfer of funds from the central budget was MKD 12 billion in 2007, over MKD 15 billion in 2010 to MKD 25 billion in 2015, that is MKD 29 billion in 2018. [https://www.finance.gov.mk/mk/node/7703] Accessed 03.02.2019

[27] The average gross salary is in the amount of MKD 35.573,00 at the rate of 18 percentage contribution to the pension and disability insurance, MKD 6.403,00 would be appropriated while at the rate of 18,4 percent for this purpose MKD 6.545,00 would be appropriated or the difference would be MKD 142. Ministry of labor and social policy of the Republic of Macedonia, *How to get a fair and stable pension system*. [http://mtsp.gov.mk/content/pdf/dokumenti/2018/MTSP%20prezentacija%2002.pdf] Accessed 03.02.2019

MKD 2,5 billion less), and in 2021 the transfer would be MKD 29 billion (that is MKD 3 billion less than if reforms are not implemented).[28]

## 3. LEGAL AND FINANCIAL ASPECTS OF PENSION SYSTEM REFORM IN REPUBLIC OF NORTH MACEDONIA

Before the pension system reform in Macedonia, the first pillar was financed from the pension contributions of the employee`s, the central Budget and several years ago by dividends from the shares of the public share companies and the dividends from units form the limited liabilities companies (The Public Insurance and Disability Fund in the 90-tees became an owner of shares and units in many attractive companies in the country).[29] This shares and units from the trade companies were regular income to the Public Pension and Disability Fund.[30]

Before 2000, the Public Pension and Disability Fund that provides pensions for the retired insurances and other citizens that are set under the provisions of the Law on Pension and Disability Insurance, define the pension contributions that are paid by the employers. By the Law, every month 18 percentage[31] of the monthly income of the employee goes to this Fund. After 2002, 35% from these 18 percentages are transferred to the personal accounts in the mandatory fully funded Funds. So this becomes a "person`s pension pot".[32]

After 2000,[33] the state started tremendous reconstruction in the national pension system. A new pension legal and institutional architecture stared to be build. The one pillar pension system was extended to three-pillar system. Macedonia has implemented the pension reforms as the most of the Middle East countries in Europe did, following the recommendations of the model that the World Bank suggested. The reform was in line with the pension system tendencies in EU at that time, having in mind that "…most EU Member States have carried out gradual and in some cases substantial pension reforms over the last decades in order to enhance

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28 Ministry of Finance of the Republic of Macedonia, *Draft Budget of the Republic of Macedonia for 2019.*. [https://www.finance.gov.mk/files/u3/Prelog%20budzet%202019%2004.pdf] Accessed 03.02.2019

29 Law on transforming enterprises with Social Capital, Official Gazette no. 38/1993. By article 19 of this Law, the enterprises that were transformed 15% of their asset value were given as units or shares to the Public Pension and disability fund. Also, there companies were obligate on 2 % fix dividends per year

30 *Ibid*. Article 19, paragraph, 3

31 This percentage vary by the life standard and the average salary.

32 [http://mapas.mk/mapas-en/index.php/pension-reform/membership-in-the-mandatory-private-pension-funds] Accessed 03.02.2019

33 In 2000, amended Law on pension and disability Insurance from 1993, Official Gazette 24/2000. In 2002 the Law on mandatory fully funded pension insurance was adopted, Official Gazette of the Republic of Macedonia No.29/2002

fiscal sustainability, while maintaining adequate pension income. The intensity of pension reforms has been particularly strong since 2000. These reforms have been implemented through a wide-range of measures that have modified substantially the pension system rules and parameters (e. g. pension age, retirement incentives, pension calculation, indexation, social contributions). Pension reforms have generally been implemented only gradually and over long time periods."[34]It is also notable for the reforms of the pension systems in EU that although they differ markedly, they also adopted a number of key trends in order to protect adequacy and to respond better to changes in labor markets and gender roles. These trends were: encouraging more people to work more and longer so as to obtain similar entitlements as before: increases in pensionable ages; rewarding later and penalising earlier retirement, etc.; Measures to address adequacy gaps, e.g. through efforts to broaden coverage, support building up rights, ease access to pensions for vulnerable groups and increase in financial support for poorer pensioners; Gender dimension: women tend to predominate among those with atypical contracts, they tend to earn less than men and tend to take career breaks for caring responsibilities more often than men.[35] Also, one of the commonly adopted trends was the move from largely single to multi-pillar systems. This is a result of the trend in most, but not all, Member States to lower the share of public PAYG pensions in total provision while giving an enhanced role to supplementary, prefunded private schemes, which are often of a Defined Contribution (DC) nature.[36]

The trend of moving to multi-pillar system was part of the reform in the pension system of Macedonia. There was a reform of the system's design that introduced the principle of fully-funded pension insurance, where in addition to the first pillar, two more pillars were added, a mandatory and a voluntary private pension pillar in 2008.[37] The Fully funded pension insurance differs radically from the previous pension insurance because with this insurance each member has an individual account, which recorded its assets and provides a correlation and interdependence between the paid contributions and future pensions of the members. This insur-

[34] Carone G.; Eckefeldt P.; Giamboni L., Laine V.; Pamies S., *Pension reforms in the EU since the early 2000's: achievements and challenges ahead,* European Commission, Directorate Generale for Economic and Financial Affairs-DG ECFIN 20 December 2016, p. 5, Available at [https://mpra.ub.uni-muenchen.de/78163/] MPRA Paper No. 78163, posted 8 April 2017, Accessed 14.04.2019

[35] European Commission - Green Paper towards adequate, sustainable and safe European pension systems SEC(210)830, Brussels [2010], p. 5

[36] *Ibid*, p. 5

[37] Law on Mandatory Fully Funded Pension Insurance, Official Gazette No. 29/2002, 85/2003, 40/2004, 113/2005, 29/2007, 88/2008, 48/2009, 50/2010, 171/2010, 36/2011, 98/2012, 13/2013, 164/2013, 44/2014, 192/2015, 30/2016 and 21/2018; Law on Voluntary Fully Funded Pension Insurance, Official Gazette No. 7/2008, 124/2010, 17/2011, 13/2013

ance is based on accumulation of assets from contributions to individual accounts that are being invested and the return on investments with reducing the net costs of operating of the system, accumulated in individual accounts.[38] The mandatory pension funds are pooled from all contributions of the pension fund members. Because of the safety and sustainable pension pillar, the company for managing mandatory pension funds invests the fund asset in no-risk securities (bonds or/ and other securities issued or guaranteed by the government of Macedonia on the domestic market) or in low risk securities ( deposits, units in investment funds, etc.). For example, in 2015, 60 % of the investment portfolio of the both mandatory investment funds were in state securities issued by the Ministry of Finance or Central Bank and 22% were invest in units of investment funds.[39]

Present, the pension beneficiary will earn pension consisted of two parts: the contribution from the gross salary of the pension member and the benefit earned by capitalization (accumulation) of the asset / units. The unit value depends of the investment policy that the management company of the private fund is conducting overall years. According the Laws the investment policy of these types investment funds must be with very low or no risk investment.

This was a period when vast new law and by- laws were brought in this area. Also, this is a period when the Agency for supervision of fully funded pension insurance – MAPAS was established, and the first two management companies for conducting mandatory Pension funds were established, and later the management companies for voluntary pension funds. New financial institutions comprise at the Macedonian financial market. These management companies for the mandatory pension funds were established by the two most powerful banks in that period: Komercijala Banka AD – Skopje and Tutunska Banka AD- Skopje as domestic capital and holdings from Slovenia. From 2005 their work was focus to attract and pull in more members as possible. A massive propaganda has started by these two banks and the Pension Companies managing Pension Funds. [40]

Starting from 2011, "the country's pension scheme, which is based on defined contributions, differs from the model applied in most of the EU countries; hence the respective EU acquis for supervision of the institutions for occupational re-

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[38] Mustafai, H., *Pension System Reform in the Republic of Macedonia*, International Refereed Scientific Journal Vision, Volume, Issue 1, March 2017, pp. 69-78

[39] See Report for the conditions of the fully financing pension insurance , MAPAS, 2016, Skopje. [http://mapas.mk/wp-content/uploads/2016/06/Izvestaj-KFPO-2015-MK.pdf] Accessed 01.03.2019

[40] The both Pension Companies managing Pension Funds were established in Juni 2005. For more details see: [http://mapas.mk/wp-content/uploads/2018/07/zadolzitelno_reg.pdf]. In Feb 2019 the Agency for Supervision of Fully Funded Pension Insurance has issued license for one more pension management company. Now, there are three pension management companies

tirement provisions cannot be applied. Pension funds can now invest a small part of their portfolio in equity capital and in municipal bonds, in order to stimulate SMEs and local development. The limitation on investing in non-domestic securities continues, which is contrary to the principles of EU law. However, the limit was relaxed to 50%[41] (30% in 2010)."[42] This is why in 2012 new reforms were introduced to the Macedonian law. In 2012 the Macedonian Parliament adopted a new Law on Pension and Disability Insurance[43], which follows on the previously planned reforms on the established three pillar pension system. As rights on pension and disability insurance once again are determined the following: the right to retirement, disability pension, the right to vocational rehabilitation and appropriate allowances, the right to family pension, right to compensation for physical damage, and right on minimal pension.[44] Regarding the right of retirement there are no changes in the terms and conditions for its acquisition. The old-age pension is acquired by age of 64 years (men) or 62 years (women) with minimum 15 years of service. The Law only reduces the age limit of the insured who work in jobs placements where service is calculated with increased length. This Law didn't adopt the most common measure that EU countries have adopted in order to address pension sustainability challenges in the EU. That measure is consisted of raising pension ages. Nearly all European countries have increased the level of early and statutory retirement ages (the only exception being Luxembourg). In some cases (e.g. Greece, Sweden, France and Finland), particularly large increases have been legislated between 2008 and 2013. Looking forward, according to the Ageing Report 2015, only Luxembourg and Sweden have not legislated (further) rises of pension ages. Austria and Slovenia also project increases limited to women (in order to harmonise pension age between genders).[45]On the other hand, the Law on Labor Relations[46] with an amendment in 2014 has provided the possibility for the employee, with a statement addressed to the employer, to request for continuation of the employment contract for a maximum of 67 years for a man and 65 years for a woman, unless otherwise stipulated by law. [47] In 2016 the Con-

[41] Article 48 from the Law on Amending and Supplementing the Law on Mandatory Fully Funded Pension Insurance, Official Gazette No. 50/2010

[42] European Commission – Commission Staff working paper: The FYROM 2011 Progress Report, Brussels, 2011

[43] Official Gazette No. 98/2012

[44] Article 5 of the Law on Pension and Disability Insurance, Official Gazette No. 98/2012

[45] Carone, *et al., op. cit.* note 34, p. 8.

[46] Law on Labor Relations, Official Gazette of the Republic of Macedonia No.62/2005; 106/2008; 161/2008; 114/2009; 130/2009; 149/2009; 50/2010; 52/2010; 124/2010; 47/2011; 11/2012; 39/2012; 13/2013; 25/2013; 170/2013; 187/2013, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016 and 120/2018)

[47] Official Gazzette 113/2014

stitutional Court of Republic of Macedonia repealed this provision[48] regarding the difference in age provided for man and women on the bases that this provision is not in accordance with the constitutionally established principle of equality of citizens on the basis of the sex defined in Article 9 of the Constitution. According to the positive law of Macedonia, both man and women can request continuation of the employment contract for a maximum of 67 years, which is in line with the EU measures mentioned above.

Regarding the pillar structure of the system, the first and second pillars remain compulsory and are based on two components: solidarity characteristic for the first pillar and funded component associated with the second pillar.[49] In this period a big mistakes were made, by trying to attach and pull in more members by pulling out members from the Public Pension Fund without clearance how the pension will be withdrawal by the retired time. That is why the state forbidden the transfer for elder people and workers near to be retired. This was regulated later in 2012, by adopting the Law on Payment of Pensions and Pension Benefits from Fully Funded Pension Insurance, that also regulates the payments and the types of pensions and pension benefits from the second and the third pillar, was passed at the beginning of 2012.[50]

However, according to the report of the European Commission from 2012, after all the reforms in this period, in the area occupational pensions, the country was not yet sufficiently aligned with the acquis.[51]

With 2013 ending, Macedonian law has completed the eighth year of the implementation of the mandatory fully funded pension insurance in Macedonia. As of 31.12.2013, the mandatory fully funded pension insurance counted around 350,000 members. The assets in the mandatory pension funds for the first eight years have reached 27 billion denars (around 440 million Euros). The payments of the contributions into the mandatory pension funds started with the payment of the January 2006 wages, when the investment of these assets started to take place. The third pillar which became operational in 2009, with two voluntary pension

48 Decision 114/2014-0-1 from 29.06.2016

49 Bornarova, S.; Bogoevska, N.; Trojevik, S., *Pension System Reforms in the Republic of Macedonia: Expected Benefits and Challenges,* in: Academic Journal of Interdisciplinary Studies MCSER Publishing - Rome, Italy, Vol. 2 No. 9, 2013, pp.393-399, pp. 396

50 Law on Payment of Pensions and Pension Benefits from Fully Funded Pension Insurance, Official Gazette No. 11/2012, 147/2015 and 30/2016

51 European Commission – Commission Staff working paper: The FYROM 2012 Progress Report, Brussels, 2012, available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/mk_rapport_2012_en.pdf] Accessed 04.03.2019

funds had around 18,500 members in 2013. At the end of 2013, the assets in the voluntary pension funds were around 318 million denars (or 5 million euro).[52]

Furthermore, the amendments to the Laws on mandatory and voluntary fully funded pension insurance in January 2013, gave grounds for the introduction of the risk-based supervision. These amendments also harmonized both Laws with the Law on payment of pensions and pension benefits from the fully funded pension insurance. In 2013, most of the secondary regulation was amended and harmonized with the Laws on mandatory and voluntary fully funded pension insurance and mostly with the Law on payment of pensions and pension benefits[53].

Today, the Law on mandatory fully funded pension insurance provides limits on investing in non-domestic securities. Article 107 of this Law provides that no more than 50% of the value of the assets of the Pension Fund may be invested in assets issued by a foreign issuer outside Macedonia. With this restriction, no more than 30% of the Pension Fund asset value may be invested in:

- debt securities with an investment grade level rating by reputable international rating agencies issued by non-state foreign companies or banks of the European Union member-countries, OECD countries,

- shares issued by foreign companies or banks with a investment grade level rating by reputable international rating agencies, traded on the main stock exchange of the European Union member – countries, OECD countries and

- participation units, shares and other securities issued by authorized open-end and close-end investment funds established in the European Union member-countries, OECD countries that are invested primarily in equities quoted on stock exchange markets in their own countries.[54]

The pension reform caused additional budget expenditure for the Government, but also was additional financial challenge for Public Fund. In this period the Public pension fund has already lack and difficulties to cover the fund deficit, but moreover the reformed pension system demanded a certain percentage of the pension contributions to be transferred on the member`s individual account in the mandatory private fund. This data shows that, as in most of the EU Member

[52] MAPAS Report On the Developments in the Fully Funded Pension Insurance in 2013, Skopje, 2014

[53] *Ibid.*

[54] Article 107 (1)(a) related to Article105 paragraph (1) (i), (j) and (k) of the Law on Mandatory Fully Funded Pension Insurance

States, [55] in Macedonia benefits from funded schemes still play marginal role. According the Law on Mandatory Fully Funded Pension Insurance, Article 3 Paragraph 1, point 5: "*Member of a mandatory pension fund" means an individual who has entered into a contract to be a member of a mandatory pension fund, or in whose name an account has been opened in a mandatory pension fund in cases specified in the Law, and his/her membership lasts until he/she acquires the right to a retiremen.* That is why the withdrawals (transfers) from the Public to the Private funds was made partially and successively. Unfortunately, there process seems is not completed until nowadays. In 2018 the Ministry of Labor and Social Policy announced that 12.000 insurances are damaged by not being informed to make transfer to one of the Mandatory Pension Fund.[56] According to the progress reports on Macedonia that are prepared by the European Commission, another problem with the transfers was the delay in transferring funds but this problem has been overcome and: "There are no longer delays in transferring funds from the state pension insurance fund to private funds, which had previously led to a breach of the legislation on management of deposits." [57]

## 4. CONCLUSION

Despite the different level of socio-economy development of the countries in EU and in the region, they have faced with similar significant problems comprised from the pension reforms.

The Macedonian pension system was based on the principle of generation solidarity, i.e. pay-as-you-go (PAYG), where the current contribution payments are used to finance the current pensions. This system of solidarity became inadequate and burred with lack of funding. Pension reform was conducted and as a result, today, the pension system structure in North Macedonia consists of three pillars, where: the first pillar (mandatory) is still based on the principle of inter-generational solidarity, while the second (mandatory1) and third pillars (voluntary) operate on a fully-funded basis.[58] The financial objective is the pension beneficiary to earn

[55] European Commission - Green Paper towards adequate, sustainable and safe European pension systems SEC(210)830, Brussels [2010], p. 6. Just a few Member States with very acute public budget problems or well anchored automatic adjustment mechanisms were completed to reduce public pensions in payment

[56] [https://meta.mk/mapas-ke-gi-vraka-parite-na-penzionerite-koi-se-oshteteni-so-neraspredelbata-na-parite/] Accessed 02.03.2019.

[57] Commission Staff working document - The Former Yugoslav Republic of Macedonia Report 2018, European Commission, Brussels, SWD [2018]

[58] Petreski, B., *Sustainability of the pension system in Macedonia Comprehensive analysis and reform proposal with MK-PENS –Dynamic Microsimulation Model*, FinanceThink – Economic Research and Policy In-

pension consisted of two parts: the contribution from the gross salary of the pension member and the benefit earned by capitalization (accumulation) of the asset / units.

Key problem is the accumulation of financial assets, through the mechanism of appropriation funds, from the gross salary of employed persons and bring in those assets into the pension and disability insurance fund as well as from the current budget of the state, in order to provide a regular payment of pensions to the beneficiaries and to distribute evenly the burden of provision funds (trying to provide as much as possible participation of the fund's assets instead of assets from the central budget).

Reform processes were expected to stabilize the Macedonian pension system, without raising the age limit for exercising the right to pension and provide equality between the present and future pensioners. At the same time, deficit of assets in the Pension and disability insurance funds would be on the decrease, budget funds transferred to the pensions would be reduced and eventual problems and difficulties in the payment of future pensions would be eliminated.

The expected benefits from the second pillar were: transferring part of the financial burden to the insurers; reducing the older people care expenses for the next generations; stabilized income of pensioners that will not be dependent on the demographic factors; increase in the individuals' work initiatives and social insurance to provide for their future; income will not be depended only on paid contributions in the previous years, but also on the income from interest rates, dividends and other investments. [59]

Instead, the pension reform caused additional budget expenditure for the Government and a financial challenge for the Public Fund.

The analyze of the reformed pension system through the prism of EU recommendations showed that our country has implemented the pension reforms as the most of the Middle East countries in Europe did. But, according to the last annual report of the European Commission on Republic of North Macedonia for 2018 the provision setting a 50 % limit on investing in non-domestic securities by pension funds remains contrary to the *acquis*,[60] despite the fact that the same remark is present in all the European Commission reports, starting from 2011 till

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stitute, Skopje, available at [http://www.financethink.mk/wp-content/uploads/2018/06/Pension-analysis-EN.pdf] Accessed 02.03.2019

[59] Bornarova, *et al., op. cit.* note 49, p. 396

[60] Commission Staff working document - The Former Yugoslav Republic of Macedonia Report 2018, European Commission, Brussels, SWD [2018]

now. These reports contained another remark regarding the withdrawals (transfers) from the Public to the Private funds, which were made with delay. Delayed transfer of funds from the state pension insurance fund to private funds resulted in a breach of the legislation on the management of deposits till 2017.[61]

Today, according to the latest EU progress report on North Macedonia, this problem has been overcome.

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# LEGAL CHALLENGES OF REDUCTION OF THE TAX BURDEN ON LABOUR IN THE REPUBLIC OF CROATIA

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***ABSTRACT***

*Factor of labour has major role in the functioning of the economy. When it comes to employees, the remuneration they receive for their work, usually called pay or income, is in principle their main source of income and therefore has a great impact on their ability to spend and / or save. The paper analyzes the effect of changes in tax rates in the system of mandatory social contributions and personal income tax on tax burden on labour in Croatia. When it comes to the tax burden on labour, it is about taxation of the gross income of natural persons. The gross income of natural persons in Croatia is taxed with several tax forms: employer and employee mandatory social contributions, personal income tax and surtax to personal income tax. Changes in tax rates and other tax elements (eg personal deduction, tax brackets) are subject to frequent changes in order to achieve certain goals of economic and fiscal policy. EUROSTAT data show that Croatia is in the top five EU countries when it comes to tax burden on labour. Measures of tax policy and numerous tax reforms have tried to correct this fact. The main objective of this paper is to review the effects of such changes on the overall tax burden, the tax burden distribution and progressiveness and the level of tax revenues (fiscal impact).*

*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:*** *tax burden, personal income tax, mandatory social contributions, surtax to personal income tax*

## 1. INTRODUCTION

The tax burden of the workforce is an important part of financial and tax policy that may significantly influence the level of personal consumption and the employment rate in the country. Successful tax policy is not capable of solving all of the economic disbalances but it can contribute to creating balance and some other specific goals which can be achieved by instruments of tax policy, i.e. social goal of taxation.

„Namely, scientific and expert public views often identify personal income tax as key element in taxation of labour in the Republic of Croatia. Social contributions and surtax to personal income tax which also burden income derived from labour are frequently forgotten.“[1]

Individual income taxes, payroll taxes, and value-added taxes (VAT) make up a large portion of many countries' tax revenue. In many countries these taxes are progressive, which means that higher-income workers are taxed at higher rates. „The value added tax (VAT), and especially the one where taxation is made on a single-rated system, places the tax burden regressively[2] 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.“[3] However, this does not mean that the average worker is not also burdened by these taxes. It is also important to note that the tax burden on families is often lower than the burden on single, childless workers making the same pretax income. This is a result of not wanting to fulfill only the main goal of taxation, i.e. the fiscal goal, but the social goal of taxation aswell.

The tax burden on labour is broader than personal income taxes and payroll taxes. In many countries individuals also pay a value-added tax (VAT) on their consumption. „Because a VAT diminishes the purchasing power of individual earnings, a more complete picture of the tax burden should include the VAT. Accounting for VAT rates and basis in OECD countries increases the average tax burden on labour by 5 percentage points.“[4]

1 Šimović, H.; Deskar Škrbić, M., *Učinak promjena poreznih stopa na porezno opterećenje rada u Hrvatskoj*, EFZG Working paper series, No. 15-13, 2015, p. 4, [http://www.rsp.hr/ojs2/index.php/rsp/article/view/337/34] Accessed 15.03.2019

2 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 Šimović, J., *Socijalni učinci poreza na dodanu vrijednost, Revija za socijalnu politiku, Vol.* 5, No. 2, 1998, [http://www.rsp.hr/ojs2/index.php/rsp/article/view/337/341] Accessed 25.03.2019

4 Bunn, D.; Fornwalt, A., *A Comparison of the Tax Burden on Labor in the OECD, 2018*, Tax Foundation, [https://taxfoundation.org/comparison-tax-burden-labor-oecd-2018/] Accessed 15.03.2019

As far as employees are concerned, the compensation received for their work, more commonly called wages or payrolls, generally represents their main source of income and therefore has a major impact on their ability to spend and/or save. Whereas gross wages/payrolls include the social contributions payable by the employee, net earnings are calculated after deduction of these contributions and any amounts which are due to government, such as income taxes.[5]

„Labour taxes are considered to be relatively harmful to growth and employment as they depress labour supply and demand by increasing the gap between the cost of labour and employees' take-home pay. Some groups within the population are considered particularly responsive to changes in after-tax wages, e.g. low-income earners and second earners." [6]

## 2. TAX WEDGE

It is very ungrateful and complicated to compare different tax systems. There are no two identical tax systems in the world, because of the many factors that shape them. But that does not mean that there are no comparisons when it comes to tax burdens of labour. Tax wedge represents the total tax burden of labour. For comparison between two and more countries tax wedge is calculated on an example of average income. But not all categories of personal income come into consideration - only employment income.

Tax wedge equalls total of personal income tax, surtax to personal income tax and employee's mandatory contributions divided with total expenses of labour (gross salary and employers' mandatory contributions).

There are two methodologies that can be applied- KPMG and OECD methodology. European Commission uses OECD methodology when comparing tax burden of lower paid workers in member states of the EU. OECD methodology considers taxes in broader sense including mandatory social contributions paid to the central government. Also when making the simulations concerning tax wedge it has to be decided whether we are taking into account single workers[7], families[8] and

[5] Eurostat statistics explained, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Wages_and_labour_costs] Accessed 10.03.2019

[6] 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. 25

[7] OECD defines single worker as an unmarried person , whose presence is definitely larger with population under 40 years of age

[8] Tipical family is defined as family with two children between 5 and 12 years of age, but not that exact age but rather 6 or 11 years of age in maximum

sex of the targeted group. „Also OECD methodology takes into account standard tax deductions when calculating tax burden of tax payers. Many countries in the OECD provide some targeted tax relief for families with children.“[9] The Republic of Croatia has also recognized social aspect of taxation in the sense of non-taxable part of income which consists of personal deductions and allowances for children, kept household members, sorts of personal disabilities and pensioners. „While the average tax wedge for single workers in the OECD is 35.9%, the average wedge for families, defined as including a single income earner filing jointly with two children is 26.1%. Poland has the largest disparity between the two tax wedges with a 25.6 percentage-point difference between its 35.6% wedge for single workers and 10% wedge for families. The lowest family tax wedge is in New Zealand at 6.4%, which is just slightly lower than Chile, which has a 7% wedge for both single and family taxpayers.“[10]

According to the European Commission's assessment, the tax wedge in Croatia in 2014 amounted to 36% for single workers (without children) who earn 67% of average income. Most of burden refers to employee contributions - 17.1%, while the share of personal income tax amounts to 7.6 %. On the other hand, in Croatia, taxes are presented according to the cash principle - tax data only contains data on collected, but not uncollected taxes. Therefore, for a more complete comparison of the tax burden with that of other members, Croatian data should be increased for the amount of uncollected taxes. Accurate, up-to-date and statistically verified data on total unpaid taxes and contributions at the general government level are not available in the Republic of Croatia. However, it is clear from the information published by the Tax Administration that the debt amounts to tens of billions of HRK[11].

„There is a negative relationship  between the tax wedge and emloyment.“[12] „Because of this, countries should explore ways to make their taxation of labour less burdensome to improve the efficiency of their labor markets.“[13] The effectiveness of reductions in labour tax in reducing unemployment depends on the interaction of the demand and the supply side of the labour market, which is determined by the behavioural responses of businesses and workers, measured in terms of elastici-

[9] Bunn; Fornwalt, *op.cit.*, note 2

[10] OECD Publishing, *Taxing Wages 2018,* [https://read.oecd-ilibrary.org/taxation/taxing-wages-2018_tax_wages-2018-en#page7] Accessed 15.03.2019

[11] Bejaković, P., *Oporezivanje rada: Može li flat tax riješiti hrvatske probleme*?, [https://prviplan.hr/analize-i-komentari/oporezivanje-rada-moze-li-flat-tax-rijesiti-hrvatske-probleme/] Accessed 15.03.2019

[12] Hodge, S. A.; Hickman, B., *The Importance of the Tax Wedge on Labor in Evaluating Tax Systems,* [https://files.taxfoundation.org/20180913095728/Global-Primer_tax_wedge.pdf] Accessed 15.03.2019

[13] Bunn; Fornwalt, *op.cit.,* note 2

ties. The greater the response to tax changes on the part of employers or employees, the higher the elasticity of labour demand or supply, respectively.[14]

## 3. TAX BURDEN OF LABOUR IN THE REPUBLIC OF CROATIA

Tax burden of labour refers to taxation of gross personal income of natural persons. Gross personal income of natural persons in the Republic of Croatia is taxed via few fiscal forms:

1. mandatory social contributions
   a) contributions that burden the employer, i.e. health insurance contribution (16.5%)
   b) contributions that burden the emloyee, i.e. pension insurance contributions (15%+5%)
2. personal income tax
3. surtax to personal income tax.

All of the above mentioned contributions and taxes are madatory. The only difference is the technic of accounting when it comes to independent services where the entire amount of social contributions is beared by the person which provides the independent service.

„Croatia is not a leader in the amount of the tax burden on labour, but it is among the countries with a higher tax wedge. The problem in Croatia is not the income tax, which is relatively low compared to other countries, but in the first place the problem are contributions, especially those paid by employees, where Croatia has one of the heaviest burdens in the word." [15]

Citizens are not sufficiently aware which taxes they pay and how much. Part of the reason for this is the system of taxation of wages in which the employers are obliged on behalf of the employees to calculate contributions and taxes, and pay them into the government budget account. Only the net wage is paid into the employee's account. Of course, the employee, when receiving the wage, must be given a wage slip by the employer clearly showing the amount of gross wage and individual taxes and contributions.[16]

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[14] Tax Reforms in EU Member States 2015, *op. cit.*, note 4, p. 33

[15] Krtalić, S.; Žgomba, B., *Analysis of the tax wedge in the Republic of Croatia,* The EU economic environment post-crisis: Policies, Institutions and Mechanisms, Juraj Dobrila University of Pula, Pula, 2016, pp. 75-76

[16] Urban, I., *Porezno opterećenje rada u Hrvatskoj*, Newsletter, povremeno glasilo Instituta za javne financije, No. 47, 2009, p. 2

### 3.1. Social contributions

General government[17] includes not only all fiscal levels (state, regional and local self-government units), but also various non budget funds as a special form of state units. Tipical examle of these sort of funds are social insurance funds which can be formed as a special subsector within every level of public governance, but are often found on the central governence.[18]

According to the above mentioned, mandatory social contributions that are payed to general government or to be more specific to one of the non budget funds (i.e. social security funds) can be deemed as taxes by the OECD methodology. The main similarity to taxes is their obligatory character, i.e. they are both fiscal revenue of the state (or the regional and local-self-government units). But they also differ from taxes in a way of equivalence and benefit that obliged persons receive from payment of social insurance in a form of pensions and health insurance. In most countries the benefit depends on payments of adequate contribution, although the amount of the benefit is not necessarily connected to the amount of the contribution[19] which implies that the social insurance contributions are payments without direct equivalence.[20]

It should be noted that their obligatory character is not enough to consider them sort of taxes, but it is necessary that they are paid to general government which brings us to one big dilemma- should the pension insurance contributions deriving from the second pillar be included in the forming of tax wedge. If so the results would represent the position of the Republic of Croatia in a unfavorable light than it really is. One of the argument for their inclusion besides their obligatory character is relatively high level of state supervision of non budget funds they belong to. But their exclusion, although methodologically consistent, would result in better light of the Republic of Croatia in relation to actual state.

Also one of the problems is the fact that immediately after the pension insurance reform in 2002 there were workers over the age of 50 that were not obliged to pay pension insurance contributions in two divided pillars but remained in just one pillar (20% of the gross income) and the workers between ages 40 and 50 had to make the choice whether to remain in one pillar or to pay pension insurance con-

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17 IMF Government Finance Statistics manual 2001, Washington DC:IMF, 2001, pp.12-14

18 Blažić, H.; Trošelj, I., *Međunarodna usporedba poreznog opterećenja radne snage: Utjecaj nove metodologije na položaj Hrvatske*, Financije i menadžment u globalnoj ekonomiji, Pula: Sveučilište Jurja Dobrile u Puli, Odjel za ekonomiju i turizam, 2012, p. 30, [https://bib.irb.hr/datoteka/589765.Blazic_Troselj_-_Copy.pdf] Accessed 15.03.2019

19 OECD Revenue Statistics 1965-2010, OECD, Paris, 2011, p. 303

20 OECD Publishing, *Taxing Wages 2008-2009,* OECD, Paris, 2010, p. 27

tributions in two pillars. „Only 30% of those workers decided to join the second pillar.“[21]

Social contributions are at one hand very simple, but at he other hand very rigid instrument of labour taxation. „Rates of mandatory contributions are directly applied to the amount of gross income for all obliged persons (which equate with tax payers) without any deductions, allowances or differentiated rates.“[22]

There were not may changes since 2002 pension reform up till now when it comes to mandatory pension insurance contributions. There are two mandatory pillars of pension insurance contributions: First pillar deals with generational solidarity system – 15% of the gross income and the second pillar mandatory individual pension insurance-5% of the gross income. There is also a third pillar- voluntary pension insurance. The second and the third pillar represent individual capitalised savings by insured person.

There were some changes concerning health insurance contributions. The changes concern lowering rate of the health insurance contribution from 15% to 13% in May of 2012 and recall of that change in April of 2014. But the biggest change occured in 2019. Three of the mandatory social contributions payed by employer (health insurance contribution - 15%, contribution concerning work related injuries - 0.5% and contribution with assisting employment-1.7%) were incorporated in one health insurance and health insurance in case of workplace injury and profession-related illness contribution - 16.5% in 2019.[23]

„It should be noted that mandatory social contributions are usually proportional, i.e. they do not change with the growth of the personal income. But in recent times some countries have displayed changes that make these sort of social contributions progressive but not indefinitely.“[24]

When it comes to the Republic of Croatia, it does not matter whether the mandatory pension contributions in the second pillar are included in the analasys, tax burden of labour is very high. „According to the data for average pay, higher burden than the Republic of Croatia have only Austria, Germany, Netherlands and Greece, but to us more comparable Poland, Hungary, Slovenia (whose burden is the largest-22%). Turkey has the same burden as Croatia. Slovakia and Chech

21 Zuber, M., *Mogućnosti poboljšanja socioekonomskih i fiskalnih učinaka sustava obveznog mirovinskog osiguranja u Hrvatskoj*, doktorska disertacija, Sveučilište u Rijeci, Ekonomski fakultet, rijeka, 2011, p. 130

22 Šimović; Deskar Škrbić, *op. cit.,* note 1, p. 5

23 Law on contributions, Official Gazzette No. 106/2018

24 Blažić; Trošelj, *op.cit.*, note 15, p. 13

Republic have somewhat lower burden (13.4% and 11%). The view of the burden depends on the fact of who are we looking at- old memeber states or new member states, or all together."[25]

„Also, the survey shows that 5% rate of the second pillar of mandatory pension contribution is very high compared to other OECD countries. Only Chile and Switzerlad have higher rate."[26]

### 3.2. Personal income tax

When it comes to comparison of personal income tax, one should be very careful because of the definition of tax basis varies from country to country. Some countries have all sorts of personal deductions, allowances and incentives that make it much harder to see the real state of things.[27] As far as the Law on Personal Income Tax has been concerned, it has had seven amendments to the law since 1993 to improve and upgrade the tax system of the Republic of Croatia, which resulted in the adoption of the Second Law on Personal Income Tax. This second law also experienced several changes in 2004, 2008, 2010, 2011, 2012. The last change took place in 2019, which will continue to be discussed. When it comes to taxation of income from employment for the purpose of achieving the principle of equity, the most experimented with were the number of tax rates and tax brackets ranging from two (20% and 35%) to three (15%, 25%, 35%), four (15%, 25%, 35%, 45%), than three tax rates and tax brackets (12%, 25%, 40%) and last changes stopped at two tax rates (24% and 36%) and non-taxable part of income or basic personal allowance (HRK 1,000 , HRK 1,250.00, HRK 1,500.00, HRK 1,600.00, HRK 1,800.00, HRK 2,200.00, HRK 2.600,00, HRK 3.800,00).
The Law on Personal Income Tax[28] was adopted in 1993. With the beginning of its application since 1994 it replaced the existing law that has been in effect since 1991. Under the new law, the form of personal income tax has been replaced by a synthetic personal income tax with the application based on the principle of world income.

Two tax rates have been introduced - a minimum of 25% and a maximum of 35%. For such established rates of personal income tax, as well as the range between them, it can be said that „the minimum rate was among the highest, and the highest rate among the lowest compared to the then tax systems of most coun-

[25] *Cf. ibid.*, p. 14
[26] *Cf. ibid.*, p. 15
[27] Bejaković, *op.cit.,* note 9
[28] Official Gazette, No. 109/1993

tries (not only European), and the range between these two rates (10 percentage points) was one of the smallest ranges between the input and output rates of that tax during those years."[29] „At that time the range between tax rates in the European countries was, for example, 40 % in Austria, Luxembourg and Greece, 41% in Italy, 25 in Portugal, 30 in Belgium, 32 in Finland, 34 in Germany and 23% in the Netherlands."[30]

One of the goals of tax policy is to achieve fairness in taxation. When it comes to personal income tax, especially in terms of employment income and independent services income, this fairness is generally tied to income taxation by applying a progressive tax rate, whereby the optimum situation would assume the existence of larger number of rates with the lenient drop between the rates. The taxpayer in terms of the amount of earned income, or more precisely with respect to the tax basis, enters a certain tax bracket where his income is taxed at a certain tax rate. This automatically leads to a more even tax burden distribution, i.e. lower income taxpayers will enter lower tax brackets and pay taxes at lower tax rates, and taxpayers who generate higher income would enter higher tax brackets and pay tax at higher tax rates. The authors of the Law on Personal Income Tax of 1993 thought of this, but the realization of that idea in practice did not occur. It is difficult to talk about fairness in taxation if only two rates are applied in the taxation of personal income tax, with the minimum rate being set extremely high to 25%, the maximum relatively low to 35%. In this way, the Republic of Croatia differed greatly from the modern countries to which it looked up to and entered into a group of few countries that used only two tax rates when it comes to personal income taxation. A small number of tax rates causes a sudden increase in the tax burden at the transition from one tax bracket to another, which is particularly aggravating circumstance for taxpayers that generate employment income and independent services income.

During 1994, or within the year of application of the Law on Personal Income Tax, major amendments to the Law[31] were made. Out of 121 articles, 58 were amended, while 6 were deleted.[32] During 1996 there was another amendment to the Law on Personal Income Tax[33], most important of which was that the minimum tax rate has been reduced from 25% to 20%. However, only two rates were still in use.

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[29] Jelčić, B.; Bejaković, P., *Razvoj i perspektive oporezivanja u Hrvatskoj*, HAZU, Zagreb, 2012, p. 164

[30] Jelčić, B., *Je li u nas porezni teret ravnomjerno raspoređen,* Ekonomija/Economics No. 3, Zagreb, 1998,p. 328-333

[31] Official Gazette, No. 95/1994

[32] Jelčić; Bejaković, *op.cit.*, note 26, p. 170

[33] Official Gazette, No. 106/1996

After three more amendments to the 1993 Law on Personal Income Tax, there were more pronounced demands and changes in the taxation of income (and profit as well), and in 2000 a new Law on Personal Income Tax[34] The new Law on Personal Income Tax entered into force on 1 January 2001 and differed from the previous one not only in the material but also in the formal sense.

The new law has increased the number of tax rates and tax brackets. Initially, there were three rates, 15%, 25% and 35%, and from the beginning of 2003, a rate of 45% was introduced to more evenly distribute the tax burden. This is how the range between minimum and maximum tax rates increased by 20 percentage points.

This means, in essence, that after the mandatory pension contributions and the basic personal allowance at the monthly level were deducted from the gross salary, personal income was taxed from 2001 to 2003 as follows:

**Table 1:** Tax brackets and tax rates from 2001 to 2003

| Tax rate | Monthly basis (HRK) |
|---|---|
| 15% | Up to 2.500,00 |
| 25% | 2.500,01 to 5.625,00 |
| 35% | Over 5.625,01 |

Since 2003, personal income has been taxed using 4 tax rates and 4 tax brackets. It is clear that the basic personal allowance played in an exceptionally large role, which in 2001 amounted to 1250 HRK, and since 2003 it has been increased to 1500 HRK.

**Table 2:** Tax brackets and tax rates from 2003 to 2005

| Tax rate | Monthly basis (HRK) |
|---|---|
| 15% | Up to 3.000,00 |
| 25% | 3.000,01 to 6.750,00 |
| 35% | 6.750,01 to 21.000,00 |
| 45% | Over 21.000,01 |

Since January 1, 2005, the Third Law on Personal Income Tax[35] has been applied, the essence of which has not changed much in the light of the previous law. The legislator's aim was to further simplify the previous regulation. Of the most interesting changes, one should emphasize the increase of the basic personal tax

[34] Official Gazette, No. 127/2000, 150/2002

[35] Official Gazette, No. 177/04

allowance for the taxpayers to 1600 HRK (up to 3000 for pensioners), changes related to other allowances for dependent members of household - 0.50 of the basic personal allowance for spouses or other dependent family members. Also the total amount of deduction for insurance, health care and housing needs was reduced.

It is important to emphasize that the new law has established new brackets for the application of tax rates on the taxation of employment income and independent services income.

**Table 3:** Tax brackets and tax rates from 2005 to 2008

| Tax rate | Monthly basis (HRK) |
|---|---|
| 15% | Up to 3.200,00 |
| 25% | 3.200,01 to 8.000,00 |
| 35% | 8.000,01 to 22.400,00 |
| 45% | Over 22.400,01 |

„During this period, wealthier citizens paid the state approximately 2/3 of the total of personal income tax, while their relative tax burden has risen."[36] In 2008, there is a new increase in the basic personal allowance that came into force from 1 July 2008 and for which the basic personal deduction for the taxpayer is 1800 HRK, and for pensioners with a maximum of 3200 HRK. Thus, there is a new relationship within the tax brackets:

**Table 4:** Tax brackets and tax rates from 2008 to 2010

| Tax rate | Monthly basis (HRK) |
|---|---|
| 15% | Up to 3.600,00 |
| 25% | 3.600,01 to 9.000,00 |
| 35% | 9.000,01 to 25.200,00 |
| 45% | Over 25.200,01 |

The above mentioned provisions were one of the causes for the new Law on Personal Income Tax that followed in 2010.[37] Tax rates were changed yet again for taxation of certain forms of income, and some of the tax reliefs (healthcare, housing, insurance premiums, investment maintenance) were abolished.

36 Kesner-Škreb, M., *Što s porezima u Hrvatskoj? Porezno opterećenje, oporezivanje dohotka, dobiti i imovine*, Newsletter Instituta za javne financije, No. 32, p. 4

37 Official Gazette, No. 80/10

**Table 5:** Tax brackets and tax rates from 2010 to 2013

| Tax rate | Monthly basis (HRK) |
|---|---|
| 12% | Up to 3.600,00 |
| 25% | 3.600,01 to 10.800,00 |
| 40% | Over 10.800,00 |

The application of new tax rates has had an impact on the reduction of tax burden, however, when it comes to taxpayers with the lowest payrolls, the problem lies in the fact that these taxpayers (using the basic personal allowance increased by the other deductions) barely, if at all, reach the tax basis on which tax rates are applied to. This actually means that in the Republic of Croatia, taxpayers who earn income most often from their employment, earn income that is significantly lower than the amount for which they could reduce the tax basis of personal income tax. „A large number of taxpayers of personal income tax generate income that is so low that they will not pay personal income tax, but the fact remains that they lack funds to meet basic living needs whose height is indirectly (by determining the personal allowances and deductions) established by the Law on Personal Income Tax.“[38]

The income tax base on the taxation of income tax on employment and independent services is divided into three tax categories. In taxation, 3 tax rates (12%, 25%, 40%) are used from 2013 to 2017.

This means, in essence, that after the gross salary is deducted from the compulsory contributions and the basic personal allowance of taxable income on a monthly basis is taxed as follows:

**Table 6:** Tax brackets and tax rates from 2013 to 2017

| Tax rate | Monthly basis (HRK) |
|---|---|
| 12% | Up to 2.200,00 |
| 25% | 2.200,01 to 8.800,00 |
| 40% | Over 8.800,01 |

What is exceptionally interesting is that it was the first time it occurred that when determining the lowest tax bracket and thus applying the lowest tax rate, the legislator did not use a double basic personal allowance but the personal income tax is paid at the rate of 12% of the salary ranged from the tax base to the height a single amount of the basic personal allowance. Hence, entering a higher tax bracket and

[38] Jelčić, B., *Oporezivanje uskladiti s našim potrebama i mogućnostima*, Ekonomija/Economics, *Vol.* 13, No. 1, Zagreb, 2006., p. 97

applying a tax rate of 25% is much "faster", which greatly increases the tax burden on taxpayers. The fact is that tax rates have been reduced, i.e. 12%, 25% and 40%, instead of 15%, 25%, 35% and 45%, and the tax burden has been reduced, especially by abolishing the 4th highest tax rate, but the legislator has made the second step precisely when establishing a new tax system of tax brackets. Surprising is the fact that this problem was not mentioned or even questioned and has been accepted without any delay.

Till the beginning of 2017, personal income was taxed at rates 12, 25 and 40 %, and there were also a range of tax deductions and allowances. In addition to the fact that the highest 40 % rate was unproductive and punitive, the additional problem was that it applied to relatively low income. Also, the monthly basis was determined in correlation to basic personal allowance and thus the tax brackets were formed. To improve and simplify the tax system, Croatia has introduced two tax categories in 2017: the 24% rate is applied to the tax basis of up to HRK 17,500 and the rate is 36% above that amount (tax rate is applied to the difference between the category of income and monthly basis). The basic personal allowance in Croatia amounted to HRK 2,600 per month prior to 2017, and now amounts to HRK 3,800 per month. Tax basis is now calculated according to net minimum wage in the Republic of Croatia and has no connection to basic personal allowance.

**Table 7:** Tax brackets and tax rates from 2017 to 2019

| Tax rate | Monthly basis (HRK) |
|---|---|
| 24% | Up to 17.500,00 |
| 36% | Over 17.500,01 |

In 2019, monthly basis has been changed yet again.[39]

**Table 8:** Tax brackets and tax rates from 2019

| Tax rate | Monthly basis (HRK) |
|---|---|
| 24% | Up to 30.000,00 |
| 36% | Over 30.000,01 |

A progressive tax rate is not crucial when considering the distribution effect because a more even or "fairer" tax burden distribution can be achieved with a lower number of tax rates and brackets, but with personal deductions and allowances.

So in the end, tax on labour results in lower salaries for workers (but we should

[39] Law on personal income tax, Official Gazette, No. 115/2016, 106/2018

not forget the effect of other taxes which also reduce employees' standard of living, such as VAT and excise taxes). „What if employees do not want to accept lower wages? They have several "escape routes": (a) to the unofficial economy and tax evasion – to accept payment of a small proportion of or the entire salary "on the black", (b) to inactivity – withdrawal from the labour force and the search for social benefits from the government, (c) abroad – this may relate to young people and educated and qualified workers."[40]

### 3.3. Surtax to personal income tax

It should not be forgotten to mention, especially when it comes to the financing of local self-government units, the connection of personal income tax with surtax to personal income tax. The Law on Financing Local and Regional Self-Government Units[41] and Law on Local Taxes[42] provide municipalities and cities with the possibility of introducing this sort of tax revenue. A taxpayer of personal income tax is obliged to pay surtax to personal income tax if he/she has a permanent or temporary residence in the municipality or city that has prescribed the payment of the surtax. The basis of the surtax is calculated income tax. When it comes to the tax rate, municipalities and cities may set the following tax rates:

- the municipality can prescribe a rate of up to 10%
- a city below 30,000 inhabitants can prescribe a rate of up to 12%
- a city over 30,000 inhabitants can prescribe a rate of up to 15%
- The city of Zagreb can prescribe a rate of up to 18%.

In practice, this means that the tax burden will vary depending on the taxpayer's domicile. For example, the city of Osijek prescribes the rate of income tax rate of 13%, while the City of Zagreb prescribes a rate of 18%. Another example is Zadar, a city that until 2012 did not have surtax to personal income tax. This means that taxpayers with equal income will pay different amounts of tax or non at all, thereby automatically failing to meet the criteria of fairness and also affect the tax burden statistics.

[40] Urban, *op. cit.,* note 13, p. 10

[41] Law on financing regional and local self-government units, Official Gazette, No. 127/2017

[42] Law on local taxes, Official Gazette, No. 115/2016, 101/2017

## 4. MEASURES OF SOLVING LABOUR TAX WEDGE PROBLEMS IN THE EU

The overall tax burden in the EU is above the OECD average and is skewed towards labour. For euro area Member States, the tax burden on labour, as measured by the tax wedge is among the highest in the world. Taxes on (employed) labour income are the most important source of revenue, contributing nearly half of all revenues, followed by consumption taxes at roughly one third and capital taxes at around one fifth of all tax revenues in the euro area." In some Member States, labour taxation is also designed in such a way that it discourages specific groups (e.g. low income earners) from taking up work, which may raise fairness issues."[43]

„Taxation can significantly affect employment trends in the economy. Excessive taxation can disturb the proper functioning of labour market by distorting incentives for work. Emphasis of tax policy should increasingly be put on finding those elements of the tax system which cause biggest distortions and bring them to the minimum. It is generally recommended to reduce the total tax burden in the economy, disperse the tax burden from the employers and workers to other tax forms with broader tax base (such as consumption) and increase flexibility on the labour market."[44]

Following its commitment to reduce the tax burden on labour, the Eurogroup[45] agreed on a benchmark and on common principles of which one refers to financing issues. „Although, the general discussion how to boost (inclusive) growth and employment has highlighted the importance of reducing labour taxation, some Member States face the question how to finance a labour tax cut, given their consolidation needs and/or sustainability challenge. The answer very much depends on country-specific circumstances."[46]

In 2014, the Eurogroup agreed on common principles which should guide Member States when reducing the tax wedge on labour. The conclusion is that reductions of the tax burden on labour need to be duly compensated, while taking into account the country specific fiscal margin for manoeuvre.

[43] European Commission, *Financing labour tax wedge cuts,* Brussels, 2017, p. 3

[44] Deskar Škrbć, M; Drezgić, S.; Šimović, H, *Tax policy and labour market in Croatia: effects of tax wedge on employment*, Journal Economic Research-Ekonomska Istraživanja, *Vol.* 31, 2018, [https://www.tandfonline.com/doi/full/10.1080/1331677X.2018.1456359?scroll=top&needAccess=true] Accessed 03.04.2019

[45] The Eurogroup is the recognised collective term for informal meetings of the finance ministers of the eurozone—those member states of the European Union (EU) which have adopted the euro as their official currency. The group has 19 members. It exercises political control over the currency and related aspects of the EU's monetary union such as the Stability and Growth Pact

[46] *Cf. ibid.*, p. 2

After the Eurogroup agreement in September 2015, several Member States have undertaken reforms to address the high tax wedge on labour. More recently, however, reform efforts have decreased and Member States have identified the financing of labour tax reductions as a key challenge in this context. „In line with the common principles adopted in September 2014, financing options include:

1. An uncompensated labour tax reduction
2. A revenue-neutral tax shift
3. An offsetting expenditure cut.“[47]

### 4.1. An uncompensated labour tax reduction

Although we can compare the main challenges across Member States, country-specific circumstances need to be taken into account, also in full respect of the existing EU economic surveillance framework, in particular the Stability and Growth Pact.

According to the report of European Commission, given the overall limited fiscal space, only few Member States appear to have the fiscal space to reduce the tax burden on labour without the need to offset revenue losses. In 2016, only Germany, Latvia, Lithuania and Austria in the euro area (tax wedge for low-income earners) had enough fiscal margin for manoeuvre to consider an uncompensated labour tax cut. Some Member States face a need to decrease relatively high taxes on labour (overall or for low-income groups) but are still facing a fiscal sustainability challenge.

„Given that public finances are strained in many Member States, and in order to avoid putting fiscal sustainability at risk, a labour tax reduction would have to be financed by reducing public expenditure or by increasing alternative revenues.“[48]

### 4.2. A revenue-neutral tax shift

„A revenue-neutral tax shift towards consumption taxes – or to other taxes less detrimental to growth - could be explored in several Member States. Labour taxes are considered to have a particularly negative effect on growth and employment, whilst certain other taxes are generally considered less distortive.“[49] A labour tax cut can be financed by increasing other taxes to offset the revenue loss, in particular for Member States that face a need to decrease relatively high taxes on

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[47] *Cf. ibid.,* p. 4

[48] Tax Reforms in EU Member States 2015, *op.cit.*, note 4, p. 28

[49] *Ibid.*

labour, while having relatively low taxes in some areas considered less detrimental to growth. In this respect, recurrent taxes on immovable property[50] were found to be least harmful for economic growth, followed by consumption taxes, personal income taxes, environmental taxes and capital taxes. Inheritance taxes may also have only a small effecton economic behaviour.[51] In particular, a tax shift from labour to consumption[52], at an unchanged overall revenue level, can be relevant.[53] „If the reform takes the form of a revenue-neutral tax shift, there is no financing issue, since the reformed system is expected to raise the same amount of revenue as the existing system. Increased attention for inequality, fairness and redistribution might make tax shifts towards capital taxation (e.g. taxation of capital gains, inheritance tax) more attractive.“[54]

When considering potential increases in consumption taxes, it is important to examine which specific types of tax can potentially be increased (e.g. VAT or excise duties). „Also, broadening the tax base may be preferred to raising the standard tax rate as a way of increasing revenue, as it minimises distortions. Improving tax compliance can also be a meaningful way of increasing revenue for several Member States.“[55]

„If growth-friendly taxes are currently relatively low, a Member State could increase these taxes as a way of increasing public revenue. This additional revenue may then be used to help improve the sustainability of public finances or to finance a reduction in labour taxes.“[56]

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[50] In some countries, for example, labour taxes are collected nationally whilst all or some recurrent property taxes are set and paid at local level. The revenue generated from recurrent property taxes may also serve different purposes in different countries, e.g. it may simply contribute to the government's general budget, or it may be specifically allocated to financing local services

[51] Tax Reforms in EU Member States 2015, *loc.cit*

[52] Austria substantially reduced labour taxation in 2016. The reform package included an increase in the number of brackets in the personal income tax system, an increase in the amounts of several allowances and tax credits, and an increased reimbursement of social security contributions for low-income earners. Measures to finance the tax relief include among others measures to improve tax compliance, spending cuts in administration, and an increase of several other taxes (such as the reduced VAT rate for certain goods or the withholding tax on capital gains). Increased consumption tax revenue from an increase in the purchasing power of consumers is expected to finance 17% of the reform

[53] A rise in taxes, and in particular a rise in consumption taxes, could increase prices, leading to higher inflation in the short run. Depending on how wages react to higher prices, which in turn is also influenced by indexation of benefits, this may lead to wage increases that, at least partly, counteract the reduction in labour costs resulting from the tax shift (referred to as the 'second round effect'). If wages do not react quickly, a shift from labour to consumption taxes could have the same effect as a currency devaluation

[54] European Commission, *Financing labour tax wedge cuts, op.cit.*, note 39, p. 6-7

[55] Tax Reforms in EU Member States 2015, *op.cit.,* note 4, p. 29

[56] *Cf. ibid.*, p. 28

### 4.3. An offsetting expenditure cut

In September 2016, the Eurogroup called on euro area Member States to actively use spending reviews and approved a set of common principles for improving expenditure allocation through their use[57]. Member States also face calls from different directions to promote the quality of public spending in order to create favourable conditions to support investment.

In this context, a labour tax cut can be financed in a budget-neutral manner by cutting or by better and more efficient use of public expenditure. Reviews and reforms of priorities in public expenditure could contribute to a more overall growth-friendly composition of the budget. This option is particularly relevant for countries with both high labour taxation and important fiscal sustainability issues.

One way in which Member States can cut expenditures is by limiting the use or reducing the generosity of tax expenditures. Tax expenditures are generally reductions in government revenue through preferential tax treatment of specific groups of tax payers or specific economic activities. An important role for the final fiscal impact is the amount of tax returns. Tax return is obligatory only for taxpayers who change their employer in the fiscal year and for tax payers of independent services income. Other cases of tax filing apply to the possibility of achieving certain, mostly non-standard, tax reliefs. When it comes to the Republic of Croatia in 2010 some of the tax reliefs (healthcare, housing, insurance premiums, investment maintenance) were abolished which subsequently significantly reduced the amount of tax returns on the basis of these reliefs.

While tax expenditures may be motivated by relevant economic or social goals, they are not necessarily the most cost efficient instrument and may in some cases lead to severe economic impacts and distortions. „Possible tax expenditure cuts could also concern those which are too expensive to maintain, with potentially large revenue losses, with large administrative and compliance costs or which can be replaced by more efficient measures.“[58]

„Belgium, the Czech Republic, France, Italy, Latvia, Hungary, Austria, Portugal and Romania and, to a lesser extent, Germany, Estonia, Croatia Lithuania, the Netherlands, Finland and Sweden, appear to have both a potential need to reduce a relatively high tax burden on labour (either overall or for specific groups) and

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[57] [http://www.consilium.europa.eu/en/press/press-releases/2016/09/09-eurogroup-statement/] Accessed 14.03.2019

[58] European Commission, *Financing labour tax wedge cuts, op.cit.*, note 39, p. 8-9

potential scope to increase the least distortive taxes. These Member States could, therefore, consider shifting the tax burden away from labour."[59]

## 5. CONCLUSION

Factor of labour has a major role in the functionig of the economy of every country in the world. From the point of view of the employer labour represents expenses, which besides salaries paid to employees, includes expenses calculated on the salaries, mainly mandatory social contributions. [60]

There are many analyses and empirical researches in the Republic of Croatia that take interest in tax burden of labour, having personal income tax especially in focus. But not many of them see the impact the mandatory social contributions have on the tax wedge. There are many tax changes and even tax reforms regarding personal income tax, and just a few changes concerning mandatory social contributions. Taking into account results of these researches[61], that show how more fair redistribution of tax burden can be achieved with less tax rates and consequently less tax brackets, in recent years there has been a sort of tax reform that reduced number of tax rates from four to three at first and then in 2018 from three to two tax rates- 24% and 36%.

The simple fact is that high tax burdens discourage employers to hire new workers, existing employees are paid the minimum salary and consequently employers and employees pay less mandatory contributions and consequently encourage the shadow economy, most often in the form of salary disbursement in informal way which leads to tax evasion, boost incentives for reduction of employment in recessions and stimulate employment in informal sector of the economy.

Higher employers' mandatory social contributions automatically mean higher expenses for the employers themselves. „The defeating fact is that employers shift the burden of mandatory social contributions to the employees, while employees are not able to shift the burden to another market participant and have to, in the end, bear the total burden of not just taxes but mandatory social contributions

[59] Tax Reforms in EU Member States 2015, *op.cit.*, note 4, p. 31

[60] Although we consider labor as a key factor when it comes to competitiveness of companies, there are other factors that should be taken into account, e.g. capital expenses (interest on loans and dividends on equity) and non-price elements (entrepreneurship, skills and labor productivity, inovation and position of brand and product marketing)

[61] See Urban, I., *Jedna stopa unutar poreza na dohodak: utjecaj na raspodjelu poreznog tereta*, Povremeno glasilo Instituta za javne financije, Newsletter No. 24, 2006

aswell. Consequently, higher employers' contributions result in lower net salaries for employees."[62]

Much talked about pressure release of employers when it comes to mandatory social contribution has come to order in 2019. Three of the mandatory social contributions payed by employer (health insurance contribution-15%, contribution concerning work related injuries-0.5% and contribution with assisting employment-1.7%) were incorporated in one health insurance contribution-16.5% .

Governments with higher taxes generally present to the public that they provide more services as an explanation, and while that is often true, the cost of these services can be more than half of an average worker's salary, and for most, at least a third of their salary.[63]

A high tax burden on labour is a clear impediment to an efficient and smooth functioning of labour markets and runs counter to the goal of boosting economic activity and increasing employment. Reducing the tax burden on labour has the potential to support consumption, stimulate labour supply and create work incentives for low-income earners, as well as to improve firms' and employers' profitability, progress, productivity and cost-competitiveness. It should therefore increase demand, growth and support job creation on the labour market, what is extremly important for countries in transition like the Republic of Croatia. Tax systems and especially social contribution systems should be formed in such a way that they create as little obstacles as possible when it comes to employment and enterpreneurship.

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[62] Urban, *op. cit.,* note 39, p. 10

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# JOINT CONTROLLER AGREEMENT UNDER GDPR

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***ABSTRACT***

*The GDPR obliges organisations to keep watch for potential instances of joint controllership of personal data. Where those instances arise, organisations must enter into suitable "arrangements" that apportion data protection compliance responsibilities between joint data controllers. The controller means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data. But, f.i. in the case of the case of a Biobank, more than one public bodies are the controllers of personal data, and their processing takes place in an intra-group context.*

*The paper will analyse elements established by art. 26 GDPR for Joint Controller Agreement for managing personal data under GDPR, the respective roles and relationships of the joint controllers vis-à-vis the data subjects, as well as responsibility and liability of controllers and processors.*

***Keywords:*** *Joint controllership, Personal data, Joint Controller Agreement, Joint controller liability*

## 1. INTRODUCTION

The paper aims at assessing the elements established by art. 26 GDPR for Joint Controller Agreement, respective roles and relationships of the joint controllers *vis-à-vis* the data subjects, as well as responsibility and liability of controllers and processors.

GDPR regulates the joint ownership of the data treatment (art. 26) and requires controllers to specifically define (by an act legally valid under national law) the respective scope of responsibility and tasks with particular regard to the exercise of the rights of the persons concerned, who have the opportunity to apply indifferently to any of the controller operating jointly.

The data controller is defined by GDPR (art. 4 n. 7) "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member

State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law". As controller, we mean the legal entity in its entirety, not the legal representative or head of the legal entity. Thus, the controller could be a professional, as well as a legal person (private or public body), association, multinational enterprise, able to determine by itself purposes and means of the processing of personal data, not for its individual uses. Just only in the presence of both of the requirements mentioned above, it is possible to identify a controller, or joint controllers if the data of the owners operate jointly.

About any processing activity, it is possible for more than one entity to be the controller, where the processing takes place in an intra-group context (f.i. research projects founded on EU grants, biobanks or others). "However, a natural or legal person who exerts influence over the processing of personal data, for his own purposes, and who participates, as a result, in the determination of the purposes and means of that processing, may be regarded as a controller within the meaning of Article 2(d) of Directive 95/46. Furthermore, the joint responsibility of several actors for the same processing, under that provision, does not require each of them to have access to the personal data concerned"[1].

The GDPR obliges organisations to keep watch for potential instances of joint controllership.

Where those instances arise, organisations must enter into suitable "arrangement" that apportion data protection compliance responsibilities between joint controllers.

Data controllers should carefully assess the existence of possible situations of joint ownership (see, in this regard, the indications provided f.i. by the Italian Data Protection Authority in various measures, including web doc. no. 39785)[2], being obliged in this case to enter into the internal agreement referred to in article 26, paragraph 1, GDPR.

The Joint controller agreement is a new form of "legal relationship", foreseen for the first time by the GDPR. It offers many opportunities to regulate legal arrangement in the most diverse economic sectors. Particularly relevant will be the definition of the respective functions of communication of the information referred

1 Case C25/17 , *Tietosuojavaltuutettu vs Jehovan todistajat — uskonnollinen yhdyskunta*, [2018] ECLI 551 par. 68 and 69

2 Italian Data Protection Authority, *Titolare, responsabile, incaricato - Precisazioni sulla figura del ´titolare´ - 9 dicembre 1997*, doc. web. n. 39785 Retrieved from [https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/39785access] Accessed 20.02.2019

to in Articles. 13 and 14 to the data subjects, to whom the data controllers are subject.

An essential summary of the agreement must be made available to the interested parties, also in compliance with the principle of transparency[3]. The interested party, regardless of the provisions of the agreement between the various joint holders, may exercise their rights, provided for in the regulations, against and against each holder.

The advantages offered by this agreement are many: it is important to point out that, as an alternative to the appointment of the controller, the holder will be able to negotiate a joint ownership agreement with the partner and, by establishing mutual obligations and responsibilities, avoid, for example, an audit of the controller that would otherwise be necessary. In this respect, it will be essential to negotiate the obligations and responsibilities of each party in order to establish a useful and not counter-productive agreement.

The chapter is organised as follows: in Section 2 we provide an overview on the meaning of controllers in the light of the joint controllership; the Section 3 offers some examples how joint controllers are identified by the European Commission, the EU Court of Justice or by Article 29 Working Party, also because it is not so easy to understand when the controllers are joint controllers; Section 4 identifies requirements that must be included in all data processing agreements and Section 5 recognizes how liability should be apportioned between the joint controllers, to guarantee the data subjects in the perspective of EU data protection law. The Section 6 concludes.

## 2. THE ESSENCE OF THE ARRANGEMENT: PURPOSES, AND MEANS OF THE PROCESSING OF PERSONAL DATA.

GDPR requires to the controller to be responsible for making sure all privacy principles are adhered to[4]. "The data controller must adhere to what is stipulated under Article 5 GDPR, which states that personal data must be processed lawfully, fairly, and in a transparent manner (Blawfulness, fairness and transparency). (…) The personal data must be collected for specified, explicit, and legitimate purposes

[3] See generally Custers, B.; Sears, A. M.; Dechesne, F.; Georgieva, I.; Tani T.; Van der Ho, S., *EU Personal Data Protection in Policy and Practice*, T.M.C. Asser Press, The Hague, 2019; Malgieri G.; Custers B., *Pricing privacy – the right to know the value of your personal data*, Computer Law & Security Review, *Vol.* 34, No. 2, 2018, pp. 289-303; Pizzetti, F., *Privacy e il diritto europeo alla protezione dei dati personali, II: Il Regolamento europeo 2016/679*, G. Giappichelli, Torino, 2016, pp. 6-9

[4] Emili A. M., *Data Officer Protector*, A. Bartolini, R. Cippitani, V. Colcelli (Eds) Dictionary of Statuses within EU law, Springer International, Cham, 2019, p. 121

(purpose limitation) and must be adequate and necessary in relation to the purposes for which it is collected (data minimisation)” [5].

The controller and the joint controllers have to monitor also “the behaviour of data subjects” as mentioned in Recital 24 of GDPR. This activity clearly includes all forms of tracking and profiling on the internet. “However, the notion of monitoring is not restricted to the online environment, and online tracking should only be considered by way of example. WP29 interprets ‘regular’ as meaning one or more of the following: ongoing or occurring at particular intervals for a particular period; recurring or repeated at fixed times and constantly or periodically taking place. Whereas, WP29 interprets ‘systematic’ as meaning one or more of the following: occurring according to a system; pre-arranged, organised or methodical; taking place as part of a general plan for data collection and carried out as part of a strategy”. [6]

Where two or more controllers jointly determine the purposes, and means of the processing of personal data, they are joint controllers (Rec.79; Art.4 (7), and Art.26). Core activities of the controller or the processor are intended to be ‘the key operations necessary to achieve the controller’s or processor’s goals’; however, they should not be interpreted as excluding activities where the processing of data forms an inextricable part of the controller’s or processor’s[7] activity[8].

A company/organisation decides ‘why’ and ‘how’ the personal data should be processed it is the data controller, so if the determination is made with one or more organisations, the latter are joint controllers.

Because of the GDPR, Joint controllers must enter into an arrangement setting out their respective responsibilities for complying with the GDPR rules. This means that both controllers will have to take into account the jointly determined nature, scope, context and purpose of the processing, as well as the risks to which each party is exposed, in terms of probability and severity, and to determine appropriate technical and organisational measures to ensure and be able to demonstrate that the processing complies with the Regulation.

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[5] Niamh Clarke G., *et. al., GDPR: an impediment to research?,* Ir J Med Sci, 2019, Retrieved from [https://doi.org/10.1007/s11845-019-01980-2] Accessed 08.02.2019

[6] Emili, *op. cit.*, note 4, p. 122

[7] *Ibid.*

[8] ‘Processor’ shall mean a natural or legal person, public authority, agency or anyother body which processes personal data on behalf of the controller (Definitions of ‘controller’ and ‘processor’ in Article 2 (d) and (e) of Directive 95/46/E).

It is necessary, that is, the exact and explicit determination of the aims of the treatment, so much so that in the event that it is a public body that gives the rules setting up and regulating the institution and the rules governing the may establish the purposes for which this is done by the implicit definition of the purposes is not sufficient to legitimize the treatment. The arrangement may represent a contribution to the documentation of the legitimacy of the purpose which in any case, it must be made explicit, thus excluding the possibility that they could ever settle *per relationem*[9].

## 3. JOINT CONTROLLERS, SOME EXAMPLES.

"Multiple actors involved in processing personal data is naturally linked to the multiple kinds of activities that according to the Regulation and the former Directive may amount to 'processing', which is at the end of the day the object of the joint control"[10].

Anyway, it is not so easy to understand when the controllers are joint controllers.

The European Commission refers this example: "Your company/organisation offers babysitting services via an online platform. At the same time your company/organisation has a contract with another company allowing you to offer value-added services. Those services include the possibility for parents not only to choose the babysitter but also to rent games and DVDs that the babysitter can bring. Both companies are involved in the technical set-up of the website. In that case, the two companies have decided to use the platform for both purposes (babysitting services and DVD/games rental) and will very often share clients' names. Therefore, the two companies are joint controllers because not only do they agree to offer the possibility of 'combined services' but they also design and use a common platform."[11].

Among the others, Article 29 Working Party suggests the following examples that could be qualified as joint controllers:

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[9] *Contra* Navarretta E., *Commento sub art. 11 del D.lgs., 30 giugno 2003, n. 196*, in: Bianca C.M.; Busnelli F.D., (eds.) La protezione dei dati personali. Commentario al D.Lgs. 30 giugno 2003, n. 196 («Codice della privacy»), I, Cedam, Padova, p. 322

[10] Article 29. Working Party Opinion 1/2010 (adopted on 16 February 2010, reference number 00264/EN/WP 169) retrieved from [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf] Accessed 08.02.2019

[11] *What is a data controller or a data processor?* retrieved from [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en] Accessed 15.02.2019

- "Social network service providers provide online communication platforms which enable individuals to publish and exchange information with other users. These service providers are data controllers, since they determine both the purposes and the means of the processing of such information. The users of such networks, uploading personal data also of third parties, would qualify as controllers provided that their activities are not subject to the so-called "household exception"[12].
- E-Government portals act as intermediaries between the citizens and the public administration units: the portal transfers the requests of the citizens and deposits the documents of the public administration unit until these are recalled by the citizen. Each public administration unit remains controller of the data processed for its own purposes. Nevertheless, the portal itself may be also considered controller. Indeed, it processes (i.e. collects and transfers to the competent unit) the requests of the citizens as well as the public documents (i.e. stores them and regulates any access to them, such as the download by the citizens) for further purposes (facilitation of e-Government services) than those for which the data are initially processed by each public administration unit. These controllers, among other obligations, will have to ensure that the system to transfer personal data from the user to the public administration's system is secure, since at a macro-level this transfer is an essential part of the set of processing operations carried out through the portal[13].

In the opinion of the Court of Justice of the EU decided in Case C-210/16 *Wirtschaftsakademie*[14], Facebook and the administrator of a fan page created on Facebook are joint controllers under EU data protection law. The Court of Justice in this judgment describes because of the concept of 'controller' encompasses the administrator of a fan page hosted on a social network: (15) "Fan pages are user accounts that can be set up on Facebook by individuals or businesses. To do so, the author of the fan page, after registering with Facebook, can use the platform designed by Facebook to introduce himself to the users of that social network and to persons visiting the fan page, and to post any kind of communication in the media and opinion market. Administrators of fan pages can obtain anonymous statistical information on visitors to the fan pages via a function called 'Facebook

[12] Article 29 Working Party's Opinion 5/2009 on online social networking, adopted on 12 June 2009 (WP 163), retrieved from [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp163_en.pdf] Accessed 08.02.2019

[13] Article 29. Working Party Opinion 1/2010 (adopted on 16 February 2010, reference number 00264/EN/WP 169) retrieved from [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf] Accessed 08.02.2019, p. 23

[14] Case C-210/16 *Wirtschaftsakademie- Schleswig-Holstein* [2018] ECLI 388

Insights' which Facebook makes available to them free of charge under non-negotiable conditions of use. That information is collected by means of evidence files ('cookies'), each containing a unique user code, which are active for two years and are stored by Facebook on the hard disk of the computer or on other media of visitors to fan pages. The user code, which can be matched with the connection data of users registered on Facebook, is collected and processed when the fan pages are opened. According to the order for reference, neither *Wirtschaftsakademie* nor Facebook Ireland Ltd notified the storage and functioning of the cookie or the subsequent processing of the data, at least during the material period for the main proceedings."

Thus, the question is whether or not an entity to be held liable in its capacity as administrator of a fan page on a social network where the rules on the protection of personal data are infringed, because it has chosen to make use of that social network to distribute the information it offers: "30. In the present case, Facebook Inc. and, for the European Union, Facebook Ireland must be regarded as primarily determining the purposes and means of processing the personal data of users of Facebook and persons visiting the fan pages hosted on Facebook, and therefore fall within the concept of 'controller' within the meaning of Article 2(d) of Directive 95/46, which is not challenged in the present case. (…) 32. It appears that any person wishing to create a fan page on Facebook concludes a specific contract with Facebook Ireland for the opening of such a page, and thereby subscribes to the conditions of use of the page, including the policy on cookies, which is for the national court to ascertain. (…) 35. While the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network, it must be stated, on the other hand, that the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account. 42 In those circumstances, the recognition of joint responsibility of the operator of the social network and the administrator of a fan page hosted on that network in relation to the processing of the personal data of visitors to that page contributes to ensuring more complete protection of the rights of persons visiting a fan page (…)".

Scholars identify also the management of research data like a joint controllership in the case i.f. of observational research, when patient data derive from different healthcare systems[15] or biobank like the Human genetic databases (HGD) that

[15] Borghi, M., *Individual rights and property rights in human genetic databases: a common-law perspective*, in: Rainer, A.; Cippitani R.; Colcelli V. (eds.), Genetic Information and Individual Rights, Universität

are essential facilities for medical research[16]: "in that case, the custodian of the centrally assembled research data should be the sole controller, and data transfer agreements (DTAs) should regulate the processing through that database. The data protection officer of the receiving centre should assure that the conditions are indeed met, next to potential other governance mechanisms of the project such as decision procedures about the use of the database for specific protocols when applicable."[17]

## 4. TERMS OF THE ARRANGEMENT BETWEEN JOINT CONTROLLERS.

GDPR imposes significant specific requirements that must be included in all data processing agreements. The contract to comply with the elements established by art. 26 GDPR, has to be characterised as follow:

A) It has to establish the respective responsibilities between the controllers for compliance with the obligations under GDPR.

B) It has duly to reflect:

   i) the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects.

   ii) the protection of the rights and freedoms of data subject.

C) It may designate a contact point for data subjects.

D) It has to determine the clear allocation of the responsibilities and liability of controllers and processors under GDPR.

The essence of the arrangement shall be made available to the data subject. The essence of the Joint controller agreement is a clarify distribution of control.

Anyway, at national level only just two Data Protection Acts provide some general guidelines on joint controllership: the Norway Act of 15 June 2018 no. 38, and Belgican Act of 30 July 2018 Federale Overheidsdienst Justitie, Federale Overheidsdienst Binnenlandse Zaken En Ministerie Van Landsverdediging "*Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van*

Regensburg, Regensburg, 2018, p. 120

16 See generally Tutton, R.; Oonagh, C. (eds.), *Genetic Databases: Socio-ethical issues in the collection and use of DNA*, Routledge, London and New York, 2004; Häyry M. *et al.*, *The Ethics and Governance of Human Genetic Databases. European Perspectives,* Cambridge University Press, Cambridge, 2007; Elger, B., *Ethical Issues of Human Genetic Databases: A Challenge to Classical Health* , Routledge, London and New York, 2012

17 van Veen E.-B., *Observational health research in Europe: understanding the General Data Protection Regulation and underlying debate*, European Journal of Cancer, *Vol.* 104, 2018, p. 75

*persoonsgegevens*"[18]. This means that for the legal operators it is not so easy to work on a good construction of a joint controllers agreement because of not any deep analysis by the national legislators about its requirements.

Nevertheless, following the art. 26, we can summarise how by the joint agreement, the joint controllers shall in a transparent manner determine their respective responsibilities for compliance with the obligations under GDPR.

The arrangement clauses especially have to explicit in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14 GDPR to the data subjects. The articles mentioned above require the information to be provided where personal data are collected from the data subject (art.13) and the information to be provided where personal data have not been obtained from the data subject (art.14).

At the same time, the article 26 invites to clarify to whom the data controllers are subject, and the definition of the respective functions of communication of the information.

The responsibility and the liability of controllers and processors, also in relation to the monitoring by and measures of supervisory authorities have to be determinate. The arrangement requires a clear allocation of the responsibilities under the GDPR, "including where a controller determines the purposes and means of the processing jointly with other controllers or where a processing operation is carried out on behalf of a controller" (Recital 79 EU GDPR).

The above-mentioned clauses are the core of the arrangement because explicitly established by the DGPR.

The clauses list on Art. 26 GDPR opens the question about what happens if one of these clauses is not planned in the text. "With respect to data subjects, it is important that transparent information is provided to the intended subjects by the data controller on the methods by which their data will be processed"[19], so the set of information that must be provided to data subject seems to be a mandatory requirement and compulsory to reach the GDPR goal.

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[18] Belgian Act in the art. 52. "(…) Mutual arrangements shall establish the respective responsibilities of the joint controllers in a transparent manner, in particular with regard to the exercise of the rights of the data subject and to provide the information referred to in Articles 37 and 38, unless their respective responsibilities have been established by the law, the decree, the ordinance, the European regulations or the international agreement. A single point of contact for the parties involved can be designated in the mutual arrangement"

[19] Niamh Clarke, *et al., op. cit.,* note 5

GDPR seems to be a communitarian compulsory rule, especially the transparent data processing is mandatory in private enforcement of the law. If so, it could have a huge effect on the enforcement of the GDPR.: f.i under the Italian legal system, the joint controller's agreement contrary to mandatory rules on transparent data processing information would be void (art. 1418 Italian Civil code). This means that void contracts have neither binding force nor legal effectiveness and that the nullity may be claimed by anyone, and it can also be declared by a national court.

Anyway, it is possible to insert other kind of clauses to well-equip the agreement, f.i. the possibility for each party A) to terminate the Agreement (with or not with immediate effect) if the other party not shall comply with all the obligations imposed on a controller under the GDPR in the performance of its obligations under the Joint Controller Agreement; B) to ascertain that provisions of Agreement shall continue to apply to any personal data in the possession of either party which was covered by the Agreement eventually expired; C) to foreseen a mutual assistance in complying with all applicable requirements of the GDPR; D) to establish how and if implementing appropriate technical and organisational security measures to protect personal data in possession to other party; E) to inform each other of any data breaches; F) to establish clear rules to ensure information will not be processed outside of EU without the appropriate security measures and how the all partners must be informed of this intent with sufficient notice in writing.

Always, data subjects are entitled to enforce their rights in respect of and against each of the controllers, so the essence of the arrangement shall be made available to the data subject.

In particular, it could be important, but not necessary, to identify the "contact point for data subjects" in order to exercise the rights provided for by the Regulation.

## 5. JOINT CONTROLLER LIABILITY.

In the joint controllers arrangement, roles and responsibilities must be allocated. "Unfortunately, due to the multiplicity of possible arrangements, it is not possible to draw up an exhaustive 'closed' list or categorization of the different kinds of joint control. (….). In the context of joint control the participation of the parties to the joint determination may take different forms and does not need to be equally shared." [20]

[20] Article 29. Working Party Opinion 1/2010 (adopted on 16 February 2010, reference number 00264/EN/WP 169) retrieved from [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf] Accessed 08.02.2019, p. 21

The Joint controllers can be given if one cooperation partner decides on the purposes of the data processing, with the other deciding freely on the means of the data processing. The judgment C-210/16 *Wirtschaftsakademie* remembers us how the shared responsibility is not always equal: it depends on the stage of the processing the joint controller is involved in and on the actual control it has over the processing. At the same time the judgment above mentioned seem to interpret concept of being "jointly responsible" as equivalent to the concept of "joint controllership" as laid down in Article 26 GDPR, opening the door for a broader interpretation of the term "Joint Control".

Also if the broad interpretation of the definition of a controller opens the problem for the "delineation of responsibility so far does not follow from the broad definition of a controller. The danger of that definition being too broad is that it results in a number of persons being co-responsible for the processing of personal data."[21]. Thus, according to Advocate General Bobek, the controllership should be interpreted with respect to operations of processing not in relation to "processing" in general (globally to all operations).

Arrangement ascertains the responsibility and liability of controllers and processors, anyway question of how liability should be apportioned between the joint controllers, while important to organisations, is a secondary question from the perspective of EU data protection law. With regard to controllers' liability Advocate General Bobek states "a (joint) controller is responsible for that operation or set of operations for which it shares or co-determines the purposes and means as far as a given processing operation is concerned. By contrast, that person cannot be held liable for either the preceding stages or subsequent stages of the overall chain of processing, for which it was not in a position to determine either the purposes or means of that stage of processing." "(…) Through a broad definition of the concept of 'controller', effective and complete protection of the persons concerned, the existence of joint responsibility does not necessarily imply equal responsibility of the various operators engaged in the processing of personal data. On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case"[22].

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21 Advocate General, Michal Bobek, Opinions delivered in case Fashion ID, C-40/17, Retrieved from [http://curia.europa.eu/juris/document/document.jsf?text=&docid=209357&doclang=EN] Accessed 05.05.2019

22 Case C25/17 , *Tietosuojavaltuutettu vs Jehovan todistajat — uskonnollinen yhdyskunta*, [2018] ECLI 551 par. 66

That's because of each joint controller is liable for the entirety of the damage, although national law may apportion liability between them (Liability of joint controllers, Rec.79, 146; Art.26(3), 82(3)-(5)). Where liability arises in a joint controllership scenario, EU data protection law's primary focus is on ensuring that the data subject is protected. "Where controllers or processors are involved in the same processing, each controller or processor should be held liable for the entire damage." (Recital n. 146).

"The GDPR makes joint controllers fully liable. Once 'full compensation' has been paid to the affected data subject(s), joint controllers may recover damages from one another."[23] According to article 82 paragraphs 2 and 3, because of a data subject can apply to ask for damage in the case of the joint-controllers involved in the data treatment, data subject has to put in the condition to know the internal arrangement as above explained.

If one joint controller has paid full compensation, it may then bring proceedings against the other joint controllers to recover their portions of the damages (art. 82, paragraph 5).

The full responsibility of each controllers established by the Regulation, reproduces rules already existent in the internal legal systems, so the data subject will not be affected by the will not be damaged by insolvency, disappearance or liability for the infringement[24]: see for instance the art. 2055 in the Italian civil code establishes that "if the act causing damage can be attributed to more than one person, all are jointly and severally liable for the damages. The person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom." So, in case of doubt "the degree of fault attributable to each is presumed to be equal." In the light of European harmonization, also the French jurisprudence[25] "does not accept that a victim may be undercompensated just because one or several of the tortfeasors may be unknown". If several controllers "may have caused the damage, they can be made liable under one of the following doctrines: fault based liability (*faute commune, faute* collective), if acting as a group and guilty of a collective fault"[26]. Under the German tort law,

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[23] Detlev, G.; Hickman T., *Obligations of controllers*, Unlocking the EU General Data Protection Regulation: A practical handbook on the EU's new data protection law, 2019, retrieved from [https://www.whitecase.com/publications/article/chapter-10-obligations-controllers-unlocking-eu-general-data-protection] Accessed 09.02.2019

[24] Gambini M., *Responsabilità e risarcimento nel trattamento dei dati personali*, in: Di Cuffaro, V.;, D'orazio R.; Ricciuto V., (eds.), I dati personali nel diritto europeo , Turin, Giappichelli, 2019, p. 1026

[25] Cass. Civ. 2, 2 April 1997, Bull. II, no. 112

[26] Moréteau O., *French Tort Law in the Light of European Harmonization*, Journal of Civil Law Studies, *Vol.* 6, 2013, p. 792

the Civil code provides "that several tortfeasors who have caused the same harm are jointly liable (830, 840 par. 1 BGB). The Code provisions still distinguish between different kinds of joint torfeasors although the consequence is identical for all, namely joint liability. Joint liability means that the victim is entitled to claim (and sue) compensation of the full damage for each tortfeasor although the whole compensation ha to be paid only once ( see 421 BGB). As a well a judgment can be enforced against of anyone of the tortfeasors at the victim's discretion. If one torfeasor ha satisfied the claim in full it is for him to sue the others for eventual redress and to bear the accompanying procedural and insolvency risk."[27]. In the Portuguese tort law the article 490 states "if there are multiple actors, instigators or collaborators of the wrongful act, all of them are liable for the damage caused by them". "Art. 497 prescribes the solidarity regime in the tort law"[28]. The fully responsibility draws by the GDPR is another step beyond on the way for the unification of the Unification of tort law among the Member States.

Anyway, according to the general principal of the European tort laws, the joint responsibility doesn't mean any exception to the principle of liability, so close to the principle of joint responsibility survives differentiated responsibility. This is the meaning of "Recital" n. 146: "the controller or processor should compensate any damage which a person may suffer as a result of processing that infringes this Regulation. The controller or processor should be exempt from liability if it proves that it is not in any way responsible for the damage". For freeing oneself from responsibility requires positive proof that one has employed every cure or valid measure to prevent the harmful event. It is therefore not enough negative proof that they have not infringed any provision of law or regulation or otherwise the rules of common prudence. Anyway, where controllers or processors "are joined to the same judicial proceedings, in accordance with Member State law, compensation may be apportioned according to the responsibility of each controller or processor for the damage caused by the processing, provided that full and effective compensation of the data subject who suffered the damage is ensured", if the subjects will receive full and effective compensation for the damage they have suffered.

The right to compensation for material (actual loss or lost profits) or non-materialdamages (compensation for harm inflicted) on grounds of infringement on the legislation relating to the processing of personal data. Anyway, the concept of

[27] Magnus U., *Multiple tortfeasors under the German Law*, in: Rogers W. V. H.; van Boom W.H. (eds.), Unification of Tort Law: Multiple Tortfeasors, Kluwer Law International, Netherland, 2004, p. 89

[28] Pereira Dias, A.G, *Portugese tort law: a comparison with the Principles of European Tort Law*, Conference Paper, 2004, p. 461, retrieved from [https://estudogeral.sib.uc.pt/bitstream/10316/2563/1/European_Principles_Tort_Law_Portugal.pdf] Accessed 10.05.2019

damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of the GDPR (Recital 146).

The conduct that is considered suitable to integrate the above-mentioned case and from which damage may be caused to the owner of the personal data, are those indicated by the art. 6 of the GDPR and more in general because of the infringes the GDPR, that also includes processing that infringes delegated and implementing acts adopted in accordance with the Regulation and Member State law specifying rules of GDPR (see. Recital 146).

The Processing data, indeed, shall be lawful "only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks."[29]

Further hypotheses of conduct suitable for causing damage can be inferred from art. 6, which refers to codes of conduct of different categories including[30] f.i. journalists, as well as codes of conduct for data users' personal data for historical, sta-

[29] Art. 6 Reg. (EU) 2016/679

[30] See Cippitani, *Genetic research and exceptions to the protection of personal data*, in: Renair, A.; Cippitani, R.; Colcelli, V. (ed.) Genetic Information and Individual Rights, Universität Regensburg, Regensburg, 2018, p. 78

tistical or other statistical purposes, for information systems operated by private entities in relation to consumer credits, reliability and punctuality in payments and in relation to the processing of data collected for private investigations.

## 6. CONCLUSION

If under the GDPR, organisations are obliged to demonstrate that their processing activities are compliant with the Data Protection Principles (Rec.85; Art.5(2) and Rec.74; Art.24 GDPR), an arrangement between joint controllers can help organisations and organisms to demonstrate compliance with all the principles of the regulation: principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, and integrity and confidentiality.

As matter of fact, the core of the joint controller agreement are the contractual clauses able to clarify distribution of control and the responsibility and liability of controllers. The art. 26 GDPR requirements can support the joint controllership for data to remain manageable and transparent, especially beyond that and with controllers from member states with different background regimes, where it is joint controllership could become "unmanageable and insufficiently transparent for the data subjects" [31].

At same time, arrangement referred to in paragraph 1 of the art. 26 GDPR "shall duly reflect the respective roles and relationships of the joint controllers *vis-à-vis* the data subjects" and "the essence of the arrangement shall be made available to the data subject".

So, the latter has to permit a generalized control on the function of the agreement to stress - on EU dimension - the value of individual control or informational self-determination. "Now that we are living in the GDPR era, one thing is for sure, the increased enforcement power and higher maximum fines, plus the enhanced awareness of data subjects' rights and their ability to exercise those rights means that controllers and processors will be held to account for their processing activities now more so than ever."[32]

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[31] van Veen E.-B., *op. cit.* note 16, p. 75

[32] Pantlin Nick, Wiseman Claire, Everett, Miriam, *Supply chain arrangements: The ABC to GDPR compliance —A spotlight on emerging market practice in supplier contracts in light of the GDPR*, Computer law & Security review, 34, 2018, p. 885.

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# NEW SERVICES OFFERED WITHIN THE REMIT OF TARGET2 – HOW DO THEY CORRESPOND WITH TFEU AND CENTRAL BANK TASKS?*

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***ABSTRACT***

*When Eurosystem founded TARGET2, its initial purpose was execution of payments. In that sense TARGET2 did not substantially differ from any other Real-Time Gross-Settlement system (RTGS) operated by a central bank. Hence, the service initially offered in TARGET 2 represented (and still represents) a typical central bank task. However, the number of services offered within the remit of TARGET2 increased over time. With the establishment of TARGET2-Securities (T2S) began the Eurosystem's involvment in enhancing securities settlement. The legal basis for provision of T2S service stated in relevant legal acts remained the same as for the first service (RTGS). The said legal basis is to be found in the TFEU and in the Statute of the ESCB and of the ECB as "promoting the smooth operation of payment systems". However, the 2015. ruling of CJEU in Case T-496/11 United Kingdom v ECB interpreted the said legal basis narrowly, and it contested the ECB's competence to make regulations for legal entities engaged in securities clearing. This paper aims to explore if the said ruling could have further repercussions i.e. could it be understood as denying the ECB any competence over securities, including their settlement, which might make Eurosystem's competence to establish and operate T2S open for discussion. Finally, this paper briefly explains the TIPS service which is also offered within the remit of TARGET2 and whose purpose is execution of payments. Albeit TIPS differs from T2S in that it is clearly a payment service and, as such, can easily be connected with the Eurosystem's role in promoting smooth operation of payment systems, one must note that the same service is also offered on a commercial basis by private entities. This paper explores how does provision of instant payments correspond with central bank tasks.*

**Keywords:** *payment system, TARGET2, T2S, TIPS, securities settlement, instant payments*

* Views expressed herein are personal to the author and not necessarily attributable to the Croatian National Bank

## 1. INTRODUCTION

Central banks, in their function of monetary authority, play a prominent role in economic life of any country. Their tasks and objectives, as stipulated in relevant national legislation, may vary, although the prevailing central bank tasks include controlling money supply by raising or reducing interest rates, overseeing exchange rate policy and (very often) supervising the banking sector. That being said, the tasks and objectives of central banks across the EU are fully harmonised by the virtue of the Treaty on the functioning of the European Union[1] (hereinafter, "the TFEU") and its Protocol 4 on the Statute of the European System of Central Banks (ESCB) and of the ECB (hereinafter, "the Statute")[2].

The TFEU reaffirms the principles of conferral, subsidiarity[3] and proportionality[4], as proclaimed in Article 5 of the Treaty on European Union (hereinafter, "the TEU"). Based on the TEU, the competences of the European Union depend on the will of the Member States i.e. the Union has competences only if Member States decide to bestow them to the Union in accordance with the Treaties.[5] If not, the competences remain with the Member States. The competences conferred to the EU are further divided into three main categories: exclusive[6], shared[7] and supporting competences[8].

This paper focuses on the services offered within the system called TARGET2, which is operated by the Eurosystem and serves (among other things) for the

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1 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, C 326 , 26.10.2012., p. 1 – 390, [eur-lex.europa.eu] Accessed 02.05.2019

2 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, OJ L C 202/230, 07.06.2016

3 Article 5(3) of the TEU states: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

4 Article 5(4) of the TEU states: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

5 Article 5(2) of the TEU states: "Under the principle of conferral, the Union is allowed to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

6 Article 2(1) and Article 3 of the TFEU (Lisbon)

7 Article 2(2) and Article 4 of the TFEU (Lisbon)

8 Article 2(5) and Article 6 of the TFEU (Lisbon)

processing of monetary policy operations and execution of large-value payments in euro. The establishment of the said payment system is closely linked to the monetary policy for euro area countries (which is, in accordance with Article 3 of the TFEU, one of the exclusive competences of the Union). Namely, having a single currency and a single monetary policy is necessarily connected with having a common Real-Time Gross-Settlement (RTGS) payment system.[9]

TARGET2 is undoubtedly such common RTGS system. However, the services offered in TARGET2 evolved over time. First extension of TARGET2 services was provision of a new T2S service. T2S service goes beyond execution of payments, since it involves enhancing securities settlement as well. Second extension was provision of instant payments through the new TIPS service.

This paper aims to explore if the provision of such services is in line with the Eurosystem's competences proclaimed in the TFEU and the Statute, as well as to explore and explain the link between execution of instant payments (which can be perceived as commercial service) and traditional central bank tasks. The nature of the topic dictates the use of a chronological and descriptive method. The main research issue is exploring can TFEU still provide an adequate legal basis for the newly introduced services i.e. how does TFEU correspond to the quickly changing needs of financial markets.

## 2. REASONS FOR ESTABLISHING TARGET2: THE LINK BETWEEN CONDUCTING MONETARY POLICY AND OPERATING AN RTGS SYSTEM

The Eurosystem as a whole conducts the monetary policy for the euro[10].The Eurosystem is not a single legal person but, as its name indicates, a system composed of the European Central Bank (ECB) and central banks of those EU Member States whose currency is the euro[11].

It bears noting that the Statute[12] states that defining and implementing the monetary policy of the Union is an ESCB task. The ESCB is also a system, broader

[9] The explanation of reasons why central banks operate RTGS systems can be found in Dent A.; Dison W., *The Bank of England's Real-Time Gross Settlement infrastructure,* Bank of England Quarterly Bulletin Q3, 2012, p. 235-236, [https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2012/the-boes-real-time-gross-settlement-infrastructure.pdf] Accessed 05.05.2019

[10] This conclusion is based on Article 127(2) in conjunction with Article 139(2)(c) of the TFEU

[11] Article 1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank

[12] Article 3.1. of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank

than the Eurosystem, since it also includes central banks of Member States whose currency is not the euro. However, it follows from the TFEU[13] that the objectives and tasks of the ESCB[14] are not to be applied to Member States with derogation, which, consequently, makes defining and implementing the monetary policy of the Union a Eurosystem task.

The reason for this somewhat unusual legal drafting technique is perhaps to be found in the assumption made throughout the TFEU that not having the euro as a legal tender is a temporary situation for Member States and that Member States with derogation will eventually adopt the euro.

The task of defining and implementing the monetary policy is closely linked to another central bank task: promoting the smooth operation of payment systems[15]. It has been stated that " since the beginning of Stage Three of the Economic and Monetary Union, all monetary policy operations are processed through the TARGET system".[16] This goes to prove how important is the link between the RTGS payment system and conduct of monetary policy in the euro area.

The initially established payment system was named TARGET, which is an acronym of Trans-European Automated Real-time Gross settlement Express Transfer system[17], and it started operating in January 1999[18]. The first TARGET had a decentralised structure, legally as well as technically, and was construed of 16 national payment systems and the ECB's payment mechanism (EPM).[19] Serving the needs of the ECB's monetary policy was identified as one of the main objectives of TARGET[20]. However, this heterogeneous system proved to be extremely complicated when it came to introducing functional changes.

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13 Article 139(2)(c) of the TFEU

14 To be precise, Article 127(1) to (3) and (5) of the TFEU

15 Article 3(1) fourth indent of the Statute

16 Issing O., *New Technologies in Payments – A Challenge to Monetary Policy,* Lecture to be delivered at the Center for Financial Studies Frankfurt am Main, 28 June 2000, [http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.43.2483&rep=rep1&type=pdf] Accessed 03.05.2019

17 The meaning of the acronym is explained in the title of the Guideline of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (recast) (ECB/2012/27) (OJ L 30, 30.01.2013.)

18 It bears noting that the euro was first introduced on 1 January 1999. However, at this point in time there were no euro banknotes and euro coins – the euro was introduced only in its "cashless" form. At the same time, banknotes and coins of "old" European currencies have been used as a legal tender. This duality lasted till 1 January 2002. when euro banknotes and coins were first put to use

19 ECB, *Overview of TARGET* (update July 2005), p. 4, [https://www.ecb.europa.eu/paym/pdf/target/current/targetoverview.pdf] Accessed 03.05.2019

20 ECB, *Overview of TARGET* (update July 2005), p. 5, [https://www.ecb.europa.eu/paym/pdf/target/current/targetoverview.pdf] Accessed 03.05.2019

To simplify the structure of the system and to allow the alterations to be made in a relatively uncomplicated manner, the Eurosystem designed a new, less heterogeneous system, named TARGET2. TARGET2 started replacing TARGET in 2007, bringing one important novelty into European payments landscape: the new system was based on an integrated central technical infrastructure, named Single Shared Platform (SSP)[21]. Even though TARGET2 to this day remains legally structured as a multiplicity of payment systems[22], technically it has the structure of a single system and no technical differences exist in the setup of various TARGET2 component systems. The new system, TARGET 2 became fully operational in 2008.

Initially, TARGET2 provided standard services as any other payment system operating in central bank money. Through this system large value interbank payments were executed. The system enabled payments in euro to be executed between banks from different parts of the euro area. It also enabled Eurosystem to conduct an efficient monetary policy.

Moreover, taking into account the abovementioned aim of the whole European Union ultimately becoming a monetary union, central banks from non-euro area are permitted to join TARGET2 upon signing the so called TARGET2 Agreement. Based on the said Agreement non-euro area central banks accept to be bound by the TARGET2 Guideline, which is an exception from Article 139(2)(e) of the TFEU. It follows from the said provision of the TFEU that legal acts of the ECB are not to be applied in Member States with derogation. Nonetheless, an exception can be made if a central bank of such Member State voluntarily accepts to be bound by the provisions of a specific ECB legal act or legal instrument[23].

For the purpose of facilitating the smooth transition to euro in due course, Croatian National Bank joined TARGET2 on 1 February 2016 and is today one of the so called connected central banks[24] (term used to denote the central banks outside of the euro area participating in TARGET2). Croatian component system

[21] Recital 3 of the Guideline of the European central bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (OJ L 30, 30.1.2013, p. 1)

[22] Article 1(2) of the Guideline of the European central bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (OJ L 30, 30.1.2013, p. 1)

[23] For details on the difference between ECB legal acts and legal instruments please see: *Legal instruments of the European Central Bank,* ECB Monthly Bulletin. November 1999. Frankfurt am Main: European Central Bank, [https://www.cvce.eu/obj/legal_instruments_of_the_european_central_bank-en-9922a45b-3a5f-44bc-9155-0c4063538aa6.html] Accessed 03.05.2019

[24] Article 2 (19) of the TARGET2 Guideline defines a 'connected NCB' as "an NCB, other than a euro area NCB, which is connected to TARGET2 pursuant to a specific agreement."

of TARGET2 is named TARGET2-HR and is mainly used by its participants (Croatian banks) for the execution of large value inter-bank payments in euro. The other two TARGET2 services (which are to be described in more detail below) are not used by the participants in the Croatian component of TARGET2.

As previously mentioned, TARGET2 evolved over time and began offering services, which are not exclusively linked to the execution of large-value interbank payments.

## 3. ESTABLISHMENT OF TARGET2-SECURITIES: SECOND SERVICE OFFERED WITHIN THE REMIT OF TARGET2

The scope of services offered by the Eurosystem within the TARGET2 framework was first extended to the TARGET2-Securities or T2S service. Even the name of the service suggests that its extent goes beyond mere execution of payments, since it makes a link between execution of payments (implied by the use of the term 'TARGET2') and transfer of securities (implied by the use of the term 'securities').

By establishing TARGET2, Eurosystem achieved full harmonisation of large-value payments. However, securities infrastructures remained highly fragmented[25]. This comes as no surprise, since transfer of securities is from both technical and legal point of view much more complex than the transfer of funds (i.e. execution of payments). As a consequence of this complexity, different Member States had different approaches in regulating the securities settlement and various technical solutions were applied[26].

As a way of introduction, few remarks about the chronology are appropriate. At its meeting held in July 2006 (prior to the go-live of TARGET2), the Governing Council of the ECB decided to bring together different European central securities depositories[27] (CSDs) and to examine if such fragmentation could be

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25 Lucas Y., *Target2-Securities: A major contribution to European financial integration?,* Journal of Securities Law, Regulation & Compliance, *Vol.* 1 No. 4, 2008, [http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?vid=1&sid=50b10e98-490d-4e3b-9fdb-815cba3f58fa%40sessionmgr4006] Accessed 06.05.2019

26 Kokkola T. et al, *The Payment System, Payments, securities and derivatives, and the role of the Eurosystem, ECB*, Frankfurt a/m, p. 265, [https://www.ecb.europa.eu/pub/pdf/other/paymentsystem201009en.pdf] Accessed 05.05.2019

27 Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014.) defines a CSD as a "legal person that operates a securities settlement system referred to in point (3) of Section A of the Annex and provides at least one other core service listed in Section A of the Annex"

avoided by establishing the previously mentioned T2S service[28]. The fundamental principles of the new T2S service were published in April 2007[29] for public consultation. The public consultation resulted in the endorsement of the proposed service by the relevant stakeholders, so in July 2008 the T2S project was officially launched[30]. The development and operation of T2S was assigned to four central banks of the Eurosystem—Banque de France, Bundesbank, Banca d'Italia, and Banco de Espana, while the project was coordinated by the ECB. Nevertheless, creating and operating the T2S platform remained a Eurosystem project, jointly owned by all the central banks of the Eurosystem. The role of four abovementioned central banks (often referred to as 4CBs[31]) is limited to the task of developing and maintaining the T2S platform.

One might ask why did the Eurosystem embark on this exceptionally ambitious project, whose link to central bank tasks was not as self-evident as was the case with the setting-up of TARGET2? As stated in the documents published by the ECB[32], the purpose of the T2S service was to enhance the securities settlement which takes place across different Member States. To this end, the Governing Council of the ECB[33] adopted on 18 July 2012 Guideline on TARGET2-Securities[34].

The main goal of the T2S project has been identified as the establishment of a securities settlement platform that will connect CSDs from all over Europe. Furthermore, the main benefits of the project have been recognised in "the promotion

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Section A of the Annex lists the following core services of central securities depositories: "1. Initial recording of securities in a book-entry system ('notary service'); 2. Providing and maintaining securities accounts at the top tier level ('central maintenance service') and 3. Operating a securities settlement system ('settlement service')."

[28] Decision of the European Central Bank of 29 March 2012 on the establishment of the TARGET2-Securities Board and repealing Decision ECB/2009/6 (ECB/2012/6) (OJ L 117, 01.05.2012, p. 13) (recital 1) – no longer in force; (hereinafter, "The T2S Board Decision")

[29] ECB, *T2S consultation paper: general principles and high-level proposals for the user requirements*, 26 April 2007, [https://www.ecb.europa.eu/paym/cons/html/t2s.en.html] Accessed 03.05.2019

[30] Decision of the European Central Bank, *op. cit.,* note 28, Recital 2

[31] Which is also in line with Article 1 of Annex IIa to TARGET2 Guideline

[32] ECB, *What is TARGET2-Securities (T2S)?*, [https://www.ecb.europa.eu/paym/target/t2s/html/index.en.html] Accessed 03.05.2019

[33] In accordance with Article 9(2) of the Statute of the ESCB and of the ECB, Governing Council is one of the two decision making bodies of the ECB, comprised of (Article 10(1) of the Statute of the ESCB and of the ECB) the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro

[34] Guideline of the European Central Bank of 18 July 2012 on Target2-Securities (ECB/2012/13), OJ L 215, 11.8.2012, p. 19

of financial integration and overcoming the fragmentation of the securities settlement infrastructure through the provision of central bank services".[35]

Taking into account that the crucial part of T2S is enhancing securities settlement, and that the execution of payments *via* TARGET2 is more or less ancillary, the question is if promotion of smooth operation of payment systems from the TFEU and the Statute can be an adequate legal basis.

The ECB legal acts relevant for the establishment of T2S[36] identify following provisions as a legal basis for the provision of said service: the first indent of Article 127(2) of the TFEU and Articles 3.1, 12.1, 17, 18 and 22 of the Statute

Tridimas (2009, p. 258) [37] emphasized the importance of Article 22 of the Statute as a legal basis for the provision of the T2S service, further stating that the "said provision grants the ECB power to carry out one of the tasks assigned to it under Article 105(2) of the TFEU i.e. to promote the smooth operation of payment systems".[38] Tridimas concludes Article 22 of the Statute is "sufficiently wide to enable the ECB to adopt the instruments necessary for the introduction and running of T2S".[39]

We find the line of reasoning explained above extremely important, since it relies on a more extensive interpretation of Article 22 i.e. that the phrase "smooth operation of payment systems" could include also the establishment of the platform for securities settlement (T2S service). Needless to say, part of that particular service is related to a payment system (so called "cash leg" of securities transactions), but the other part of it (securities settlement) is conducted outside of payment system. Still, as noted above, the ECB *inter alia* also found the legal basis for T2S in Article 22.

Legal basis for the establishment of T2S was contemplated by Lamandini (2006, p. 5-7)[40] as well. Although Lamandini's line of reasoning is not identical to the one explained by Tridimas, they have some elements in common. Lamandini finds the

[35] Kokkola *et al.*, *op. cit.* note 26, p. 265

[36] The T2S Board Decision, *op. cit.* note 28 and Guideline of the European Central Bank of 18 July 2012 on TARGET2-Securities (ECB/2012/13) (OJ L 215, 11.8.2012., p. 19–29)

[37] Tridimas T., *Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement,* p. 258, [https://www.researchgate.net/publication/265246431_Community_Agencies_Competition_Law_and_ECSB_Initiatives_on_Securities_Clearing_and_Settlement/download] Accessed 02.05.2019

[38] Tridimas, *op. cit.* note 37, p. 258

[39] *Ibid.*

[40] Lamandini, Marco, *The ECB and Target 2-Securities: questions on the legal basis,* 2006, p. 5-7, [https://scholar.google.hr/scholar?hl=hr&as_sdt=0%2C5&q=T2S+legal+basis&btnG=] Accessed 06.05.2019

legal basis for the establishment of T2S in Article 105(2) of the TFEU[41] and in the Statute (Articles 17, 18, 22 and 23). In his paper Lamandini notes that "the wording of Article 22 does not mention specifically the settlement of securities". He concludes, however, that there is a close link between securities settlement and payments infrastructure and that problems in one of them could "lead to contagion and domino effect".

The above legal reasoning represented by Tridimas, Lamandini and the ECB was put to test (albeit only indirectly, since the court case described below was not directly related to T2S) by the Court of Justice of the European Union (hereinafter, 'the CJEU') in the case *United Kingdom v ECB*[42]. In the said proceeding UK contested the ECB's competence to adopt the Eurosystem Oversight Policy Framework[43] for central counterparties (hereinafter, 'the CCPs'). This judicial proceeding is interesting in the context of T2S, since the CJEU's ruling encloses an opinion on the interpretation of Article 22 of the Statute. The CJEU accepted the UK's plea about ECB not being competent for regulating CCPs. The legal basis for such verdict was the CJEU's interpretation of Article 105(2) of the TFEU (the Eurosystem's role in promoting smooth operation of payment systems) and Article 22 of the Statute.

As already stated above, Article 22 of the Statute provides that "the ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries".

In the said case ECB claimed that "the term 'clearing systems' in Article 22 of the Statute must be read in conjunction with the 'payment systems' to which reference is made in the same article and the smooth operation of which constitutes one of the Eurosystem's tasks[44]". Simply put, ECB claimed that, apart from its competences related to clearing of payments, it also has the necessary competence to adopt regulations related to clearing of securities.

However, the CJEU did not accept this line of reasoning, claiming that the ability "granted by Article 22 of the Statute to the ECB to adopt regulations 'to en-

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[41] Article 105(2) of the TFEU determines the ESCB's task of promoting the smooth operation of payment systems

[42] Case T-496/11 United Kingdom v ECB [2015] ECLI:EU:T:2015:133, [http://curia.europa.eu/juris/document/document.jsf?text=&docid=162667&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2213068] Accessed 02.05.2019

[43] Eurosystem Oversight Policy Framework from 2011 is available on [https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework2011en.pdf] Accessed 03.05.2019

[44] Case T-496/11 United Kingdom v ECB [2015] ECLI:EU:T:2015:133, par. 90

sure efficient and sound clearing and payment systems' cannot be understood as a competence in respect of securities clearing systems"[45]. The option from Article 22 of the Statute must be, in the CJEU's opinion, regarded as limited to payment clearing systems only[46].

Therefore, the CJEU contested the ECB's competence to adopt regulations related to clearing of securities. Such legal interpretation is grounded on the restrictive interpretation of the term 'payment system', which excludes the ECB's competence over securities clearing systems. Albeit the CJEU did not express its opinion on the ECB's competence in relation to securities settlement services (since that specific competence was not tested in the case at hand), it is likely that the same line of reasoning might be applied to T2S respectively. Therefore, CJEU's ruling could be deemed as a serious challenge to the ECB's competence in relation to securities (whether clearing or settlement) and consequently its competences in relation to the T2S.

Notwithstanding the above, the arguments presented by the ECB in this case remain valid and persuasive: there are close links between payment systems and securities clearing and settlement systems[47]. Securities clearing and settlement systems are linked to payment systems, since in the former securities are transferred and in the latter funds (corresponding to the payment for the securities) are transferred. Consequently, the disruption in securities settlement systems could affect the payment systems (i.e. their smooth operation). ECB also claimed that Article 127(2) TFEU must be interpreted as to include securities clearing and settlement systems, since those systems gain importance after the drafting of the TFEU[48].

Undoubtedly, establishment of T2S serves a broader purpose, first and foremost the smooth functioning of capital markets as an important part of the financial markets of the Eurozone. An obstacle in smooth functioning of capital markets is related to achieving cross-border delivery versus payment.

The concept of delivery versus payment or DvP is related to one of the most important concerns related to buying and selling securities i.e. achieving synchronicity in making a payment and delivering security. The idea behind T2S is to enable the exchange to happen simultaneously. For achieving such simultaneousness, payment accounts opened in TARGET2 are used. However, no securities

45 *Ibid.*, par. 99

46 *Ibid.*, par. 100

47 *Ibid.*, par. 47

48 *Ibid.*, par. 47

accounts are opened in T2S, since T2S is not a CSD, but a technical solution (a platform) to which CSDs connect.

The establishment of the T2S platform unquestionably contributes to creation of the capital markets union and thus better financial integration within the Union. Indirectly, it also increases financial stability within the Union and contributes to achieving the common goals of Member States whose currency is the euro.

To conclude, even though the concept of T2S is primarily connected to enhancing securities settlement, it serves a much broader purpose and is, as such, within the Eurosystem's competence.

## 4. PROVISION OF INSTANT PAYMENTS IN TARGET2: TIPS AS THE SECOND EXTENSION OF SERVICES OFFERED IN TARGET2

The latest service offered within the remit of TARGET2 was TIPS (TARGET instant payments settlement[49]) service, which went-live on 30 November 2018. As the word "instant" in the name of the service suggests, the entire idea of this service is to offer customers execution of payments in euro to payees all over Europe within seconds. In order for payments to be instant, the system needs to be open 24 hours a day, seven days a week, 365 days a year. This differs from the regular TARGET2 setup, which includes having opening hours and business days[50].

TIPS service is a payment service and therefore can be linked to the Eurosystem task of promoting the smooth operation of payment systems. However, this does not make offering instant payments a regular or exclusive central bank task. Prior to establishing TIPS, instant payments in euro have been offered on a commercial basis by the EBA CLEARING's pan-European real-time payment system RT1. In 2019 the Dutch banking started offering their instant payments solution as well. It is believed by some parts of the banking community that instant payments will become "a new normal" i.e. the standard within the payments community.

TIPS is offered within the remit of TARGET2, which is undeniably an advantage for the TIPS in comparison to other payment systems offering instant payments in euro. First, payment transactions are settled in central bank money, which makes them more secure for the participants (since a central bank operating a system

[49] Recital 4 of the Guideline (EU) 2018/1626 of the ECB of 3 August 2018 amending Guideline ECB/2012/27 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (ECB/2018/20), OJ L 280, 9.11.2018, p. 40

[50] See Appendix V to Annex II of the TARGET2 Guideline

cannot become insolvent), which may influence potential participants' decision on which system to join. Second, any end-of-day balance on the TIPS account is taken into account for the purpose of minimum reserves, which enables banks (participants in the system) to better use their money. Finally, even though TIPS service currently comprises only instant payments in euro, theoretically it is possible for TIPS service to be extended to other currencies as well.

To conclude, albeit TIPS is a service related to a payment system, which can therefore be linked to the Eurosystem's task of promoting the smooth operation of payment systems in a much simpler way than the T2S service, it goes well beyond of what is usually considered a central bank task. Especially considering that making a link between provision of instant payments service and the monetary policy might be a challenging. Be that as it may, provision of instant payment service within the remit of TARGET2 is a proof of the Eurosystem's determination to play its role of a catalyst in the development of payment system.

Namely, it is stated that a central banks have three roles in relation to the development and smooth operation of payment systems[51]. First, central banks can operate a payment system. As already stated, TARGET2 is constructed as a homogenous set of systems and each central bank operates its own TARGET2 component system.[52] Second, central banks can oversee payment systems (which they very often do). Third, central banks can play the role of a catalyst i.e. central banks can promote innovation and development of payment systems.

It is stated in one of the ECB's publications[53] that, "in its catalyst role, the central bank plays an important role in private sector initiatives as a partner or facilitator, both for the development of payment, clearing and settlement systems (...) and for the establishment of market standards and practices that facilitate the overall efficiency of payment, clearing and settlement arrangements". Furthermore, it is stated that "the catalyst function aims to promote efficiency in payment, clearing and settlement infrastructures from the perspective of the economy as a whole".

It is important to note, however, that the catalyst function of a central bank is not regulated. Catalyst function uses research (analysis of market needs and conditions) for the purpose of achieving mid-term and long-term goals in the financial markets. Such goals are never achieved through regulation and coercion, but through moral suasion[54].

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[51] Kokkola, *op.cit.* note 25, p. 157-158

[52] Article 2(2) of the Guideline ECB/2012/27, *op. cit.* note 17

[53] Kokkola *et al*, *op. cit.,* note 26, p. 156-157

[54] *Ibid.*, p. 164-165

Moreover, provision of the TIPS service can also be linked to other two roles of a central bank in promoting the smooth operation of payment systems. In the words of Benoît Cœuré, the Chairman of the Committee on Payments and Market Infrastructures (CPMI) and ECB's Executive Board member: "Fast payments have the potential to generate benefits for various stakeholders and for society in general, provided that risks are properly managed. They can play a key role in upgrading and modernising a jurisdiction's payment system. Central banks can contribute to the development and implementation of fast payments through their traditional roles as catalysts for change, as well as operators and overseers of payment systems[55]."

Taking into account all of the above, it follows that the provision of the instant payments service by the Eurosystem is closely linked to its task of promoting smooth operation of payment systems and its catalyst role.

## 5. CONCLUSION

Undoubtedly, both T2S and TIPS have some similarities with commercial services. Nevertheless, provision of such services is in line with the Eurosystem's public task of promoting the smooth operation of payment systems. The tasks of the Eurosystem remained unchanged over time, owing to the fact they are defined in the TFEU. The manner of executing the Eurosystem's tasks over time, however, is subject to changes.

It bears noting that promoting smooth operation of payment systems is achieved through three separate central bank roles: central bank's role as a payment system operator, payment system overseer and as a catalyst in promoting change and adapting the existing infrastructures to the rapidly changing needs of the financial markets

The Eurosystem's catalyst function includes foreseeing the future trends in payments and enhancing innovation and modernization.

In the past the Eurosystem acted decisively in order to reduce market fragmentation, which is expected to bring improvements in efficiency and economic growth[56]. TARGET2 served as a platform for conducting many of the said activities. Payment systems and securities settlement systems are interdependent, and

[55] BIS, *Central banks are monitoring and fostering the development of fast payment services - CPMI*, Press Release, 8 November 2016, [https://www.bis.org/press/p161108.htm] Accessed 02.05.2019

[56] Mersch Y., *Shaping the future of Europe's financial market infrastructure,* opening remarks at the Information session on the consultative report on RTGS services, Frankfurt am Main, 22 March 2016., available at [https://www.bis.org/review/r160329b.pdf] Accessed 05.05.2019

any disruption in operation of the latter necessarily affects the former. Conversely, integration of securities markets inevitably has positive effects on the smooth operation of payment systems.

To conclude, in analysing the legal framework of TARGET2 and the services offered through it, one must bear in mind that during the last decade the circumstances in the financial markets have changed significantly. On the other hand, TFEU remained the same. However, insisting on a rigid interpretation of the TFEU would result in depriving the Eurosystem of the possibility to further foster market integration within the euro area: both in relation to payments and in relation to transfers of securities. The above goes to prove that, in order for legal acts to stand the test of time, they need to be understood and applied, whenever possible, in accordance with their basic principles and the intent of the legislator.

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7. Guideline (EU) 2018/1626 of the ECB of 3 August 2018 amending Guideline ECB/2012/27 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (ECB/2018/20), OJ L 280, 9.11.2018

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# UNCONVENTIONAL MONETARY POLICY OF THE EUROPEAN CENTRAL BANK*

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***ABSTRACT***

*Central banks control and manage the amount of money in the economy by steering short-term interest rates. Conventional short-term interest rate monetary policy has its limitations and the limit is zero lower bound. Zero lower bound means that the short-term interest rate cannot be set below 0%. Managing the level of short-term interest rate a central bank can influence the overall availability and cost of credits and control the quantity of money in economy. If the level of the inflation rates are low and economic growth is weak a central bank can lower short-term interest rate to increase money supply in the economy.*

*After the 2008 financial crisis, the European Central Bank reduced short-term interest rates to zero or near zero to stimulate spending and investing with the expectations that this measure would be enough to induce economic growth in the euro area. Contrary to expectations, lowering short-term interest rates had little effects on economy in the euro area. Economic growth stagnated, inflation rates were very low with a tendency to deflation and the rate of the employment was low. Similar effects occurred in other countries where central banks also lowered short-term interest rates to zero or near zero.*

*Since then, the European Central Bank and other central banks did not achieve expected results using conventional short-term interest rates monetary policy so they had to use some other unconventional and non-standard monetary policy measures.*

*The European Central Bank conducted Asset purchases programme (APP) and Longer-term refinancing operations (LTRO) as non-standard monetary policy measures and unconventional balance sheet monetary policy. In this paper, these non-standard measures of the European Central Bank monetary policy will be explained. Characteristics of each measure will be provided and the measures will be compered. The European Central Bank has adopted a decision for each of the measures and those decisions as a legal basis for each of the measure will be given and explained. The European Central Bank expected some results and those expected results will be compared with achieved results of these non-standard measures. Alternative measures and other policies that can improve effectiveness of the unconventional monetary policy measures will be suggested and explained.*

***Keywords***: *money, central bank, monetary policy instruments, unconventional monetary policy measures, European Central Bank, interest rates, inflation, economic growth*

* Views expressed herein are personal to the author and not necessarily attributable to the Croatian National Bank

## 1. INTRODUCTION

Monetary policy is the policy by which a central bank control and manage the amount of money in an economy.[1] Adequate amount of money in the economy is essential because too much money in the economy can cause inflation, and vice versa very little money can cause deflation.

Central banks have the authority to issue money and to control the quantity of money in the economy. Central bank of the European Union is the European Central Bank and it has the right to authorise the issue of euro banknotes. According to the Treaty on the Functioning of the European Union, only such banknotes have the status of legal tender within the euro area.[2] Furthermore, the European Central Bank has the authority to increase or decrease the quantity of money in the euro area economy by applying measures and instruments of monetary policy. One of the basic tasks of the European Central Bank is to define and implement the monetary policy of the European Union.[3]

A change in the quantity of money in the economy could be reflected in a change in the general level of prices. Prolonged periods of high inflation are typically associated with high monetary growth. The close association between the growth of money and inflation in the economy and the long-run neutrality of monetary policy have been confirmed by a very large number of economic studies.[4] That means that the general level of prices and the inflation can be controlled by the central bank using the instruments of monetary policy.

Considering the stated, maintaining the price stability is the primary objective of the European Central Bank as it is specified in the Article 127 of the Treaty on the Functioning of the European Union. The European Central Bank shall also support the general economic policies in the European Union.[5] Therefore, the price stability is the main objective but the European Central Bank will support the general economic policies, which include full employment and balanced economic growth.

Although the Treaty on the Functioning of the European Union has specified price stability as a primary objective of the European Central Bank, the Treaty did not define what the price stability actually means. Therefore, the European

[1] Debarati, R., *Power of money*, Vij Books India Pvt. Ltd. New Delhi, 2011, p. 11

[2] Article 128(1) of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 1-12 (TFEU)

[3] Article 127(2) TFEU

[4] Executive Board of the ECB (2011): *The Monetary Policy of the ECB 2011,* ECB, Frankfurt, p. 55-56

[5] Article 127(1) TFEU

Central Bank's Governing Council adopted a quantitative definition of price stability in October 1998 and clarified it in 2003. By that definition, price stability means maintaining inflation rates below, but close to 2% over the medium term.[6] According to that definition of price stability the European Central Bank is committed to avoiding both inflation that is persistently too high and inflation that is persistently too low which includes deflation.

Monetary policy of the European Central Bank operates by managing the level of short-term interest rates and influencing the overall availability and cost of credits in the euro area economy. The European Central Bank may conduct open market operations to steer interest rates, manage the liquidity situation in the financial market and signal the stance of monetary policy.[7] Therefore, the monetary policy directly affects short-term interest rates and indirectly affects longer-term interest rates, currency exchange rates, and prices of equities and other assets and thus wealth. Through these channels, monetary policy influences household spending, business investment, production, employment and inflation.

The European Central Bank has the authority to increase or to reduce short-term interest rates on loans that it provides to banks and with that authority, it can increase or decrease the liquidity of the banking system and the quantity of money in the economy. Higher short-term interest rates reduce the demand for loans and they make loans less attractive for households and companies, which reduces quantity of money in the economy. At the same time, saving becomes more attractive since the return on the savings is increased. Decrease in spending and investing decreases inflation and may initiate deflation. Lowering short-term interest rates does the opposite. Lower short-term interest rates increase liquidity of the banking system, they increase the demand for loans, consequently increasing spending and investing. Lower short-term interest rate increases quantity of money in the economy but it puts pressure on prices and inflation.

Conventional short-term interest rate monetary policy has its limitations. Central banks can lower short-term interest rate down to 0% but it cannot be lower than 0%.  It is called zero lower bound problem. Global financial crisis that fully erupted during 2008 has shown disadvantages of standard short-term interest rate monetary policy. During the crisis, all major central banks including the European Central Bank reduced short-term interest rates near to zero or to zero to affect spending and investing which should have stimulated economic growth and rise

[6] European Central Bank (2006): *Price stability – Objective of the Eurosystem,* ECB, MP.001 08/06, p. 2

[7] Article 5 of the Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) OJ L 91, 2.4.2015, p. 3–135

inflation levels. Contrary to expectations, lowering short-term interest rates had little effects on economies. Economic growth stagnated, inflation rates were very low with a tendency to deflation and central banks had to use some other non-standard and unconventional measures to achieve price stability and to support economic growth.

## 2. INSTRUMENTS AND LEGAL GROUNDS OF THE UNCONVENTIONAL MONETARY POLICY ISSUED BY THE EUROPEAN CENTRAL BANK

This section provides an overview of a non-standard and unconventional monetary policy measures issued by the European Central Bank, its characteristics and legal grounds of these measures.

Since 2009, the European Central Bank implemented non-standard monetary policy measures in two ways: one is Asset purchases programme (APP) and the second is Longer-term refinancing operations (LTRO).

Asset purchases programme as a non-standard set of monetary policy measures started on 2 July 2009 with the first covered bond purchase programme (CBPP1). The European Central Bank issued Decision on the implementation of the covered bond purchase programme (ECB/2009/16). Decision stated that objectives of that covered bond purchase programme were: "(a) promoting the ongoing decline in money market term rates; (b) easing funding conditions for credit institutions and enterprises; (c) encouraging credit institutions to maintain and expand their lending to clients; and (d) improving market liquidity in important segments of the private debt securities market."[8]

The programme was targeted at nominal amount of €60 billion of eligible covered bonds. Covered bonds eligible for purchase under the programme were covered bonds that: could be used as collateral for Eurosystem credit operations, complied with the criteria for collective investment in transferable securities, had an issue volume of more than €100 million and were given a minimum rating of AA or equivalent by at least one of the major rating agencies (Fitch, Moody's, S&P or DBRS), in any case, not lower than BBB-/Baa3, and had underlying assets that include exposure to private and/or public entities.[9]

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8 Recital 2 of 2009/522/EC: *Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme* (ECB/2009/16), OJ L 175, 4.7.2009, p. 18-19 (CBPP1 Decision)

9 Article 2 of the CBPP1 Decision

The programme ended, as planned, on 30 June 2010 when it reached a nominal amount of €60 billion. The European Central Bank intended to hold the assets bought under this programme until maturity.[10]

The second Asset purchases programme started on 14 May 2010 with the securities markets programme (SMP). The European Central Bank issued Decision establishing a securities markets programme (ECB/2010/5). Under that programme, the European Central Bank decided to purchase on the secondary market eligible marketable debt instruments issued by the central governments or public entities of the euro area Member States and on the primary and secondary markets eligible marketable debt instruments issued by private entities incorporated in the euro area. Marketable debt instruments will be eligible for outright purchase under the programme if they fulfil general criteria in order to be eligible for Eurosystem monetary policy operations.[11]

The Governing Council of the European Central Bank explained that, in view of the current exceptional circumstances in financial markets, characterised by severe tensions in certain market segments that were hampering the monetary policy transmission mechanism, and thereby the effective conduct of monetary policy oriented towards price stability in the medium term, a temporary securities markets programme was initiated. Governing Council terminated the SMP programme by decision on 6 September 2012. The existing securities in the SMP portfolio was held to maturity.

The third Asset purchases programme started on 3 November 2011 with the second covered bond purchase programme (CBPP2). The European Central Bank issued Decision of on the implementation of the second covered bond purchase programme (ECB/2011/17). The objectives of the second programme were also to contribute to: "(a) easing funding conditions for credit institutions and enterprises and (b) encouraging credit institutions to maintain and expand lending to their clients."[12]

The programme was targeted at nominal amount of € 40 billion of eligible covered bonds and ended on 31 October 2012.[13]

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[10] ECB Press release (2010): *Covered bond purchase programme completed,* ECB Frankfurt, 30 June 2010 [https://www.ecb.europa.eu/press/pr/date/2010/html/pr100630.en.html] Accessed 15.04.2019

[11] Articles 1 and 2 of 2010/281 *Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme* (ECB/2010/5) (OJ L 124, 20.5.2010), p. 8–9 (SMP Decision)

[12] Recital 3 of 2011/744/: *Decision of the European Central Bank of 3 November 2011 on the implementation of the second covered bond purchase programme* (ECB/2011/17) OJ L 297, 16.11.2011, p. 70–71 (CBPP2 Decision)

[13] Articles 1-4 of CBPP2 Decision

On 8 December 2011 the Governing Council of the European Central Bank decided on additional enhanced credit support measures to support bank lending and liquidity in the euro area money market. The Governing Council has decided to conduct two longer-term refinancing operations (LTRO) with a maturity of 36 months and with the option of early repayment after one year.[14]

These aforementioned programmes were temporary and they were limited in volume of securities that were purchased. Since the effects of these Asset purchases programmes and long-term refinancing operations were weak, the European Central Bank continued with the non-standard monetary policy measures.

On 29 July 2014, the European Central bank issued a Decision on measures relating to targeted longer-term refinancing operations (ECB/2014/34) (TLTRO I) in pursuing its price stability mandate and to enhance the functioning of the monetary policy transmission mechanism by supporting lending to real economy over a period of two years.[15] TLTRO I provided financing to credit institutions for periods of up to four years. They offered long-term funding to banks at almost the same conditions as in main refinancing operations in order to further ease private sector credit conditions and stimulate bank lending to the real economy. TLTRO I aimed to support bank lending to the non-financial private sector, meaning households and non-financial corporations, in Member States whose currency is the euro.

The fourth Asset purchases programme started on 15 October 2014 with the third covered bond purchase programme (CBPP3). The European Central Bank issued Decision on the implementation of the third covered bond purchase programme (ECB/2014/40). The objectives of the third covered bond purchase programme was: "Further enhance the transmission of monetary policy, facilitate credit provision to the euro area economy, generate positive spill-overs to other markets and, as a result, ease the ECB's monetary policy stance, and contribute to a return of inflation rates to levels closer to 2%."[16] The programme continues but as of January 2019, the European Central Bank no longer conducts net purchases, and only

[14] ECB Press release (2011): *ECB announces measures to support bank lending and money market activity,* ECB Frankfurt, 8 December 2011; [https://www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html] Accessed 15.04.2019

[15] Recital 2 of 2014/541/EU: *Decision of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations* (ECB/2014/34), OJ L 258, 29.8.2014, p. 11–29 (TLTRO I Decision)

[16] Recital 2 of 2014/828/EU: *Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme* (ECB/2014/40), OJ L 335, 22.11.2014, p. 22–24 (CBPP3 Decision)

continues to reinvest the principal payments from maturing securities held in the CBPP3 portfolio.

The fifth Asset purchases programme started on 19 November 2014 with the asset-backed securities purchase programme (ABSPP). The European Central Bank issued Decision on the implementation of the asset-backed securities purchase programme (ECB/2014/45). The objectives of a new asset-backed securities purchase programme was the same as it had been for the third covered bond purchase programme and it targeted longer-term refinancing operations that were to further enhance the transmission of monetary policy, facilitate credit provision to the euro area economy, generate positive spill-overs to other markets and contribute to a return of inflation rates to levels closer to 2%. Asset-backed securities eligible for the programme were securities that fulfil the eligibility criteria applicable to asset-backed securities submitted as collateral for Eurosystem monetary policy operations.[17]

As of January 2019, the European Central Bank no longer conducts net purchases under the asset purchase programmes, but continues to reinvest the principal payments from maturing securities purchased under the asset purchase programme (APP). The period of APP net asset purchases ended in December 2018.[18]

The sixth Asset purchases programme started on 4 March 2015 with the public sector asset purchase programme (PSPP). The European Central Bank issued Decision on a secondary markets public sector asset purchase programme (ECB/2015/10). Under the programme, the European Central Bank purchased public sector debt securities on the secondary markets. In terms of the size of the PSPP, the ABSPP and the CBPP3, the liquidity provided to the market by the combined monthly purchases amounted to € 60 billion.[19]

PSPP Decision stated that: "This programme was taken as part of the single monetary policy in view of a number of factors that have materially increased the downside risk to the medium-term outlook on price developments, thus jeopardising the achievement of the European Central Bank's primary objective of maintaining price stability. These factors include lower than expected monetary stimulus

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17 Recital 2 and Articles 1-2 of *Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme* (ECB/2014/45), OJ L 1, 6.1.2015, p. 4–7

18 ECB Press release (2018): *ECB decides on technical parameters for the reinvestment of its asset purchase programme,* 13 December 2018, [https://www.ecb.europa.eu/press/pr/date/2018/html/ecb.pr181213.en.html] Accessed 03.04.2019

19 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121 14.5.2015, p. 20 (PSPP Decision)

from adopted monetary policy measures, a downward drift in most indicators of actual and expected euro area inflation — both headline measures and measures excluding the impact of volatile components, such as energy and food — towards historical lows, and the increased potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices. The programme aim was to further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to levels below but close to 2% over the medium term." [20]

On 28 April 2016 The European Central Bank initiated the second series of targeted longer-term refinancing operations that consisted of four targeted longer-term refinancing operations (TLTRO II), each with a maturity of four years. The aim was the same to further ease private sector credit conditions and stimulate credit creation. The TLTROs-II was also intended to strengthen the transmission of monetary policy by further incentivising bank lending to the non-financial private sector, i.e. households and non-financial corporations, in Member States whose currency is the euro. In conjunction with other non-standard measures in place, TLTROs-II aimed to contribute to a return of inflation rates to levels below, but close to 2 % over the medium term. [21]

The seventh Asset purchases programme started on 1 June 2016 with the corporate bond purchase programme (CSPP). The European Central Bank issued Decision on the implementation of the corporate sector purchase programme (ECB/2016/16). Under the programme, the European Central Bank purchased corporate bonds in the primary and secondary markets. Marketable debt instruments issued by corporations was eligibility if they fulfil criteria for marketable assets for Eurosystem credit operations.[22] This decision was taken in order to also: "Further strengthen the pass through of the European Central Bank asset purchases to the financing conditions of the real economy, and in order to provide, in conjunction with the other non-standard monetary policy measures in place, further monetary policy accommodation and contribute to a return of inflation rates to levels below, but close to, 2 % over the medium term."[23]

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[20] Recital 3-4 of the PSPP Decision

[21] Decision (EU) 2016/810 of the European Central Bank of 28 April 2016 on a second series of targeted longer-term refinancing operations (ECB/2016/10), OJ L 132, 21.5.2016, p. 107–128

[22] Article 1-2 of the Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), OJ L 157, 15.6.2016, p. 28–32 (CSPP Decision)

[23] Recital 3 of the CSPP Decision

Under the Asset purchases programmes European Central Bank purchased cover bonds, asset backed securities, public and private sector securities.

**Table 1:** ECB holdings under the asset purchase programme

| | Monetary policy securities portfolios | **Reported value as at 26 April 2019** |
|---|---|---|
| 1 | Covered bond purchase programme 1 | € 3.2 billion |
| 2 | Securities Markets Programme | € 62.8 billion |
| 3 | Covered bond purchase programme 2 | € 3.5 billion |
| 4 | Covered bond purchase programme 3 | € 261.5 billion |
| 5 | Asset-backed securities purchase programme | € 26.2 billion |
| 6 | Public sector purchase programme | € 2,098.7 billion |
| 7 | Corporate sector purchase programme | € 177.6 billion |
| | Total net result of the Asset purchases programmes | € 2,663.5 billion |

Source: European Central Bank, Open market operations
https://www.ecb.europa.eu/mopo/implement/omo/html/index.en.html

Table 1. shows that the net result of the Asset purchases programmes was € 2.66 trillion at the end of April 2019 of public and private sector securities. Almost 80% of the purchased securities and more than € 2 trillion have been issued by public sector entities.

Longer-term refinancing operations were part of the non-standard measures. The second series of targeted longer-term refinancing operations is still active and it consists of four targeted longer-term refinancing operations (TLTRO II) each with a maturity of four years.

**Table 2:** Outstanding amount and the maturity date of the second longer-term refinancing operations

| **Type** | **Settlement date** | **Maturity date** | **Days** | **Outstanding amount** |
|---|---|---|---|---|
| TLTRO II | 29/03/2017 | 24/03/2021 | 1456 | € 230.47 billion |
| TLTRO II | 21/12/2016 | 16/12/2020 | 1456 | € 61.37 billion |
| TLTRO II | 28/09/2016 | 30/09/2020 | 1463 | € 44.18 billion |
| TLTRO II | 29/06/2016 | 24/06/2020 | 1456 | € 379.37 billion |
| Total: | | | | € 715.36 billion |

Source: European Central Bank, Open market operations
https://www.ecb.europa.eu/mopo/implement/omo/html/index.en.html

Table 2. shows that the second longer-term refinancing operations will mature in 2020 and 2021 and that the outstanding amount is € 715 billion.

By Asset purchases programmes and long term refinancing operations, European Central Bank extended its balance sheet assets for € 3.3 trillion; from €1.4 trillion in 2007[24] to € 4.7 trillion in April 2019.[25]

## 3. EFFECTS OF THE UNCONVENTIONAL MONETARY POLICY CONDUCTED BY THE EUROPEAN CENTRAL BANK

The European Central Bank stated the aim of the asset purchase programmes and longer-term refinancing operations. The stated aim was to ease monetary and financial conditions, including those relevant to the borrowing conditions of the euro area non-financial corporations and households, to support aggregate consumption and investment spending in the euro area and ultimately contribute to a return of inflation rates to levels below but close to 2% over the medium term. The objectives were to promote decline in money market term rates, ease funding conditions for credit institutions and enterprises, encourage credit institutions to maintain and expand lending to corporations and households and to improve market liquidity in important segments of the private debt securities market.

Some of the stated aims and objectives were achieved. Non-standard measures improved liquidity of the banking system and the liquidity of the entire financial sector in the euro area. Improved liquidity brought more stability to the financial system and lowered the cost of operation of credit institutions. Credit institutions used the increased liquidity to pay down their more costly liabilities and replace the funding with less expensive liabilities to lower their expenditure.[26] Large asset purchases programmes and longer-term refinancing operations have reduced long-term interest rates, preventing high liquidity premiums from depressing financial institutions and financial markets.[27]

The expectations were that credit institutions would use increased liquidity and lower short-term and long-term interest rates to grant loans to corporations and households to support investment and consumption, which would lead to economic growth and full employment. The expectations of economic growth and full employment have not been met as expected because granting loans and demands for the loans do not depends only on the liquidity and the interest rate. Central banks can supply financial sector with liquidity but cannot solve underly-

24 European Central Bank (2007): *Consolidated financial statement of the Eurosystem as at 21 December 2007*

25 European Central Bank (2019): *Consolidated financial statement of the Eurosystem as at 26 April 2019*

26 European Central Bank (2015): *Economic Bulletin*, Issue 7 / 2015 – Articles, p. 40-41

27 Guerini, M.; Lamperti, F.; Mazzocchetti, A., *Unconventional Monetary Policy: Between the Past and Future of Monetary Economics,* Working paper, S Growth, 2018, p. 5

ing solvency problems or poor creditworthiness. Therefore, unconventional monetary policy measures can buy time and in the short run stabilise conditions but in the long run this is unsure. Likewise, low interest rates delay the acknowledgment of losses. Seven years after the financial crisis the recovery of the economies in the euro area remains weak. [28]

However, the macroeconomic effects seem to be quite different in the United States of America. While the effects in the euro area have been weak, the unconventional monetary policy have supported economic growth in the US economy. Some authors believe that it could be related to fiscal policy. According to Keynes, once nominal interest rates reach zero, monetary policy can do no more (zero lower bound). Thus, in the case of reaching the zero lower bound only fiscal policy could work since interest rates cannot go below zero.[29] When the crisis started the debt-to-GDP ratio in USA was relatively low, and the unconventional monetary policy was combined with expansionary and strong fiscal policy, which increased the level of public debt but positively stimulated the US economy. In contrast to the USA, the euro area is a monetary union of 19 of the 28 EU member states and each state is on a different level of economic development and with the different fiscal policy. Most of the EU economies entered the crisis endowed with already high debt-to-GDP ratios; this, combined with the compliance of the restrictive fiscal policy regime might help explain the different outcomes in the euro area and the USA.[30] There is also no government debt instrument for the euro area as a whole, only national bonds. European Central Bank asset purchasing programmes therefore amounts to buying pro-rata shares of the debt of member states. Given that investors vastly prefer to hold German debt than Portuguese or Italian debt, European Central Bank policy involves actuarial transfers across governments, even if these transfers are not realized.[31]

Overall, unconventional monetary policy instruments such as asset purchasing programmes offer some theoretical promise for addressing the zero bound. However, these policies have now been conducted for some years, in the case of Japan for more than two decades, and at least so far, they have not convincingly shown an ability to decisively overcome the problems posed by the zero bound.[32]

Monetary policy has a restricted influence in stimulating economy and economic

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[28] Pereira, I., *Is the ECB unconventional monetary policy effective?,* GEE Papers, No. 61, 2016, p. 8-9

[29] *Ibid.,* p. 6

[30] Guerini; Lamperti; Mazzocchetti, *op. cit.,* note 27, p. 3-4

[31] Rogoff, K., *Dealing with Monetary Paralysis at the Zero Bound,* Journal of Economic Perspectives, *Vol.* 31, No. 3, 2017, p. 53

[32] *Ibid.,* p. 54

growth. The best contribution of monetary policy to economic growth is to ensure price stability. Environment of stable prices shall assist sustainable economic growth. Monetary policy can also provide money and liquidity at low interest rates, but monetary policy itself cannot induce economic growth because it cannot obligate corporations and households to borrow money and to invest or to consume. Without new investments and consumptions fresh liquidity will remain an unused potential with a weak effect to real economy. Only in cooperation with other policies, monetary policy can stimulate economic growth. Other policies that can stimulate economic growth are related to structural reforms, which can improve effectiveness in real economy. Fiscal policy with some tax relief can induce investments and consumption. Social policy that will support people in need can also stimulate consumption and increase demand for goods and services. These policies are difficult to implement, they are sometimes unpopular and take time. On the other hand, monetary policy is easier to conduct but without the support of these other policies, its results are weak.

## 4. CONCLUSION

The European Central Bank conducts monetary policy in the euro area. Standard monetary policy is conducted by managing the level of short-term interest rates. Managing the level of short-term interest rates the European Central Bank can influence the overall availability and cost of credits and can control the quantity of money in the euro area economy. If the level of the inflation rates are low and economic growth is weak European Central Bank can lower short-term interest rate to increase money supply in the economy. However, short-term interest rate policy has its limitations and the limit is zero lower bound, which means that the short-term interest rates cannot be set below 0%.

European Central Bank and all major central banks have reduced short-term interest rates to zero or near zero to stimulate spending and investing with the expectations that this measure alone will be enough to induce economic growth. Contrary to expectations, lowering short-term interest rates has little effects on economies. Economic growth stagnated, inflation rates were very low with the tendency to deflation and the central banks had to use some other non-standard and unconventional measures to achieve price stability and to support economic growth.

The European Central Bank introduced Asset purchases programmes and Longer-term refinancing operations as non-standard monetary policy measures. European Central Bank conducted Asset purchases programmes from 2009 to 2018 and un-

der the seven programmes purchased cover bonds, asset backed securities, public and private sector securities in the amount of more than € 2.6 trillion. By Asset purchases programmes and long term refinancing operations, European Central Bank extended its balance sheet assets for € 3.3 trillion, from €1.4 trillion in 2007 to € 4.7 trillion in April 2019.

The objective of these non-standard monetary measures was to ease monetary and financial conditions, to expand lending to corporations and households and to support aggregate consumption and investment spending in the euro area.

The result of non-standard measures are improved liquidity of the banking system and the liquidity of the entire financial sector in the euro area. Improved liquidity brought more stability to the financial system. The long-term and the short-term credit interest rates are lower. However, the expectations of economic growth and full employment have not been met.

Monetary policy and all its standard and non-standard measures cannot alone achieve economic growth and full employment. Monetary policy can provide price stability, liquidity and credits at low interest rates but without cooperation of other policies the economic growth and full employment will not be achieved. Structural reforms can improve effectiveness in real economy. Fiscal policy with some tax relief can induce investments and consumption. Social policy that will support people in need can also stimulate consumption and increase demand for goods and services. These policies in cooperation with monetary policy can achieve results in sustainable economic growth and full employment.

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